Basic Concepts of German Criminal Procedure – An Introduction

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One of the characterisations of the German as a member of the family of continental legal systems heard most often is that its procedure is inquisitorial, as opposed to the adversarial model. But what does that really mean? Is it all encapsulated in the role of the judge, or are there other features that define the character of the German procedure as inquisitorial? Is it actually still useful to use the terminology of “inquisitorial vs. adversarial”? Does “inquisitorial” not tend to convey connotations that remind us of medieval practices involving dungeons, torture, extorted confessions, draconic punishments and the personal union of prosecutor, judge and executioner in the figure of the inquisitor, or a burden on the defendant to prove their innocence etc.? Is the standard of proof in the continental systems, sometimes called intime conviction according to its French variant orfreie Überzeugung in German, really lower than the “beyond reasonable doubt” standard that common lawyers tend to be so proud of? This paper will provide an overview of the systemic model of German criminal procedure and its fundamental principles.

Introduction

One of the major distinctions often heard about the German as a member of the family of continental legal systems is that its procedure is inquisitorial as opposed to the common law adversarial model. But what does that really mean? Is it all encapsulated in the role of the judge, or are there other features that define the character of the German procedure as inquisitorial? Is it actually still useful to use the terminology of “inquisitorial vs. adversarial”? Does “inquisitorial” not tend to convey connotations that remind us of medieval practices involving dungeons, torture, extorted confessions, draconic punishments and the personal union of prosecutor, judge and executioner in the figure of the inquisitor, or a burden on the defendant to prove their innocence etc.? Is the standard of proof in the continental systems, sometimes called intime conviction according to its French variant orfreie Überzeugung in German, really lower than the “beyond reasonable doubt” standard that common lawyers tend to be so proud of? This paper will provide an overview of the systemic model of German criminal procedure and its fundamental principles.

* Professor of Law, Durham Law School. – This paper is a modified version of the chapter on basic concepts in my forthcoming book Principles of German Criminal Procedure, 2011, Hart Publishing. I thank the publisher for his gracious consent to its use for the Review. All sections (§) mentioned in this paper are from the Strafprozessordnung (Code of Criminal Procedure – StPO) unless otherwise mentioned. Abbreviated German law journal titles etc. are used according to the common German usage and can be found in the abbreviation section of any major German law journal; they are as such usable in the search engine of the German database JURIS (www.juris.de).
union of prosecutor, judge and executioner in the figure of the inquisitor, or a burden on the defendant to prove their innocence etc.? Is the standard of proof in the continental systems, sometimes called intime conviction according to its French variant or freie Überzeugung in German, really lower than the “beyond reasonable doubt” standard that common lawyers tend to be so proud of? A quick look at the law will teach us that none of these worrisome features are part and parcel of the German approach, and indeed any modern continental procedure, even if some very high level common law practitioners and academics that I have met over the years seem to think that, for example, continental inquisitorial systems do not have an equivalent to the 5th Amendment in the US Constitution and that an accused has to cooperate with the prosecution in her own trial and prove her innocence.

These voices appear to lose sight of the fact that German law, just to name a few examples, does not accept any sort of reverse burden of proof on the defence, that the defence is in principle not obliged to provide any sort of disclosure to the prosecution or even to the court or to tell them in advance the nature of the defence case, nor is the defendant at risk of adverse comment for merely exercising her right to silence in the pre-trial stage and then choosing to make a statement in court. The defendant is protected by the rule of nemo tenetur se ipsum accusare, i.e. no-one must cooperate in their own prosecution and conviction, to which the fact is a corollary that the defendant is not a witness in her own case, not an object of but a subject in the proceedings. She cannot therefore incur liability for perjury because she does not testify and is never under oath, a situation that has come to be called by many common lawyers the (in)famous “right to lie”. The presumption of innocence, yet another example, is actually stronger under German law than under English law and models based on the English understanding, because it attaches until the conviction has become final, that is until the last avenue of appeal has been exhausted. In the European context for example, in turn is predicated upon the understanding of what it means to be “proved guilty according to law” (Art. 6(2) ECHR): In England, this stage is (arguably) reached with the jury verdict at trial, because there is no right to appeal against such a verdict absent leave being granted by the iudex ad quem or iudex a quo. In Germany (with one exception) and most if not all continental European countries there is an automatic right to appeal – albeit in various shapes and forms depending on which court’s decision is being appealed – against a trial verdict and thus a verdict cannot be finalised.

1 It might be worth reflecting upon the question to which extent such a personal union has been cemented in the UK by the introduction through Part 3 of the Criminal Justice Act 2003 of conditional cautions issued by the CPS and/or the police, see Peter Hungerford-Welch, Criminal Procedure and Sentencing, 2008, 115 ff. The equivalent to police cautions, the so-called polizeiliche Strafvergehängnisse, were abolished in Germany by § 6 of the Einführungsgesetz zur Strafprozessordnung (EGSPO), i.e. the Code of Criminal Procedure (Introduction) Act; their function has de facto been assumed by the Bußgeldbescheid, i.e. a summary fine by the administrative authority in charge, which does, however, no longer have criminal but merely administrative character and is administered under separate legislation, the Ordnungswidrigkeiten­gesetz - OWG.

2 A fact which as led some to argue – rightly – that the expression “judge-led” is a better representation of the material substance of the law.

3 Evidence for this is, for example, that the defendant retains the right to ask questions to witnesses and experts in the civil law court and can make motions and seize the case directly if she is represented by counsel. She is not relegated by either law or custom to sitting in the dock and merely watching the efforts of her counsel, as appears to be the case in many common law systems. In practice the picture is, however, very similar for obvious reasons and it is a rare defendant who, although represented, will conduct her own witness examination, but it is not infrequent that she will ask supplementary questions.


5 In theory, the logical conclusion should be that it actually stretches until the decision denying leave has become final because there is a right to ask for leave, but that may be a legal nicety.

6 Which is in stark and somewhat odd contrast to the situation in the Magistrates’ Court, where there is an automatic right of appeal to the Crown Court under s. 108(1) Magistrates’ Courts Act 1980 and s. 48 Senior Courts Act 1981, apart from other ways of challenging the verdict to the High Court by way of case stated or judicial review – see Hungerford-Welch, Criminal Procedure and Sentencing, 7th ed., 2008 (hereinafter Hungerford-Welch), 377 ff. and Pt. 63 of the Criminal Procedure Rules 2010.

7 § 313 – This provision, which was introduced as a measure of ending the docket overload and consequent backlog by the Gesetz zur Entlastung der Rechtspflege, i.e. the Administration of Justice (Reduction of Workload) Act, of 1993, allows the appellate court to dismiss an appeal without a hearing if either the defendant appeals against a fine or a warning of a fine of not more than 15 daily units (see §§ 40, 59 StGB) or a summary fine (Geldbuße), or the prosecution appeals against an acquittal or annulment of the proceedings and they had not asked for a fine of more than 30 daily units, if the appeal is obviously unfounded. § 313(2), however, makes it clear that this is not an additional requirement for an appeal because the “leave” must be granted unless the appeal is obviously without merit, in which case it shall be dismissed by written procedure as unzulässig i.e. inadmissible. In other words, the law does not introduce a leave requirement but merely allows to court to dispose of the appeal based on its paper form, and to dispense with a hearing. This provision was politically motivated based on budgetary and staffing constraints in the judiciary, is widely regarded as a systemic artefact and as probably inapplicable in juvenile proceedings. It has the clear potential for misuse by both judges and prosecutors by encouraging them to dispose of a case, for example, by reducing the number of daily units and increasing the amount of the daily unit instead, because the latter is not a criterion for § 313. – See Lutz Meyer-Goßner, Strafprozessordnung, 53rd ed. (2010) (hereinafter MG) § 313 marginal no. (hereinafter Mn.) 2 with further references.

