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Trends in German Criminal Procedure Law

Abstract. *German criminal procedure law is under constant reconstruction, since its promulgation in the 1870s, it was changed more than 200 times. When a law undergoes long term changes, it is especially interesting to take account of specific trends – where does normative restructuring happen and how are different spheres of reconstruction interrelated. This contribution identifies 4 distinct areas where topics either remain very stable or where criminal procedure law undergoes profound changes. One area that is rather constant is the interest in efficiency of criminal investigation, trial, and sentencing. However, within this common interest in efficiency, we see important changes in the realm of human rights guarantees. Since the German Federal Constitutional Court did substantially change its interpretation of human rights, insisting upon a core of absolute protection within each and every human right, institutional safeguards of human rights in criminal procedure had to be amended, leading to a new emphasis on the principle of proportionality. While this is a trend that is mainly concerned with serious crime, lesser offenses are subject to widespread procedural decriminalization. Such widespread decriminalization is only possible because the role of the victim was newly assessed. Newfound possibilities to actively participate in criminal procedure or to interact with criminal procedure increase acceptance for procedural outcomes apart from criminal sentencing.*
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Introduction

After having taught Criminal Procedure Law and related subjects in East Asia for more than 20 years, the author got used to looking at German Criminal Procedure Law from afar. Being a German by descent, the author was always asked to make at least some reference to the German example. By doing so, it became obvious that many related questions shift in their importance. What is really interesting in such a situation is often not a specific paragraph, but a mindset that expresses itself through Criminal Procedure Law and its relevant changes. Therefore, this article is less concerned with specific dogmatic or normative questions, but with important and overarching trends within Criminal Procedure Law and its constant efforts of finding normative and practical answers to a changing society.

It is therefore a contribution that tries to share experiences and insights into German criminal procedure, not to give an example for granular questions – how important they might ever be – but to give an account concerning questions such as the balance between efficiency of criminal prosecution and human rights of a criminal suspect. Quite often, this balance is expressed through the terms of the principle of proportionality that found its way from police law through administrative and constitutional law into criminal procedure law. Still, this principle underwent distinct changes due to new ways of interpreting in German constitutional law. A second line of

thought – that expresses considerations of proportionality in a very different way – is the tendency to look for ways of procedural decriminalization. A third development worth being noted are changes that arise from a reconsideration of victim interests, giving way to new forms of procedural choices and forms of procedure. This pluralization of procedures is an expression of the pluralization of subjects. All these examples show how values reconnect in new ways or how even new values become viable within German criminal procedure law.

Efficiency

There are very different ways to assess the efficiency of a procedural system. Either we try to indulge into estimates in the field of criminology as to whether crimes are discovered and solved; or we can try to scrutinize criminal procedure itself and see if criminal procedure sticks to its own standards. When choosing the first way to assess the efficiency of the system, we may very often find estimates concerning crimes that perhaps happened or concerning crimes that are reported but never solved – maybe due to lack of evidence or due to lack of substance. These numbers try to combine field research with case numbers within the judiciary. Since only a small proportion of crimes is scrutinized in such a way, they are very often more or less disputed or misleading. However, when we try to judge the criminal justice system from within, we will find a different form of efficiency, showing the adherence of the system to its own standards. In this context, we find two numbers directly related to each other, revealing court opinion not about criminal actions of individual suspects, but about professionality and soundness of investigation and prosecutorial decision making. Therefore, they are an assessment of professional efficiency of major criminal justice institutions from within the criminal justice system. The first set of numbers concerns decisions of prosecutors as to whether dismissing a case or not. In case prosecution dismisses a case, but the victim objects, courts can uphold the prosecutorial decision to dismiss a case as being justified, or they can oppose it. The second set of numbers concerns cases where the court rejects charges brought forward by a prosecutor on reason of insufficient evidence.