8 See the Green Paper of the European Commission on the Presumption of Innocence - COMM (2006) 174 final - and the replies by individual countries and organisations, all available at http://ec.europa.eu/justice_home/news/consulting_public/presumption_of_innocence/ne_wis_contributions_presumption_of_innocence_en.html, especially Question 8 on the duration of the presumption where the following picture emerged: There is a clear split between the civil law countries in Europe, making motions and seize the case directly if she is represented by counsel. She is not relegated by either law or custom to sitting in the dock and merely watching the efforts of her counsel, as appears to be the case in many common law systems. In practice the picture is, however, very similar for obvious reasons and it is a rare defendant who, although represented, will conduct her own witness examination, but it is not infrequent that she will ask supplementary questions.
become final until there is no more chance of an appeal. The standard of proof required in § 261 for conviction, the “free conviction” (freie Überzeugung) does in effect mean exactly the same thing as the reasonable doubt standard, because the judge must be convinced of the facts as supported by the evidence to a degree that “reasonable and not merely theoretical doubts are excluded”. In addition, the judge must set out her reasons for her persuasion in the judgment, something an English jury does not do and an English appellate court could thus in effect be said to be merely making an educated guess about whether the jury verdict is unsafe, based on the directions of the judge and his overall handling of the trial. The reasons are susceptible to full appellate review against the parameters laid down in the law, a degree of protection against judicial arbitrariness which is arguably higher than in English law. In sum, this short overview of some of the features of German procedural law should have shown that we better be wary of attaching significant substantial connotations to mere terminological usage and should abstain from generalisations.

The Applicable Law

German criminal procedure is determined by a number of legal sources mainly on the federal level, much like the substantive law, and the same hierarchy of norms as well as rules of interpretation apply. The main conviction as the critical point were those from Ireland and the Bar Council of England and Wales; they did, however, point out that the presumption is revived once a conviction is quashed. The Bar Council expressly emphasised that this position is intricately linked to the fact that there is no automatic right of appeal from a conviction in the Crown Court, but only with leave of the latter or the Court of Appeal. The impact of the domestic appeals model on the operational scope of Article 6(2) is clearly brought out, for example, in the case of Callaghan v UK, European Commission of Human Rights, Decision of 9 May 1989, Application no. 14739/89. This has the consequence that adult should consequently be given some leniency and be educated rather than punished.

1 European law has so far impacted mostly on the areas of international cooperation in prosecution and enforcement, for example, through instruments such as the European Arrest Warrant, the European Evidence Warrant, the Framework Decision on financial penalties etc. For the German view on these developments and the German implementing legislation see Wolfgang Schomburg/Otto Lagodny et al., Internationale Rechtshilfe in Strafsachen, 5th ed., forthcoming 2011.

13 A famous and highly controversial case on this issue was the trial of Erich Honecker, the former Chair of the Politbüro and Head of the Council of State (Staatsratsvorsitzender) of the now defunct German Democratic Republic, whose trial was stopped because of a procedural bar pursuant to § 206a under recourse to the constitution of the Land Berlin, because he was terminally ill and therefore being put on sanctions under the Grundgesetz – GG: The Basic Law or German Federal Constitution, which lays the foundation for issues such as judicial independence and civil liberties. The constitutions of the individual member states of the Federation can also have an impact on the application of the federal law, although the general rule is that the lowest rank of federal law breaks state constitutional law, Art. 31 GG.

14 European Convention on Human Rights: Directly applicable in German law, has the same functions as the Human Rights Act 1998 in the UK.

15 Strafprozessordnung – StPO: The Code of Criminal Procedure which contains the majority of the law related to the conduct of criminal proceedings against adults.

16 Jugendgerichtsgesetz – JGG: Juvenile Courts Act, which regulates the specific features of proceedings and sentences against juveniles (14 – 18 years of age) and young adults (18 – 21 years of age). It is noteworthy in this context that the criminal law is not fully congruent with the civil law on the consequences of coming of age at 18: The civil law attaches the full canon of rights and duties once a person reaches that age. There is no separate treatment for the group between 18 and 21; the latter had for many years been the age of majority in Germany. However, the juvenile law operates, not uncontroversially, on the common sense experience that (a) many people under 21 are still in the developmental stages of a juvenile or that (b) the offence sometimes carries a distinctly juvenile character, and that they should consequently be given some leniency and be educated rather than punished. This has the consequence that adult sources that we will be looking at are, after the international and European Union levels of legislation, the following laws:

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criminal law will normally apply to 18-year-olds unless one of the
two conditions just mentioned is made out.

- **Strafgesetzbuch – StGB:** The Criminal Code makes provision for
  the bulk of the sentencing law and for prerequisites to prosecution
  such as requests to prosecute and limitation periods etc.

- **Gerichtsverfassungsgesetz – GVG:** The Criminal Code makes provision for
  the bulk of the sentencing law and for prerequisites to prosecution
  such as requests to prosecute and limitation periods etc.

- **Einführungsgesetz zum Gerichtsverfassungsgesetz – EGGVG:** Courts Organisation Act
  and its Introductory Act containing basic rules on jurisdiction,
  composition of courts, open justice etc.

There are further secondary pieces of legislation that exist now on the
Länder i.e. member state level after the 2006 Federalism Reform, namely
the law on the conditions of the detention on remand in criminal
proceedings, the Untersuchungshaftvollzug, and the law on conditions of
imprisonment, the Strafvollzug. Both of these were previously regulated
by federal laws but have now been devolved into the domain of the
individual Länder; at the time of writing not all of them had passed their
own state legislation but a number still applied the old federal law as
Land law for the time being. There are furthermore two sets of
regulations that are important for the administrative side of the work
mainly of the prosecution, the so-called Richtlinien für das Straf- und
Bürgschaftverfahren – RiStBV – i.e. the Guidelines for Criminal and
Administrative Summary Fine Proceedings, and the Anordnung über
Mitteilungen in Strafsachen – MiStra – i.e. the Criminal Proceedings
(Transmission of Information) Ordinance. Both can be compared to a
kind of statutory instruments and were passed by the governments of the
Bund and the Länder. The law on criminal records is regulated by the
Bundeszentralregistergesetz (Federal Central Criminal Register Act).