First, when the prosecutor decides according to sec. 170 II 1st sentence German Criminal Procedure Law (GCPL) to terminate a procedure either due to proof of innocence or due to lack of evidence, the victim can object. If the prosecutor general – as a part of prosecutorial internal control – upholds the decision to terminate procedure (sec. 172 I GCPL), the victim can ask the high court to scrutinize this termination of procedure furthermore (sec. 172 II, III, IV GCPL). However, only in a tiny percentage of all cases, such a complaint will lead to an acceptance of charges, furthermore to lead either to an obligation of the prosecutor to file public charges (sec. 175 GCPL), or to an investigation by the court in order to reach an informed decision (sec. 173 GCPL in combination with sec. 157 German Court Organization Law (GCOL)), or to return the case to the prosecutor with the order to investigate furthermore (OLG Hamm, Hamm StV 2002, 128). When we look for the success rate of such an objection against termination of procedure, we see only a dwindling number of cases reaching their proclaimed aim. In 2015, there have been ca. 1,300,000 terminations of proceeding; 3,000 objections have been filed; only in 12 cases, the prosecutor was forced by the courts to press for public charges. This is an almost incredible success rate in favour of public prosecutors: less than 1 in 100,000 terminations was found to be flawed, only 0.4% of all objections resulted in a court order to press for charges.

Contrary to unduly terminating procedure, there is a possibility to press for unjustified charges. In order to prevent the accused from an unnecessary trial, the court will first scrutinize charges brought forward by the prosecution, before accepting these charges and deciding upon opening main trial (sec. 199 ff GCPL). According to normative language, the standard for pressing for charges might be different from the standard for accepting charges and opening main proceedings. While the prosecutor is obliged to press for public charges as soon as there are "sufficient reasons for preferring public charges" (sec. 170 I GCPL), the court will accept charges as soon as there is "sufficient ground to suspect … that the indicted has

committed a crime" (sec. 203 GCPL). While we might perceive the first wording to be centred upon a very high degree of suspicion, the latter is much more focused upon evidence: there has to be sufficient ground to suspect the accused has committed a crime; in other words, there has to be enough evidence to make a trial viable. Still – evidence at this stage of trial is only scrutinized in a formal way: an indictment has to put forward (either direct or indirect) evidence concerning each element of crime (Tatbestandsmerkmal). Only then is a trial on material charges possible. Since only 0.5% of indictments (or 1 in 200) are rejected by the courts, prosecution is regularly found to provide enough evidence to enable a court trial to go forward. In case charges are rejected, this may lead to further investigation by the prosecution and an indictment at a later stage, or to a dismissal and termination of procedure.

Regardless of whether it is the extreme that a victim lodges a successful objection against termination of procedure, or whether charges brought forward by the prosecution are dismissed by the court due to an (formally) insufficient chain of evidence, numbers where courts criticise decisions of prosecutors are staggeringly low. 12 successful objections within 1,300,000 terminations of cases leads to the question: why should anyone bother to uphold a system with such a low success rate? To a very high extent, the same question applies to the scrutinization of public charges by courts? Why bothering with such a formal consideration when courts and prosecutors are facing a huge work load? Reasons are at least threefold: (1) the success of a system sometimes can be measured in its "insignificant number of bad results": the fact that only a very few cases are singled out as being wrong decisions means, that the overwhelming majority is found being sound and reasonable; (2) by scrapping this control mechanism, any oversight over a deteriorating quality of indictments (or terminations) will be lost, leaving no means to assess the soundness and efficiency of investigation; (3) the transparency of control of prosecutorial work enhances public trust into professionality and efficiency of investigation: prosecution neither dismisses charges lightly nor presses for unjustified charges.

Human Rights

This intense scrutiny, that definitely prevents most suspects from being indicted (or having cases dismissed) unduly, protects citizens from having to face unnecessary criminal trials. Since enduring criminal investigation and criminal trial is conceived as a duty of each and every citizen, it is directly related to human rights (and obligations). So when we reflect upon these numbers, we see more human rights of the suspect or the accused coming into view: be it the principle of nulla poena sine lege, of ne bis in idem, of due process, or of habeas corpus, there are a many traditional human rights tied to criminal procedure. Criminal punishment can crush a person's future and is the most severe form of state interference into a citizen's life. It is on these reasons, criminal procedure proclaims that a person is "innocent until proven guilty", thus trying to uphold the human rights of an accused as long as possible. However, this principle invokes the perception of a change of quality at the very moment a court hands down a guilty verdict: innocent – and therefore gifted with all human rights – until found guilty – and therefore loosing central aspects of human rights – economic ability (fine), freedom of movement (imprisonment), and in some countries maybe even one's very own life (capital punishment) – as soon as convicted.

This categorical division into all or nothing is not realistic, so it gave way to a more gradual approach in German criminal procedure. Possible restrictions prior to being found guilty are evident and are often justified by claiming an "obligation of the suspect or accused to endure restrictions of his/her rights due to the needs of investigation or trial. This becomes very obvious when we have a look at remand detention: There is no exact normative lower limit of severity of crime that might preclude the possibility of ordering remand detention. In case of severe suspicion, anybody that might hamper future conduct of trial through flying, hiding, tampering of evidence and so on can be put into remand detention (sec. 112 GCPL). In addition, anybody that is in danger of repeating his crimes can be held in "preventive" remand detention (sec. 112a GCPL) [1]. Therefore, a murder suspect may be put into remand detention as soon as there is

serious concern that he/she might try to flee; a suspect of multiple burglaries may be put into remand detention as well, when he/she tries to destroy evidence. However, although there is no restriction as to what crime might be exempt from potential remand detention, it will still be often impossible to put somebody into remand detention. According to sec. 112 I 2nd sentence GCPL, no remand detention is justified when the case is of relative insignificance or when future sanctions are "out of proportion" (steht … außer Verhältnis) to the investigative measures of remand detention.

This clearly shows two things at the same time: on one hand, the gradual loss of basic human rights (freedom of movement) may start very early in criminal investigation. On the other hand, the severity of the individual crime and possible restrictions of human rights are directly linked to each other. Still, once human rights of a criminal suspect are infringed upon during investigation or trial, they are only partly restored at the end of the trial procedure. If the accused is found innocent, he/she will get monetary compensation and it is always questionable whether this economic gratification can restore lost social contacts or lost time. If the accused is found guilty, the sentence will be reduced in accordance with time spent in remand detention. A solution that might be more favorable to the convicted person.

While on one hand acknowledging that a suspect may have to endure restrictions during the stages of investigation and trial, thus restricting basic human rights during a pre-trial stage as well as during trial, the former massive loss of human rights after being found guilty is much reduced due to a change in opinion by the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG). Since BVerfGE 33, 1, the special power relationship (besonderes Gewaltverhältnis) of criminal convicts during the time of incarceration was revoked. Any restriction of rights has to be stipulated by the law and cannot be merely based upon internal rules of an institution like a prison. So instead of being an object that is governed by prison rules, any convicted criminal has to be treated as a subject. Since this quality of being a citizen gifted with human rights basically stays intact even in the case a person is convicted, society can't give up upon a convicted criminal, leading to a very strong emphasis upon the right of any convict to resocialization [2]. This means, even those convicts that are perceived as being a long-term threat to public security – well beyond serving their prison sentence – have to be treated with dignity and cannot be denied the possibility of re-entering society once their sentence is served. Although an imminent threat to public security may justify a separation from society beyond a prison sentence, thus resulting in what is called security arrest (Sicherheitsverwahrung, sec. 66 ff German Criminal Law (GCL) = Strafgesetzbuch), but such a restriction of freedom is only justifiable when the convicted person is gaining access to specific courses that allow them to prepare for an eventual re-entry into society. This comprises of psychological training as well as of vocational training or other measures that are deemed important for reducing risks to society and enhancing chances of a better interaction of the former criminal with his social surrounding.