**The Stages of Procedure**

It is important to have a general grasp of the structure of the normal
procedure in German criminal law, leaving aside some special procedures
which we cannot look at here for reasons of space. The normal flowchart
of a case is as follows, in a very simplified manner:

Within each of those stages, there are, of course, numerous fields of
interaction between the prosecution and the courts, for example, in the
investigation stage the prosecution may have to apply for arrest, search
and seizure, phone-tapping warrants etc., at trial it is within the discretion
of the prosecution whether to extend an indictment to facts newly
discovered during an ongoing trial under § 266 or to opt for a separate
trial, and in the enforcement stage it may have to present the dossier to
the court for decisions about early release etc.
Juvenile Courts

We have already seen that there exist specific regulations for the proceedings against juveniles and young adults under the JGG, which are to be conducted from the investigative stage with special reference to educating the defendants, and not merely with a view to punishment (§ 2 JGG). The general provisions of the StGB and StPO only apply insofar as the JGG does not provide otherwise (§ 2(2) JGG). The most obvious one is that this category of defendant is (usually)16 tried before special juvenile courts, staffed (ideally) by judges, both lay and professional, and prosecutors who have experience in dealing with young people; it is quite another issue whether the juvenile court will apply substantive juvenile criminal law to cases of young adult offenders as was indicated above. Juvenile courts take precedence over adult courts of the same or lower tiers (§ 47a 1st sentence JGG).17 Another major feature of the juvenile procedure that has no equivalent in proceedings against adults is the institution of the Jugendgerichtshilfe, the Juvenile Court Support Service (§ 38 JGG). This service is an invaluable help for juvenile courts in that it provides information about the defendant’s development and in the case of a conviction, acts as a specialist probation service unless the court appoints another person as probation officer. As far as sentencing is concerned, the JGG contains its own arsenal of sanctions geared towards the overall aim of educating rather than punishing the defendants.

Terminological issues – The Different Forms of Decisions, Stages of Legal Examination; the Offender at Different Stages of the Proceedings

Forms of decisions

One difficulty that arises when trying to present the German system to an Anglophone audience is the lack of congruence between procedural

16 § 103(2) 2nd sentence JGG allows for juveniles, and § 112 1st sentence JGG which refers to §§ 102 -104 JGG for young adults, to be tried exceptionally before certain courts that have specialist jurisdiction over adults if the juveniles/young adults are co-defendants with adult defendants being tried before those courts and trying them together appears advisable in order to establish the truth of the case or for other serious reasons. § 104 JGG orders in those cases that for juveniles a number of provisions from the JGG shall apply before the adult court and leaves it in the discretion of the court to apply others from the JGG; however, § 112 2nd sentence JGG excludes the application of the provisions referred to in § 104 JGG in the case of young adults insofar as they would not ordinarily apply to young adults.

17 The only exception are the specialist courts mentioned in the previous footnote, see § 47a 2nd sentence JGG which refers to § 103(2) 2nd and 3rd sentences JGG; the latter states that these courts take precedence even before the juvenile chamber at the Landgericht (District Court). See Chapter 3 on jurisdiction ratione materiae in my forthcoming book (fn. 1) for more detail.

concepts. One of those issues is the various forms of decisions and how they are described. In English, we have judgment, decision and order as well as the generic expression of a ruling. A judgment usually closes an instance, for example, after a trial or an appeal, a decision short of judgment may rule on a motion by a party, allowing or denying it, and an order usually expresses a command of the court to the parties or third persons. All of these can also untechnically be called a ruling. German law distinguishes along other lines that are not easily classified: It knows Urteile, Beschlüsse and Verfügungen as well as the specific instrument of the Strafbefehl; the generic term for all of these is Entscheidungen. Urteile come closest to the English judgments in that they are usually meant to close an instance based on a full trial18; any other decisions or orders are issued by Beschluss. A Beschluss does not normally require an oral hearing, but some decisions after an oral hearing are Beschlässe. A Beschluß may contain a decision and/or an order within the meaning under English law. However, in some cases, the function of an Urteil can be taken by a Beschluss, for example, in § 349(2) which allows the appellate court in the Revision, i.e. the appeal on points of law, to dismiss an appeal on the merits as obviously unfounded by Beschluß or in a case of an obviously founded appeal to quash the lower court’s Urteil under § 349(4) by unanimous vote; a decision on the merits of an appeal against an Urteil usually has to be passed by Urteil (see, for example, § 349(5)). The Strafbefehl, a decision issued in purely written proceedings and characterised by some commentators as a Beschluß19, can convict and sentence a defendant to a fine or, if he is represented by counsel, even to a suspended term of imprisonment not exceeding one year (§ 407(2) 2nd sentence); yet once it has become final it has the force of an Urteil (§ 410(3)). Similarly, the decision of the court to order a provisional discontinuance of the proceedings under a condition in § 153a(2) 1st sentence after an indictment and until the end of the trial (and even of an appeal hearing on the facts) is given by Urteil; if the defendant complies with the condition the discontinuation becomes final and the effects of double jeopardy attach (§ 153a(1) 5th sentence) as they would to an Urteil.20 A Verfügung is usually a purely internal decision by a judge or prosecutor, for example, the decision of a prosecutor to indict a defendant or to discontinue the proceedings, the so-called Abschlussverfügung.

Why is all this important? Because the form a decision takes decides the manner in which an appeal may be lodged against it: Urteile can
typically be attacked through the appellate avenues of Berufung (by way of trial de novo) and Revision (appeal on points of law only), both of which are time-limited, Beschlusse are typically subject to the Beschwerde (which may be time-limited and is then called sofortige Beschwerde). Verfügung as mainly internal acts are usually not subject to appeal. Indeed, if the court uses the wrong form, the proper appellate remedy is in principle determined by the form it should have taken. For example, if a court decides by Beschluss to discontinue a trial for a part of the facts underlying the indictment because in its view the defendant is not guilty of committing an offence based on those facts, the decision is in fact a partial acquittal and is considered to be an Urteil. It is thus easy to see that the rhetorical question “What’s in a name?” does not apply to (German) legal terminology.

Stages of legal examination

A notable decision from recent British legal history is that of Blackbum v Attorney-General, in which Mr Albert R. Blackbum filed an action to prevent the UK from joining the Common Market by signing the Treaty of Rome and thus giving up part of its sovereignty. The Court of Appeal, per the then Master of the Rolls, Lord Denning, dismissed the action on

21 This is, for example, not true of the procedure under the OWG, where an Urteil dismissing an objection to a summary fine as inadmissible is subject to the Rechtsbeschwerde, i.e. a Beschwerde on points of law only; § 79(1) 1st sentence No. 4 OWG.
22 There is a major exception for the most important Verfügung of the prosecution, the above-mentioned Abschlussverfügung i.e. the decision under § 170 whether to indict or discontinue the proceedings. The decision to indict is not subject to appeal, neither is the trial court’s decision to admit the indictment for trial (§ 201(1)), however, the decision not to indict can be reviewed by the so-called Klageerzwingungsverfahren under § 172 which consists of a two-tier process, first a request to the senior prosecutor to order his subordinate to indict, and in the case of the former’s refusal to do so, an application to the Oberlandesgericht to order the prosecution to indict. – There is a more general discussion about whether such Verfügungen can be the object of a request for judicial review under § 23 EGGVG if they have some form of external effect and may infringe the rights of the defendant or other parties and much here is still controversial; see the commentary in MG § 23 EGGVG.
23 MG Einl Mn. 122. – The ensuing question of how to treat an appeal that takes the right form for the decision as it has been issued, but not for the form in which it should have been issued, is usually solved by the application of the Metbstreitigkeitsprinzip, i.e. the principle of providing maximum effect to a party’s procedural declarations if the error is the court’s rather than the party’s; see BGH MDR 2009, 1000.
24 BGH JZ 1963, 714; see also BGHSt 15, 259. – This must be distinguished from the situation under § 300 which requires the court to interpret a declaration by the defendant aimed at reviewing a ruling in a manner to give it maximum effect as the proper remedy, i.e. if someone wrongly files a Beschwerde against an Urteil, the court must interpret this as either a Berufung or a Revision. The two scenarios may, of course, overlap; see Karslruher Kommentar zur Strafprozessordnung, 6th ed., 2008 (hereinafter KK)-Paul § 300 Mn. 1 – 3.