Since a guilty verdict has to either directly order placement in security arrest after finishing prison sentence, or at least clearly stating the possibility of a future decision of placement in security arrest, the problem of anti-social behavior and of a significant risk to society is known from the very beginning of institutionalized sanctioning of a criminal. Therefore, the criminal has a right to classes that give him the possibility to improving prospects of avoiding future security arrest from the very beginning of serving prison sentence. Otherwise, any future security arrest will automatically turn unconstitutional. In other words, restrictions of human rights of a convicted criminal are not only dependent upon the assertion of guilt of said criminal but are dependent upon state action aimed at reversing individual shortcomings too. A criminal is a person to being helped, and it is the responsibility of state authority to lend help to any convicted criminal. The worse the situation is, the more it is the responsibility of the state to intervene – not to destroy the convicted criminal, but in order to enable a future reintegration of any criminal into society.

Principle of Proportionality

As can already be seen with restrictions to remand detention, German criminal procedure law applies a dynamic approach towards the guarantee of rights throughout investigation and trial. Infringements of human rights are not categorically allowed in a certain situation, but must always take the position of BVerfGE 115, 118 (158) into account. According to this decision, any human right shares in its inner core the concern for human dignity (Menschenwürde), which is an absolute value. Therefore, since it is impossible to quantify an absolute value, to align any human right in its inner core with the absolute protection of human dignity in accordance with Art. 1 Grundgesetz (GG = German Constitution) posed serious problems for criminal investigations. What was meant as an argument against the so called "Luftsicherheitsgesetz" – excluding any possibility to justify a kill order for taking down an unidentified airplane on the basis of written law – had serious repercussions for criminal prosecution, especially for criminal investigation. When the right to privacy has a core meaning that enjoys an absolute protection, how should law enforcement officers conduct undercover investigations? The problem was brought forward to the same constitutional court and in BVerfGE 109, 279 (314), the court upheld his decision concerning the absolute protection of the core area of the right to privacy. Since then, German parliament had to restructure relevant norms and criminal investigations have to adhere to a multi-layered realization of the proportionality principle.

To show how this application of the proportionality principle is put to work in practice, we may have a closer look at sec. 100c GCPL. In administrative and in constitutional law, the proportionality principle is split in three distinct parts:

1) Principle of appropriateness
2) Principle of least harm
3) Principle of proportionality in a narrow sense: benefits outweigh damages.

However, sec 100c GCPL is not just applying these three sub-principles but indulges in further considerations on how to restrict incursions by covered investigations and how to balance the needs of the investigation with the rights of the accused. In sec. 100c I Nr. 1-3, interception of private speech on private premises is restricted to (1) particular serious crimes, (2) serious instances of said crimes, and (3) situations where it is likely that interception of speech will result in establishing facts of crime or lead to determining whereabouts of co-accused. It is only after this threefold restriction that the legislator considers the first sub-principle of proportionality in some sort of disguise since he demands that other means of establishing related facts "would be disproportionately more difficult or offer no prospect of success". This means, eavesdropping on the communication of a suspect is appropriate and – in addition – the only way to get information in an efficient way. Sec. 100c II is a catalogue of various crimes in 7 distinct laws that are deemed being serious enough to make interception of private speech on private premises being a viable option for the investigator. In order to inflict least possible harm, sec. 100c III tries to restrict such measures to the suspect, knowing and acknowledging that 3rd parties may be affected. In sec. 100c IV, the law draws an absolute line as it states that "statements concerning the core area of the private conduct of life will not be covered by the surveillance", which means that the core area of private conduct of life (such as having sex) is absolutely protected and therefore always outweighing any possible benefits of surveillance. Sec. 100c V-VII deal with specific problems of interrupted recordings, of inadmissibility of evidence, and of prosecutors having to ask courts for immediate clearance of evidence when doubts concerning legality of evidence obtained by surveillance measures arises.

This complex normative structure, that's got parallels in rules concerning online surveillance and other forms of undercover investigative measures, shows how the traditional idea of human rights protection during investigation is substantially changed. Whereas restrictions to personal freedom during investigation was seen as something that can be dealt with in a "material" way (financial compensation or swapping part of a sentence against remand detention), no such possibility is envisioned when it comes

to (secret) infringements of privacy. Harm is done and it is irreparable. When the suspect is later convicted, all these infringements might have been worth committing. When the suspect is later found innocent, any possible harm is left unanswered – no compensation, no remorse. Therefore, it is understandable that the constitutional court asks for a very strict application of relevant competences. Due to considerations of efficiency, investigation is allowed to infringe upon human rights of the suspect (or accused), but it must adhere to extended principles of proportionality.