This approach, which matches what another common law judge, David Hunt, said about the function of procedural rules in the context of the international criminal justice system, would be anathema to a German judge. German law, not that different from English law on this issue in principle, knows of the distinction of whether an application, request, action, appeal etc. is admissible (zulässig) or inadmissible (unzulässig), or whether it is well-founded on the merits (begründet) or not (unbegründet). However, where an English judge such as Lord Denning might view it as an expression of pettiness to stop a case, especially one as important as the Blackbum litigation, on a technicality such as standing (locus standi), that is exactly what any German judge would do regardless of the nature of the case. The rationale is, on the one hand, that the courts can only exercise their powers to the extent that the constitution and the laws made by Parliament allow them to do so, and laws setting out formalities in the judicial process count among them. German law, and with it many continental legal systems, does not subscribe to the concept of an inherent judicial power that is not derived from some external source but emanates from the judicial function qua natura. Cases such as, for example, the US Supreme Court decision in Chambers v NASCO, Inc. that allow such inherent powers to function even in the face of express legislation have no counterpart in German law. Apart from this purely doctrinal issue, on the other hand, the distinction also has effects in the realm of res judicata: If an application, for example, has been rejected as inadmissible it may be repeated once the criteria for admissibility have been complied with; if it is dismissed on the merits the applicant is
excluded from proceeding with a fresh application based on the same facts.

The position of the offender at different stages in the proceedings

Depending on the stage at which a (potential) offender finds himself in the process, he is given a different name. Before the prosecution indicts a person, he is called the Beschuldigte. After indictment, but before admission of the indictment, he is called the Angeschuldigte, and after the admission of the indictment, his name is the Angeklagte. The use of the terms is apparent from the provisions of the StPO in the different stages of the proceedings. The translation is relatively straightforward without causing too much potential for confusion: Beschuldigter is translated by “suspect”; Angeschuldigter by “accused” and Angeklagter by “defendant”.

The Major Procedural Maxims – An Overview

Every legal system is driven by some axiomatic principles or maxims that determine its overall shape, the practice of the courts and the academic treatment of problematic scenarios. It will be helpful for the reader to have an outline of a number of rules that make up the character of German criminal procedure; they are not exhaustive but represent the main facets required to understand the ensuing discussion. One can loosely categorise them as constitutional principles that have found a specific outlet in criminal procedure, and as systemic procedural principles, but there is a certain conceptual overlap between both categories.

Constitutional Principles

Judicial independence

This is an obvious feature to which almost all countries of this world subscribe, at least on the paper of their constitutions. In Germany, it was historically introduced in order to block attempts by the monarch at interfering with the judicial sphere (so-called Kabinettjustiz – cabinet justice) and is not to be understood as a privilege of the judiciary. Its aim is to protect the judiciary from outside interference and to make it subject only to the law. It has two facets, personal independence (persönliche Unabhängigkeit) and independence in judicial decision-making (sachliche Unabhängigkeit). The latter has been enshrined in the constitution in Art. 97(1) GG:

Judges shall be independent and subject only to the law.

A major facet of this rule is that German judges are not bound by precedent; there is no stare decisis doctrine and any judge at an Amtsgericht (AG) may deviate from the consistent jurisprudence of the BGH and even of the Federal Constitutional Court, unless the latter’s decision has the force of an Act of Parliament under § 31 BVerfGG. A binding effect exists only in an individual case along the avenues of appeal. This applies equally to professional and lay judges.

Because independence in decision-making realistically depends on not having to worry about the consequences of one’s decisions, Art. 97(2) GG provides corresponding protection to professional judges:

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.

A corollary to protecting judicial independence against personal bias are the provisions on recusal in §§ 22 – 31. Furthermore, the German
understanding of independence has a direct impact on the professional evaluation of judges, for example, for the purposes of granting them life tenure or promotion: Any comments that touch upon, however slightly, the actual work of a judge, his legal views and practice, his reversal rate by the appellate courts etc. are highly problematic and can be questioned before the administrative courts and the special judicial disciplinary tribunal, the Richterdienstgericht. The position of the judiciary has been set out in the Deutsches Richtergesetz – DRiG – (German Judiciary Act) which contains regulations for the federal judiciary and certain framework rules for all judges, and the corresponding state laws enacted in pursuance of Art. 98(3) GG for the state judiciary.

The right to a predetermined judge (Gesetzlicher Richter)

Judicial business needs to be allocated in a fashion that excludes to the greatest extent possible any kind of horse-trading as to who sits on which case. It is obvious that a party may have a strong interest in getting a judge they know is favourably disposed towards their position. Likewise, scenes sometimes seen in American courtroom movies where one judge offers to take a case off a colleague because the latter wants to go on vacation or attend a conference etc. can give rise to additional concerns about judicial docket-swapping. The German constitution outlaws both scenarios in Art. 101(1) sentence GG:

No one may be removed from the jurisdiction of his lawful judge.

This has traditionally been held to mean that the methods of case assignment (Geschäftsverteilung – see for more detail on the procedure §§ 21a – 21j GVG) in any individual courts must be so exact and comprehensive as to ensure that any case finds its way to the proper judge “blindly”. To this end, courts must draw up annual case allocation plans (Geschäftsverteilungspläne) which may run into dozens or hundreds of pages depending on the size of the court. They must consider any eventuality, for example, who takes over if a judge falls ill for a longer period of time. These plans are public record and can be inspected by defence counsel to prepare motions for a change in the panel. If accompanied by a certain degree of arbitrariness as opposed to a genuine error by the court, their violation can also have an effect on an appeal based on the unlawful composition of the panel under § 338 No.1

and may result in the reversal of Urteile by courts that have assumed jurisdiction by grossly neglecting the statutory rules on jurisdiction. This restriction must be seen in connection with §§ 20 StPO and 22d GVG which state that the mere fact that a court has no jurisdiction ratione loci or that a judge decided a matter who was not meant to do so under a valid case allocation plan does not make their actions invalid, unless the violation obviously and glaringly violated the rules on jurisdiction.

The right to be heard (Rechtliches Gehör)

Art. 103(1) GG states: In the courts every person shall be entitled to a hearing in accordance with the law.

This means on the one hand that every person must get a chance to state their views in judicial proceedings, orally or in writing, and that any decision taken without affording them such an opportunity runs the risk of being quashed as unconstitutional. On the other hand it entails the duty of the court to advise the parties of any legal points it intends to base its decision upon if these are so far outside of what can be expected by a well-informed and diligent party that it would amount to a trial by ambush by the court. The decision of the court must show that it engaged with the relevant arguments put forward by a party; if this is not the case the decision may violate Art. 103(1) GG and be reversed. Similarly, courts must not use facts known to them but not to the defendant in order to arrive at a decision that is to his disadvantage, an issue particularly relevant in proceedings for terrorism and organised crime. If a judge in a certain case indicates, for fear or existence of bias or based on an exclusion by law, through a statement to the other judges of his chamber or another judge in charge of recusal matters, that he may be prevented from sitting on that case, his statement must be disclosed to the parties so they can comment upon it. This constitutional right has

41 See BGHSt 38, 212 and KK-Pfeiffer/Hannich Einleitung Mn. 25.
42 The principle does not apply to violations of the rules on jurisdiction ratione materiae other than case allocation plans; OLG Köln StV 2004, 417.
43 The rule does not apply to allocation plans that are legally flawed; MG § 22d GVG Mn. 1.
44 MG § 20 Mn. 1 – 3; § 22d GVG Mn. 1.
45 MG § 20 Mn. 1.
46 BVerfGE 88, 188.
47 Although not necessarily each and every one even if they are abstruse and entirely off the mark: BVerfGE 47, 182.
49 BVerfGE 63, 45.
50 BVerfGE 89, 28.
been taken up in many provisions of the StPO, such as §§ 33, 230, 243(4), 257, 258 etc.

The right to a fair trial

This right, which covers many different aspects of criminal proceedings and is in a way the basic right underlying almost all others, is guaranteed by Art. 20(3) on the Rechtsstaat principle (state based on the rule of law) together with the general personal freedom right in 2(1) GG. Its underlying rationale is to ensure that a person is not made a mere object of the proceedings but retains a way of engaging actively in them. For Germany, the right has been given concrete shape in the StPO and the corresponding parliamentary legislation, including the ECHR and mainly its Art. 6. In practice, the right has been held to constitute a rule of interpretation to be applied by the courts to the existing law rather than a vehicle of creating new legal interests; in a democracy it should be used with great care because it is primarily for the democratically elected legislature to flesh out such general principles and there may be several equally acceptable ways of reaching that goal. Violations of the right to a fair trial do not necessarily lead to a procedural bar, but may have the consequence of a substantial reduction in sentence, as, for example, in the case of the prosecution reneging on an assurance not to prosecute or in the well-known scenario of entrapment by undercover agents provocateurs. The principle also has had a major effect in the context of plea bargaining, which after a long period of being based purely on case law was finally codified in § 257c. Another important area of application is the right to the assistance of counsel and to legal representation on the basis of free legal aid in the case of indigent persons.

51 BVerfGE 77, 65.
52 BVerfGE 63, 45. – See also from a literary point of view the famous work by Franz Kafka, The Trial. Kafka describes the experiences of Josef K. who wakes up one morning and finds himself under arrest for a crime he did not commit and the nature of which is never revealed to him during the entire – and bizarre – proceedings.
53 BGBISI 24, 124; 49, 112; NSIZ 1984, 274; BVerfGE 57, 250.
54 BGBISI 37, 10.
55 BGBISI 45, 321; 47, 44 and see now the regulation of the conditions for their use in §§ 110a – 110c.
56 Note, however, that § 257c(2) 3° sentence clearly states that there must be no charge bargaining and that measures of rehabilitation and incapacitation (§§ 61 – 72 StGB) cannot be made the object of a bargain.
57 BVerfGE 38, 105.
58 BVerfGE 46, 202; 56, 185.

The presumption of innocence (Unschuldsvermutung)

As already indicated above, this is one of the foundation pillars of any criminal justice system worthy of the name. It is also based on the Rechtsstaat concept and thus has constitutional rank, despite the fact that it also applies on the level of simple federal law through Art. 6(2) ECHR.

The Federal Constitutional Court has developed a practice of using the ECHR to interpret the German domestic constitutional concept of the presumption of innocence based on the specific significance of the Convention for the relationship between its human rights and the German constitution’s civil liberties (Grundrechte). The presumption has a connection to the principle in dubio pro reo, yet there are slight differences in that the in dubio rule is triggered only after the court has evaluated all the available evidence before it and must then weigh any gaps in favour of the suspect, accused or defendant, whereas the presumption in German understanding applies irrespectively of that at all stages of the proceedings until the conviction has become final through exhaustion of the entire appeals process. Equally, a defendant is not required to prove, for example, an alibi but she may do so and a failure to prove it does not automatically mean that she is guilty. In other words, the absence of exculpating evidence is not equal to the presence of incriminating evidence. However, the presumption naturally does not prevent measures such as arrest, search and seizure etc. which merely require a certain degree of suspicion instead of certainty.

The principle of proportionality (Grundsatz der Verhältnismäßigkeit and Übermaßverbot)

Also derived from the Rechtsstaat principle in Art. 20(3) GG, this principle states that any intrusion by the state into the rights of an individual must only use the least burdensome means necessary to achieve a legitimate objective and that the individual must be overall subject to a legitimate expectation to suffer the intrusion even if it is of such a character (Zumutbarkeit). Like the right to a fair trial this rule has been broken down into specific provisions related to the different stages of the proceedings, such as the taking of (intimate) samples from the suspect, arrest and detention, and similar sentiments as above apply. In
practice, proportionality will often be determined by the seriousness of the charge and the strength of evidence underlying the suspicion at any given time. However, even a charge of murder or of other serious offences in and of itself is, for example, not a sufficient reason to remand a suspect in custody pending trial if none of the usual reasons for denying bail exist: The introduction of the provision of § 112(3) which did away with the requirement to establish a risk of flight or tampering with evidence etc. in cases of serious crime in order to detain a suspect was held to be unconstitutional qua lack of proportionality if literally applied and was consequently read down by the Federal Constitutional Court to include such a requirement, although it conceded that in cases of such serious offences the degree of justification in an arrest warrant was for obvious reasons not as high as that for medium level crime under the usual criteria.65 In fact, in many cases an arrest warrant may be based on flight risk because of the severe punishment the suspect can expect and the court may thus circumvent the problems of subsection (3).66

The judicial duty of care (Gerichtliche Fürsorgepflicht)

This is a kind of ancillary duty based on a variety of constitutional axiomata such as the right to a fair trial and the principle of a socially oriented state based on the rule of law (sozialer Rechtsstaat) (Arts. 20(1), 28 GG). It supplements the right to a fair trial in asking judges to assist especially undefended and inexperienced pro-se defendants in the proper exercise of their rights, and to abstain from exploiting their position by as king them, for example, to declare a waiver of appeal by telling them that they got away with a black eye etc., with the judge thus avoiding the need for a fully reasoned Urteil.67 It may also mean re-opening the hearing if a co-defendant makes an unexpected confession in his last word (§ 258(2)) before judgment is pronounced to allow the other co-defendant(s) to react to this and consult with their counsel.68 Other cases include the court looking for a therapy placement for a drug addict who is willing to go into therapy69 or making the best effort to arrange a hearing date at which counsel of the defendant’s trust can attend.70 Finally, the duty of care also covers third persons such as witnesses in need of support.71

72 A conviction or acquittal for a summary offence (Ordnungswidrigkeit) also triggers ne bis in idem for a re-prosecution as a criminal offence and vice-versa; § 84 OWiG. Note that a sanction for a disciplinary offence does not bar a prosecution for a connected criminal offence based on the same conduct, but that an acquittal from a criminal charge blocks a disciplinary sanction unless there is another aspect to the conduct that is distinguishable from the criminal charge; there may, however, have to be credit given in the sentencing decision. See MG Einl M. 178 - 179. 73 See for the restricted application of the principle in the international and transnational context Michael Bohlander, Ne bis in idem, in Cherif M. Bassiouini (ed.) International Criminal Law, Vol. III, 3rd ed., 2008, 541. 74 There was initially some confusion about this in international criminal law; ibid. (fn. 74). 75 BVerfGE 9, 89; 23, 191. 76 MG Einl M. 168. – However, while a case is pending before one court, the procedural bar of litis pendens (Rechtshängigkeit) exists, which prevents another court from dealing with the case; see MG Einl Mn 145. 77 MG Einl M. 170 with references to the case law. One example is § 190 2nd sentence SGB on proof of truth by judgment in cases of libel, where the libel consists of the allegation that the libelled person had committed an offence: If the libel victim had been finally acquitted of the alleged offence before the allegation was made, the defendant can no longer adduce evidence to prove that the allegation was true nonetheless. Specific problems exist with regard to the extent of the bar in cases of continuous or serial offences (Dauerdelikte und fortgesetzte Handlung) where individual acts may be prosecuted before the overall pattern becomes known and vice-versa; see on the complex issue MG Einl M. 175 - 175a. 78 MG Einl M. 172 with references.
unless there is a duty to take them into account under international or bilateral agreements.