Procedural Decriminalization

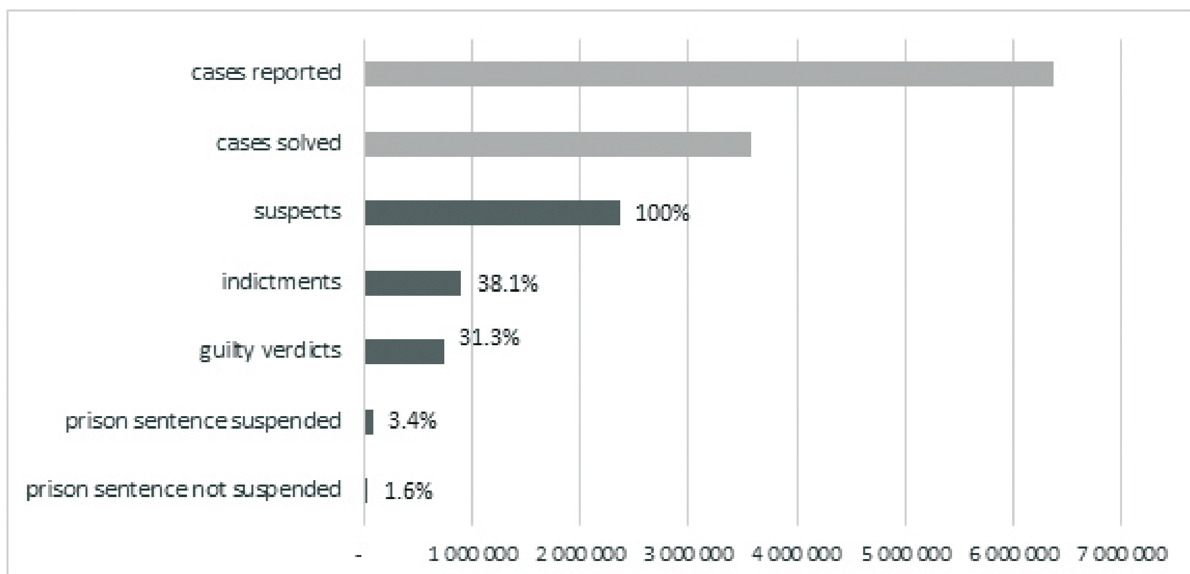
As pointed out above, the problem of an investigation interfering with personality rights due to surveillance measures is restricted to severe instances (individual assessment) of severe crimes (normative definition). On the other hand, we see that many crimes that are considered minor offenses don't reach trial stage, others lead to an indictment, but not to a trial, either ending with conditional determining of procedure (Verfahrenseinstellung unter Auflagen, sec. 383 II GCPL) or with a penal order (Strafbefehl, sec. 407 ff GCPL).

When we have a look at relevant statistics, we see 6,372,526 reported or suspected crimes in police statistics mentioned for 2016 [3]; with 3,584,167 cases, more than one half of those reported or suspected crimes were solved, which is ca. 56%. In statistics of prosecution and courts, this led to 2,360,806 individual suspects. Out of those, only 900,615 cases were indicted, leading to 737,837 guilty verdicts. However, only 80,111 people got a suspended prison sentence and a mere 37,751 cases led to a prison sentence, (with prison sentences being comprised of sentences for adults and for juveniles). This means, only ca. 25% of all cases solved is brought to the courts; in other words, 75% of cases is solved, but never going to be indicted. But even when indicted, only ca. 1.6% of all suspects is later found guilty and sentenced to jail; roughly another 3.4% of all suspects is receiving a suspended prison sentence. Even when we assume, that some suspects are responsible for more than one case solved, it is a clear exception when such a suspect hast to go to jail.