Systemic Principles

Accusatory Principle (Anklagegrundsatz)

This principle states the simple fact that under German law a court cannot seize itself of a matter unless an external prosecution, request etc. is brought. This applies, with the exception of minor contempt issues, even if a serious offence is committed in front of the judge in a sitting. The prosecution must file an indictment under § 151 before a court can proceed to a trial; the court is under a duty to check at all stages of the proceedings whether a proper indictment exists. The indictment determines the ambit of the court’s examination, as is evidenced by §§ 155(1), 264 – 266. The procedure under § 172 described above is not an exception but merely serves as a check on the prosecution’s quasi-monopoly to indict persons before the courts.

Principle of public prosecution (Offizialprinzip)

As a corollary to the accusatory principle, the Offizialprinzip puts the power to prosecute and indict in the hands of the public prosecution service which has to prosecute without having to abide by the wishes of the victim. There is thus no automatism in Germany that a prosecution will not ensue if the victim does not “press charges”, as the reader may have seen many times especially in American films. There are a few exceptions that mainly deal with minor offences where the victim (a) must either formally request prosecution, the so-called Antragsdelikte, or (b) may prosecute the offence herself (§ 374 - Privatklage), or (c) 

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80 MG Einl Mn. 177 – 177c.
81 See §§ 176 – 178 GVG.
82 She will have to refer the case to the prosecution under § 183 GVG, after recording what happened and, if need be, arresting the offender provisionally under §§ 127, 128 – she cannot, however, issue an arrest warrant based on § 112 because she lacks jurisdiction for that; see OLG Hamm NJW 1949, 191; MG § 183 GVG Mn. 1 – 2.
83 BGHSt 5, 225.
84 Fn. 23.
85 Leaving aside the institution of the Privatklage (private prosecution) for minor offences under §§ 374 – 394.
86 KK-Pfeiffer/Hannich Einleitung Mn. 3.
87 For example, minor cases of trespass, insults etc. See KK-Pfeiffer/Hannich Einleitung Mn. 4 for further examples.
88 The prosecution may, however, at any stage of the proceedings join the private prosecutor or take over the case completely (§ 377). If it does take it over, which it will normally only do if it is in the public interest (see § 376), the proceedings change their nature and transmogrify into normal proceedings as if upon indictment, with the consequence that the private prosecutor is no longer a party to them unless he joins the prosecution as a Nebenkläger under the criteria set out in §§ 395 – 402. This also means that the prosecution and the court can discontinue the proceedings under §§ 153 ff without the consent of the prior private prosecutor or the Nebenkläger; the Nebenkläger must, however, be heard before a discontinuance is issued which is why a court intending to discontinue the proceedings under §§ 153(2), 153(4)(2), 153b(2) and 154(2) must first decide whether a person is allowed to join the prosecution and hear them before ordering the discontinuance; MG § 396 Mn. 18.
89 For examples see See KK-Pfeiffer/Hannich Einleitung Mn. 4.
The following table shows the actual numbers of how cases are processed in the Amtsgericht and Landgericht jurisdictions:

Table 1: Cases dealt with by the prosecution service – All of Germany, 2006

<table>
<thead>
<tr>
<th>Total number of cases</th>
<th>Unconditional discontinuance</th>
<th>Conditional discontinuance</th>
<th>Total number of defendants</th>
</tr>
</thead>
<tbody>
<tr>
<td>4,876,989</td>
<td>1,053,654</td>
<td>241,102</td>
<td>976,600</td>
</tr>
<tr>
<td>Indictment</td>
<td>244,027</td>
<td>21,6%</td>
<td>461,274</td>
</tr>
<tr>
<td>Strafbefehl</td>
<td>581,713</td>
<td>11.5%</td>
<td>25,835</td>
</tr>
<tr>
<td>Conditional discontinuance</td>
<td>1,293,152</td>
<td>4.9%</td>
<td>1,138,299</td>
</tr>
<tr>
<td>Unconditional discontinuance</td>
<td>1,053,654</td>
<td>21.6%</td>
<td>2,65</td>
</tr>
<tr>
<td>Insufficient evidence discontinuance</td>
<td>1,293,152</td>
<td>26.5%</td>
<td>0.2%</td>
</tr>
<tr>
<td>Death of suspect, lack of responsibility</td>
<td>8,651</td>
<td>0.2%</td>
<td>23.3%</td>
</tr>
<tr>
<td>Other</td>
<td>1,138,299</td>
<td>23.3%</td>
<td></td>
</tr>
</tbody>
</table>

The major feature that justifies calling Germany an inquisitorial system is the rule that the aim of any investigation and trial is the ascertainment of the material truth (materielle Wahrheit), not the truth based on facts adduced by the prosecution and defence. The court is not bound by any declarations of the parties and investigates the facts on its own motion (§§ 153 ff. and 244(2)). German procedure is not party-driven, despite the fact that the German term for the prosecution service, Staatsanwaltschaft, is somewhat unfortunate in that it means State Attorney Service and could thus lead one to think that the prosecution only represents the one-sided interests of the state as a party. While in practice some prosecutors (and judges) may and do, of course, develop a prosecution-minded attitude, the law is opposed to such partisan approaches. The principle applies to the prosecution in the form of § 160(2) which expressly states that the prosecution must equally investigate the incriminating and exculpatory facts of a case, a provision which has led some to call the German prosecution service the “most objective authority in the world” (objektivste Behörde der Welt). In the case of a court this can mean, for example, that a judge will order the police or the prosecution to investigate a certain set of facts if they have come up during the process of a private prosecution or of an appeal (61,155), referral to another court and refusal by the trial court to admit the indictment for trial. Again, 23% of the cases that had made it to the court were dealt with by a discontinuance under §§ 153 ff. It is thus clear from the statistics that in practice the Legalitätsprinzip has already been replaced as the guiding principle. It now merely means that the prosecution has to start an investigation if sufficient facts warrant it, but that a formal prosecution by indictment or Strafbefehl occurs only in about a quarter of all cases.

Inquisitorial principle (Ermittlungsgrundsatz)

The large category of other disposals included referrals to another prosecution service, to administrative proceedings, juvenile proceedings, provisional discontinuances, joinder with other cases etc. The important information as far as adult proceedings are concerned is that of the purely criminal charges only 23.4% were actually either indicted formally or by way of a written Strafbefehl, with the latter again being applied more often than the formal indictment; one can almost say that the Strafbefehl has become a kind of secondary diversion instrument by sparing the accused the spectacle of an open trial unless she objects and chooses to contest it. 26.5% of cases were dealt with by discontinuances under §§ 153 ff and most of those were unconditional ones. Once a case goes to court, the picture changes somewhat, but there is still a high proportion of discontinuances, as is evidenced by Table 2.

Table 2: Cases dealt with by the courts – All of Germany, 2006

<table>
<thead>
<tr>
<th>Total number of defendants</th>
<th>Urteil (including acquittals)</th>
<th>Strafbefehl</th>
<th>Conditional discontinuance</th>
<th>Unconditional discontinuance</th>
<th>Other discontinuance/discharge</th>
<th>Other disposal</th>
</tr>
</thead>
<tbody>
<tr>
<td>976,600</td>
<td>461,274</td>
<td>25,835</td>
<td>124,083</td>
<td>100,994</td>
<td>28,327</td>
<td>236,087</td>
</tr>
<tr>
<td>47.2%</td>
<td>2.6%</td>
<td>12.7%</td>
<td>10.3%</td>
<td>10.3%</td>
<td>2.9%</td>
<td>24.2%</td>
</tr>
</tbody>
</table>

The other discontinuances/discharges included cases of extradition, expulsion, absence of the defendant and procedural bars. The other disposals included combination with another case (119,532), withdrawal

92 Taken from Jörg-Martin Jehle, Criminal Justice in Germany, 5th ed., 2009, 20. – Available on the website of the Federal Ministry of Justice at www.bmj.bund.de/enid/9d342b183e639ed913e2e1e5c3e018/d/Publications/Criminal_Justice_in_Germany_19x.html.

93 Ibid., 26.
Principle of oral presentation of evidence (Mündlichkeitsprinzip)

The court may under this rule only use the evidence for its decision which was orally presented and discussed in the hearing before it. Despite the fact that this principle has not been expressly enunciated in the StPO the courts have consistently interpreted various provisions such as §§ 250, 261, 264 and § 169 GVG that refer to the *Vernehmung* (interrogation) of witnesses or the *Verhandlung* (hearing) as meaning an *oral* hearing.96 This is also an expression, on the one hand, of the German approach to the concept of open justice, enshrined, for example, in § 169 GVG, which is intended to allow the audience to follow the flow of the evidential presentation and to ensure that the work of the courts is not done away from the eye of public scrutiny, and on the other hand it serves to ensure that the parties to the proceedings know on which pieces of evidence the court will be able to base its decision.97 The consequence is that, for example, the full text of documents presented in evidence must be read out and not merely be presented as exhibits, unless they are, for example, very lengthy98 and the procedure under § 249(2) (*Selbstleseverfahren*—private reading procedure) is chosen which allows the judges99 to take notice of a document by simply reading it, if all the parties have had a chance to read it as well.100 In such cases, and where the defendant is not put at a disadvantage, the efficiency and expediency of the trial proceedings obviously should be given precedence over the information interest of the public.
Concentration and speedy trial principles (Konzentrationsprinzip und Beschleunigungsgrundsatz)

These two principles are closely interrelated and aim at a fast and efficient disposal of a case, in the case of the speedy trial rule most obviously in the interest of the defendant who will want to know as soon as possible his future fate. The concentration principle in particular means that a trial should be managed with as few hearing dates as possible. The law distinguishes in this respect between the Aussetzung (decision leading to a full retrial ab initio) and the Unterbrechung (adjournment). An adjournment may be ordered for a period of up to three weeks, but for not more than a month 107 between hearings (§ 229(1) and (2)); anything that happened in the trial previously retains is validity. If that period cannot be kept, all previous procedural acts are extinguished and the trial must start again from scratch (§ 229(4) 1st sentence). The temptation to set hearing dates at three-week intervals is countered by the speedy trial rule. 108 The latter has not been specifically codified in the StPO but conceptually supplants several of its provisions and flows from Arts. 5(3) 2nd sentence and 6(1) 1st sentence ECHR as well as the Rechtsstaat principle. 109 A speedy trial, apart from serving the interest of the defendant, is also a guarantee for preserving the evidence in its best possible state: The longer a case lasts, the greater the danger of loss of memory by or illness or death of (old) witnesses, or of destruction or deterioration of real evidence such as documents, specimens etc. The determination of an appropriate timeframe can be difficult in the individual case and the mere lapse of time, especially if no blame can be apportioned to the justice system, may be a sentencing factor under § 46 StGB but will not normally give rise to a violation of the speedy trial principle under Convention standards or German law. 110 After the decision of the Great Senate of the BGH of 17 January 2008, 111 violations of the speedy trial rule are now sanctioned through the so-called Vollstreckungsläsung (enforcement solution): The court first determines, in the case of a conviction 112, the appropriate sentence taking into account the length of the proceedings, but without regard to the legal aspect of the violation of the Convention (as had been the case previously), and then declares on the basis of the severity of the violation which part of that sentence shall be considered to have been served. 113 This approach avoids the problems caused by the old system with statutory minimum sentences and thus allows for a credit to be given even in cases of a mandatory life sentence. 114

Free evaluation of evidence (Freie Beweiswürdigung)

Free evaluation of evidence (§ 261) does not mean a judicial free-for-all with respect to what the court makes of the evidence presented before it, but it means freedom from strict rules of evidence. For example, in previous times before the 19th century, the German law operated evidential rules that remind one of those in Islamic Shari'ah: A confession by the defendant provided full proof of the charges against him, as did two witnesses of unimpeachable character. If there was only one witness, the charge was proven only half and the judge was then permitted to proceed to the peinliche Befragung (painful interrogation) or in other words, to torture. In the first half of the 19th century these rules were abolished and a system introduced that followed the French principle of the intime conviction, as set out, for example, in Art. 342 of the Code d'Instruction Criminelle of 1808. 115 § 261 requires the judge to be convinced of the facts before he proceeds to conviction and sentence. In effect, this is much the same as the judicial instruction in England and Wales to the members of the jury that they "must be sure" that the defendant committed the acts he is charged with before they can find him guilty. The law acknowledges that no human being can have absolute certainty of any fact, not even those she may have witnessed herself. Therefore no merely theoretically possible alternative will prevent a conviction, but only one that is reasonably possible. The German law consequently does not ask the judge for absolute certainty, but for his own conviction based on the laws of logic and the absence of vernünftige Zweifel, that is, reasonable doubt 116 - and an adequate description of his argument in the Urteil, something not required of English juries, for example.

In dubio pro reo

As we saw above when we looked at the presumption of innocence, the application of this principle requires the existence of a finite amount of

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107 If the trial has already lasted for ten days, and then for each new block of ten days; KK-Pfeiffer/Hannich Einleitung Mn. 10.
108 BGH NJW 2006, 3077.
109 BVerfGE 63, 45; NSZ 2006, 680.
110 See the references in KK.-Pfeiffer/Hannich Einleitung Mn. 11.
111 BVerfGE 63, 45; NSZ 2006, 680.
112 The BGH has held that in cases of an acquittal the provisions of the Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen (SteEG), i.e. the Criminal Proceedings (Compensation) Act, do not apply mutatis mutandis; there is thus a tension with the view of the ECHR who requires some form of compensation for material damage and pain and suffering if a mere stating that the actions of the state violated the Convention is not enough; see MG Art. 6 MRK Mn. 9d with further references, and at 9g for the cases of violations of other conventions or procedural principles.
113 However, the courts advise caution with regard to a too generous application of this rule and require a serious violation in addition to the length of the proceedings; see BGH StV 2008, 633; 2010, 228.
114 BGH NJW 2006, 1529. - For further explanation see KK.-Pfeiffer/Hannich Einleitung Mn. 12 - 13b and MG Art. 6 MRK Mn. 9.
115 KK.-Pfeiffer/Hannich Einleitung Mn. 14.
116 BGHSt 10, 208; StV 1999, 5; NJW 1999, 1562; NSZ-RR 1999, 332.
evidence: Only when the judge has seen and heard all the evidence in a case will she be able to decide what and whom she can believe. The in dubio rule is about the factual basis for the guilt of the defendant, it does therefore not apply to each and every piece of evidence, but only to the totality of the evidence. A judge may be unsure whether to believe witnesses A, B and C because their memory may have been hazy, their testimony hearsay or an outright lie; yet, if he is sure that he can believe the incriminating testimony of witnesses D - H and maybe the expert X in a case, then he has no reasonable doubt about the guilt of the defendant. Because it is a principle that attaches to the evaluation of evidence, the in dubio rule has no application for questions of law: If a certain provision can be given a strict and a lenient interpretation and clear guidance from the legislator is missing, the court is not obliged to choose the more lenient one if there are good reasons for choosing the strict one. The question as to whether the rule applies to factual uncertainty in procedural matters as well, for example,