When most cases are solved, but not indicted – and about one half of all cases solved are found to be criminal cases – what happens to those cases? Of course, a case that

Table 1

Criminal Cases and Sentencing, Germany 2016



Source: Bundesamt für Statistik, 2018

is no crime or a case that has no evidence will be terminated (29.3% of all cases solved). However, many cases are solved, fit a certain crime, do have evidence, and have a concrete suspect – but they still are dismissed (28.1%). Either they are found to be so insignificant, that they don't warrant any further institutional reaction, or they are serious enough to demand institutional action, but they are solved through offender-victim-mediation, or they get a dispense on other conditions.

Here we see that German criminal law institutions effectively engage in a distinct form of procedural decriminalization. Even when a suspect gets a conditional dispense, he/she will only admit to wrongdoing and some compensation for the victim etc., but this is no official proclamation of guilt. Any suspect that gets charges dismissed or that gets a dispense has a clean criminal record, since he/she was never found guilty in terms of criminal law.

When we look at rates of reoffending, we see that the lesser the reaction of the criminal law system is in terms of sanctioning, the more is it unlikely that a suspect reoffends within 5 years of his/her last conviction. Therefore, German crime rates are low; attempts at reintegrating criminal suspects/accused persons into society are in a majority of cases successful without taking recourse to severe criminal sanctioning or even without criminal sanctioning at all.

Pluralization of Subjects and Pluralization of Procedures

Of cause, there is the question if such a lack of institutional enthusiasm to engage in criminal sanctioning results in an alienation of crime victims? When we look at the numbers stated above, most crime victims do not oppose an early termination of procedure: only 3,000 objections within 1,300,000 cases terminated means, less than 1% of all cases leads to an objection against early termination. This is not fatalism but one consequence of the German system of criminal procedure. Subjects within criminal procedure are not only prosecutor and defendant, but the victim is also more and more recognized as a subject on its own – regardless of the monopolization of criminal punishment by state authority. Since the victim is not – as in early modern criminal procedure – totally pushed out of the criminal justice system, but has several procedural choices in what capacity and to what extent he/she wants to participate in criminal procedure, victims (or their families) are ever more involved in criminal procedure.

How can we get to the point where most crime victims feel respected and find their interests served, while criminal procedure itself is pursuing a decriminalization of the offender whenever possible? Is it an increased institutionalized and normative respect for crime victims that enables German criminal justice to reduce pressure upon the offender? As long as victim interests are served, it might be less important whether an offender is put into prison or not.

When we put forward such questions, we realize that crime victims in Germany are not totally deprived of power to exert influence upon criminal procedure, but they have an array of procedural choices, therefore being able to reflect upon what they want and what fits them best. Currently, German criminal procedure offers role choices for crime victims as follows:

- victim as private prosecutor
- victim as private accessory prosecutor
- victim as integrated plaintiff
- victim as external plaintiff
- victim as passive receiver of compensation
- victim as active participant in offender-victim mediation.

When a victim does nothing and just lets public procedure deal with a case, he/she has to commit neither time no other resources to get some kind of outcome. The victim can stay behind the scene and is therefore protected against the offender – without any confrontation, there is no secondary victimization possible. Therefore, many victims are content with being left alone.

However, we see a couple of high-profile cases (such as the NSU-murders) where the families of victims insisted upon taking part in criminal procedure, because they felt investigation was far too long biased against the victims instead of investigating the real perpetrators. Therefore, they used the possibility of sec. 395 GCPL, that allows victims of violent crimes to take part in

criminal investigation and trial in the form of a private accessory prosecutor (Nebenkläger). In such cases, an attorney can help the victims (or their surviving families) to formulate questions and investigative interests that might be overlooked when procedure is only dealt with by a public prosecutor. Although it is sometimes not easy for public and private prosecutor to communicate and develop a common procedural strategy, the system of private accessory prosecution helps in addressing violent crimes in a more holistic way, not only to establish mere facts of who did what? but asking further questions, such as why and how an offender was able to evade institutional restrictions or preventive measures.