- whether the prosecution of an offence is barred by the statute of limitations,
- whether a request to prosecute was filed in time,
- whether double jeopardy is triggered,
- whether a young adult was still of the same developmental stage as a juvenile,
- whether the prosecution has to apply it when deciding whether to indicted the suspect,
- whether on appeal a procedural bar is raised based on whether the defendant is unfit to stand trial,
- whether the withdrawal of an appeal was valid,
- whether a procedural error has occurred.

118 BGHSt 14, 68.
119 Yes: BGHSt 18, 274.
120 Yes: BGHSt 22, 90.
121 Yes: BayObLG NJW 1968, 2118.
122 Yes: BayObLG NJW 1968, 2118.
123 No: OLG Karlsruhe NJW 1974, 806. - A certain amount of uncertainty is immanent in that stage of the proceedings; it will, however, play a part in the overall reflections of the prosecution about the likelihood of a conviction; OLG Karlsruhe Justiz 2003, 272; OLG Bamberg NSZ 1991, 252.
124 No: BGH NSZ 1984, 181. - This must be distinguished from the scenario of whether a trial may take place if the trial judge has doubts about whether the defendant is fit to plead and none of the criteria in §§ 231(2) (voluntary unlawful absence of the defendant from the hearing) or § 231a (intentionally putting oneself in a state of unfitness to plead) are fulfilled: In that case the rule applies; BGH NSZ 1984, 520; BVerfGE 51, 324.
125 No: BGHSt 10, 245.
126 No: BGHSt 16, 164. - Procedural errors must be fully demonstrated by the appellant on appeal; as far as § 136a on forbidden means of interrogation is concerned, the appellate court must ascertain these for itself through the Freibeweisverfahren.

Open justice (Öffentlichkeitsgrundsatz)

§ 169 GVG has already been mentioned above under the heading of the Mündlichkeitsprinzip. It refers only to the trial proceedings, not to a duty of the courts to publicise their decisions adequately. German law does, however, not subscribe to the understanding of open justice as practised in England and Wales, where it includes the right of the media to report about suspects from the earliest stages of the proceedings with inclusion of their full name, address and picture. The open justice principle exists in a natural tension with the protection of the interests of victims, and the rules about the latter have been significantly strengthened in recent years. The public may be excluded from the hearing for reasons of victim protection, for example in sexual offence cases, or if there is a concern based on public morality etc. The reasons are set out in §§ 170 – 175:

- Hearings in the family court and the cautelary jurisdiction (Freiwillige Gerichtsbarkeit) are in principle always in camera; the public may exceptionally be admitted, although not normally over the objection of one of the parties (§ 170 GVG);
- the public may be excluded in cases of a Sicherungsverfahren (§§ 413 – 415) with the aim of sequestering the offender in a mental health hospital or in custodial addiction treatment (§ 171a GVG);
- the court may exclude the public if in the course of a hearing the intimate sphere of any of the parties, victims or witnesses etc. is being discussed; this may include the defendant; the exclusion must not be ordered if the protected person objects to it (§ 171b GVG);

(discretionary evidence), i.e. the court is not bound to use the means of evidence provided for in the StPO for the purpose of establishing the guilt of the defendant (Strengbeweis – strict evidence): It may, for example, make a simple phone call to establish whether a violation has occurred, something it could not base a conviction on. KK-Pfieffer/Hannich Einleitung Mn. 19 – 20.

128 See KK-Pfieffer/Hannich Einleitung Mn. 21.
130 KK-Pfieffer/Hannich Einleitung Mn. 21.
131 MG § 171b GVG Mn. 3.
132 This would appear to be unusual, but from my own experience as a judge in a slightly different scenario (I remember the case of a young woman who had been raped and seriously sexually abused in various ways by the defendant, whilst being trapped in an elevator with him, for over half an hour, all the time being threatened by him with a weapon. When I asked her whether she wished to have the defendant excluded for the duration of her testimony about the intimate facts of the abuse, she answered: “No, he
• an exclusion may be ordered for reasons of national security, public order and morality; to protect life, limb or freedom of a witness; to protect an important business or trade secret or tax confidentiality, if the interests of the protected person outweigh that of an open court discussion; if a private secret is going to be discussed the divulging of which by an expert or witness might be an offence under § 203 StGB; if a person under the age of 18 is being heard (§ 172 GVG).

The verdict, i.e. the operating part or Tenor of the Urteil must always be pronounced in public, although the public may again be excluded for the reasons set out in §§ 171b, 172 GVG when the court gives its reasons for the decision (§ 173 GVG).

Conclusion

This paper is hoped to have served as a useful introduction to some of the fundamental parameters of German criminal procedure. Too many people outside the German system, even within the German-speaking world, have only nebulous ideas about the basic principles that guide its procedures. Labels such as “inquisitorial”, “professional judiciary” and “bureaucratic procedures” that are bandied about, not infrequently in a derogatory manner, in the legal discussion between systems mislead its participants about the deeper meaning and history of such concepts and shroud the view at their actual shape in the modern world. German criminal procedure is certainly very different from, for example, English and Welsh law but, as can be seen from what was explained above, there is no longer any place for criticism based on badly and superficially informed statements such as those mentioned in the beginning of the paper about the burden of proof, the right to silence etc. German procedure is a sophisticated and sometimes admittedly overly regulated system that aims at finely balancing the competing interests of the public, the victims and the defence. As with any issue of public policy, there are often multiple and equally valid ways of reaching a solution to resolve that tension that is acceptable in a society. What some of the parties to the comparative discussion, it would appear, still must learn to understand, even after many years of comparative research on all sides, is that the fact that another system has made a choice one’s own system has not made or maybe even frowns upon, is as such not a sufficient reason to denigrate the other system as unjust. Comparative research is a fascinating endeavour and indispensable in modern law-making, not only because of the effects of European legal convergence and harmonisation, but also because of its importance for the creation of principles and rules of international law under Art. 38 of the Statute of the ICJ. Nothing could be worse in that context than making badly informed assumptions the basis for the creation of law at the European and international level.

shall hear what he did to me!” She was, if it may be said to her credit, the deadliest of witnesses imaginable: calm, detached and precise in her memory despite the ordeal she had been subjected to. – Equally memorable, albeit for different reasons, was the defendant’s counsel, also a woman, who started her closing speech with the words: “Life has many faces...” (Das Leben ist vielfältig...), insinuating that the victim may have enjoyed the events as “rough sex”. 