Contrary to serious violent crimes, the victim may function as a sole private prosecutor in smaller cases, where public prosecution sees no public interest, but the victim still wants to pursue criminal charges. According to sec. 374 GCPL, there is a catalogue of minor offenses where the victim is allowed to ask a legal representative to actively press for criminal charges. By doing so, the victim can exert a serious amount of pressure upon the offender, because for most people, a criminal indictment is a serious psychological burden.

However, if a victim chooses to press for private prosecution, it has to commit time and resources to this procedure. If the victim only asks for an adhesive procedure (sec. 403 GCPL), looking for evidence is still the responsibility of the prosecutor, but any claims concerning compensation can be brought forward in the same trial procedure and therefore helps the victim to save resources. At the same time, it increases the possibility of the victim to gain fast access to compensation by the offender.

In many cases, this latest aspect is even better served when both sides engage in offender-victim-mediation outside of court proceedings. By reaching an early agreement on compensation, prospects of resocialization of the offender are clearly enhanced and therefore it takes no wonder that a successful offender-victim-mediation is one reason for early termination of procedure, be it a dismissal or a dispense.

Still, German criminal procedure law recognizes that this strong standing of the victim might be abused. So, the prosecutor has the opportunity to acknowledge the attempt of the offender to reach a deal with the victim was genuine and is therefore lowering the need for criminal sentencing – when iterating preconditions for a conditional dispense, sec. 153a I Nr. 5 GCPL asks only for a serious attempt at reaching a deal with the victim, not for having reached a deal. It is therefore possible that an offender tries to reach a deal, but in case the victim isn't interested in a deal or in case the victim asks for unreasonable compensation, the prosecutor still can try to balance the situation and acknowledge the attempt of the offender to reach a deal, with all possible consequences for resocialization prospects and a lack of interest in sanctioning, therefore opening the door of a conditional dispense.

Conclusion

When reviewing these changes in criminal procedure law, we can see that an emphasis upon efficiency functions as a common base for all of these developments. Without upholding a high degree of efficiency, no victim will believe in the adequacy of a dismissal or a dispense. Without a high degree of efficiency in investigation, the question whether surveillance is necessary or whether other investigative measures might lead to finding good evidence cannot be answered. At the same time, without the reliability of procedure that arises from efficiency, no offender might have the possibility to assess in advance if it is reasonable to acknowledge wrongdoing or even guilt and thereby avoiding indictment or getting a more lenient sentence. Without reliant information concerning possibilities to get compensation for damages through reaching an early deal or concerning possibilities to seek compensation in a more distant future, no victim can make a rational choice through which channel he/she wants to seek restitution.

Within the above-mentioned trends and reforms, we see that criminal procedure is experiencing a pluralization of values: it is not enough to establish truth concerning guilty or not. Apart from establishing crime and guilt, the (human) rights of the suspect/ accused/convict is a value in itself and has to be protected within criminal procedure

as far as possible, leading to new forms of proportionality considerations. When criminal procedure sacrifices human rights without the prospect of equalizing harm through monetary reimbursement, or through some form of reducing a sentence, the question of how to protect human rights is posed in a new and urgent manner. At the same time, personality rights and the right to resocialization are newly established values that changed the way sentencing is performed and even poses questions concerning sanctioning itself: sometimes, lesser sentences may increase prospects for resocialization and vice versa. However, the value of resocialization is not only restructuring human rights protection and sanctioning but interacts with victim interests as well. Therefore, the interest of the state in monopolizing criminal punishment is newly balanced with the interest of the victim: if an offender that stays at the working place and earns money can pay steady compensation, the victim itself may be interested in a lighter sentence of the offender or in no sanctioning at all. In such a case, state authority has to consider these differing interests and try to reconcile interest in sanctioning and interest in non-sanctioning with each other.

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Германияның қылмыстық іс жүргізу заңнамасындағы тенденциялар

Аңдатпа. Германияның қылмыстық іс жүргізу заңнамасы 1870 жылдары жарияланғаннан бері 200-ден астам рет өзгертілген тұрақты қайта құру сатысында. Заң ұзақ мерзімді өзгерістерге ұшыраған кезде, нақты тенденцияларды ескеру өте қызықты – нормативтік қайта құрылымдау қай жерде жүреді және қайта құрудың әртүрлі салалары қалай өзара байланысты. Бұл материалда тақырыптар өте тұрақты болып қалатын немесе қылмыстық іс жүргізу заңнамасы терең өзгерістерге ұшырайтын 4 бөлек бағыт ерекшеленеді. Тұрақты болып табылатын салалардың бірі-қылмыстық тергеудің, сот ісін жүргізудің және үкім шығарудың тиімділігіне қызығушылық. Алайда, тиімділікке деген жалпы қызығушылық аясында біз адам құқықтарының кепілдіктері саласындағы маңызды өзгерістерді байқаймыз. Германияның Федералды Конституциялық соты адам құқықтарын түсіндіруді айтарлықтай өзгерткендіктен, барлық адам құқықтарын абсолютті қорғау негізінде талап етілгендіктен, қылмыстық сот ісін жүргізудегі адам құқықтарының институционалдық кепілдіктері өзгертіліп, пропорционалдылық принципіне жаңа назар аударылды. Бұл тенденция негізінен ауыр қылмыстарға қатысты болса да, онша ауыр емес құқық бұзушылықтар кең процедуралық декриминализацияға жатады. Мұндай кең ауқымды декриминализация жәбірленушінің рөлі қайта бағаланғандықтан ғана мүмкін болады. Қылмыстық сот ісін жүргізуге белсенді қатысудың немесе қылмыстық процеспен өзара іс-қимылдың жаңа мүмкіндіктері қылмыстық іс бойынша үкім шығарудан басқа процестік нәтижелердің қолайлылығын арттырады.

Түйін сөздер: қылмыстық қудалаудың тиімділігі, қылмыстық іс жүргізу құқығындағы адам құқықтары, қылмыстық сот ісін жүргізудегі пропорционалдылық аспектілері, іс жүргізуді декриминализациялау, қылмыстық сот ісін жүргізудегі құндылықтардың плюрализмі.

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Тенденции в уголовно-процессуальном законодательстве Германии

Аннотация. Немецкое уголовно-процессуальное законодательство находится в стадии постоянной реконструкции, с момента его обнародования в 1870-х годах в него вносились изменения более 200 раз. Когда закон претерпевает долгосрочные изменения, особенно интересно учитывать конкретные тенденции – где происходит нормативная реструктуризация и как взаимосвязаны различные сферы реконструкции. В этом материале выделяются 4 отдельные области, где темы либо остаются очень стабильными, либо где уголовно-процессуальное законодательство претерпевает глубокие изменения. Одной из областей, которая является довольно постоянной, является интерес к эффективности уголовного расследования, судебного разбирательства и вынесения приговоров. Однако в рамках этого общего интереса к эффективности мы наблюдаем важные изменения в сфере гарантий прав человека. Поскольку Федеральный Конституционный суд Германии существенно изменил свое толкование прав человека, настаивая на основе абсолютной защиты всех без исключения прав человека, институциональные гарантии прав человека в уголовном судопроизводстве должны были быть изменены, что привело к новому акценту на принципе соразмерности. Хотя эта тенденция в основном касается тяжких преступлений, менее тяжкие правонарушения подлежат широкой процессуальной декриминализации. Такая широкомасштабная декриминализация возможна только потому, что роль жертвы была заново оценена. Новые возможности активного участия в уголовном судопроизводстве или взаимодействия с уголовным процессом повышают приемлемость процессуальных результатов, помимо вынесения приговора по уголовному делу.

Ключевые слова: эффективность уголовного преследования, права человека в уголовно-процессуальном праве, аспекты соразмерности в уголовном судопроизводстве, процессуальная декриминализация, плюрализм ценностей в уголовном судопроизводстве.

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