Articles

The Untenable Situation of German Criminal Law: Against Quantitative Overloading, Qualitative Overcharging, and the Overexpansion of Criminal Justice

By Volker Krey & Oliver Windgätter[*]

A. Introduction

It is a well-established fact that German criminal trial courts are unacceptably and unreasonably overloaded. The German Federal Constitutional Court—*Bundesverfassungsgericht,* BVerfG—and the Federal Supreme Court of Justice—*Bundesgerichtshof*, BGH—frankly admit this fact.[1] Even those legal scholars who are critical towards trial courts emphasize such overloading.[2] This overloading is aggravated in the context of austerity measures, which seem to be based on a system that can briefly be described as follows: In principle, the BGH is not, if ever then only slightly, affected, and the State Courts of Appeals—*Oberlandesgerichte*, OLG—are not affected in an extensive manner. In contrast, the trial courts fare differently: The Higher District Courts—*Landgerichte*, LG—are typically severely affected by such austerity measures, while the

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[1] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1737/05, Nov. 11, 2005, 2006 NJW 668, 670 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1610/03, Mar. 29, 2005, BVERFGK 5, 155 (Ger.); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. GSSt 1/04, Mar. 2, 2005, 50 BGHST 40, 53, 54 (Ger.). For legal literature, *see* generally VOLKER KREY, GERMAN CRIMINAL PROCEDURE LAW (2009); VOLKER KREY, 2 DEUTSCHES STRAFVERFAHRENSRECHT 162 (2007); Hans Kudlich, *Erfordert das Beschleunigungsgebot eine Umgestaltung des Strafverfahrens?*, *in* 1 VERHANDLUNGEN DES 68. DEUTSCHEN JURISTENTAGES BERLIN 2010, C 19 (2010).

[2] *See inter alia* Hans-Heiner Kühne, *Abteilung Strafrecht. Die realen und potentiellen Auswirkungen des Beschleunigungsgebots für die Struktur des Strafverfahrensrechts*, 65 JURISTENZEITUNG 821, 822, 828 (2010) (following, partially, Kudlich, *supra* note 1); Michael Hettinger, *Die Absprache im Strafverfahren als rechtsstaatlichs Problem*, 66 JURISTENZEITUNG 292, 293, 296 (2011).

Lower District Courts—*Amtsgerichte*, AG—are affected brutally. Pursuant to the authors' view, this practice demonstrates an evident disregard for the trial courts, despite the fact that their speedy as well as convincing settlement of criminal cases is of the utmost importance for the law in action and a constitutive element of criminal proceedings under the rule of law. Hence, the guarantee of an effective criminal justice system—*Gewährleistung einer effektiven Strafrechtspflege*—is rightly recognized as a fundamental element of the rule of law.[3]

Regarding the qualitative overcharging, a preliminary reference to the following two legal institutions shall be sufficient here: First, the *Adhäsionsverfahren*[4] which was recently over-expanded by statutory law,[5] and second the *Richtervorbehalt* in State police laws, the requirement of a court order in cases of police interference with civil rights in order to avert dangers, in contrast to interference with civil rights when prosecuting criminal offences. Despite police law's place in administrative law with its own administrative courts, criminal trial courts are burdened with deciding these matters.[6]

The overexpansion of German criminal justice is a consequence of the disproportional overstretching of substantive criminal law: Regarding the law in action in Germany, the federal legislator has permanently extended criminal law by enacting new criminal

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[3] *See, e.g.*, Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1349/01, Sept. 20, 2001, 2002 NJW 51, 52 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 1086/85, Feb. 25, 1987, 74 BVERFGE 257, 262 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court] Case No. 2 BvR 454/71, Jan. 31, 1973, 34 BVERFGE 238, 248–51 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvL 7/71, July 19, 1972, 33 BVERFGE 367, 383 (Ger.); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 190/91, Feb. 27, 1992, 38 BGHST 214, 220 (Ger.); LUTZ MEYER-GOßNER, STRAFPROZESSORDNUNG. MIT GVG UND NEBENGESETZEN intro. n.18 (54th ed. 2011); VOLKER KREY, GERMAN CRIMINAL PROCEDURE LAW, *supra* note 1, at n.16; VOLKER KREY, 1 DEUTSCHES STRAFVERFAHRENSRECHT nn.478 (2006); Gunnar Duttge, *BGH, 14.6.2005 — 5 StR 129/05. Der "Mißbrauch" des Beweisantragsrechts*, 20 JURISTENZEITUNG 1010, 1012 (2005); WERNER BEULKE, STRAFPROZESSRECHT n.3 (11th ed. 2010); UWE HELLMANN, STRAFPROZESSRECHT n.5 (2nd ed. 2006); Herbert Landau, *Die Pflicht des Staates zum Erhalt einer funktionstüchtigen Strafrechtspflege*, 3 NEUE ZEITSCHRIFT FÜR STRAFRECHT 121–29 (2007). *But see inter alia* CLAUS ROXIN & BERND SCHÜNEMANN, STRAFVERFAHRENSRECHT 1/7 (26th ed. 2009); Winfried Hassemer, *Funktionstüchtigkeit der Strafrechtspflege - ein neuer Rechtsbegriff ?*, 1982 StV 275; Kühne, *supra* note 2, at 822–23.

[4] Proceedings in which claims for damages resulting from crimes are decided under criminal procedure by criminal trial courts, instead of by civil courts.

[5] Most recently by the Opferrechtsreformgesetz [Victims' Rights Law Reform], June 24, 2004, BGBL I at 1354 (Ger.). But *see* in detail and very critically Volker Krey & Theresa Wilhelmi, *Ausbau des Adhäsionsverfahrens: Holzweg oder Königsweg? Kritische Analyse mit rechtshistorischen und rechtsvergleichenden Hinweisen*, *in* FESTSCHRIFT FÜR HARRO OTTO 933–53 (Gerhard Dannecker, Winrich Langer & Otfried Ranft eds., 2007), with further references.

[6] *See infra* Part C.

statutes.[7] This development contradicts the *ultima ratio* nature of criminal law, an important element of the rule of law.

B. The Quantitative Overloading

I. Permanent Exceedance of the So-Called Pensenschlüssel *and Concealment of the Trial Courts' Serious Overload by the Enactment of* PEBB§Y

The *Pensenschlüssel,* which was used for decades, until 2005, as scale for determining the civil and criminal judges' workload, demonstrated a permanent and significant overstretching of criminal justice at the Higher and Lower District Courts for a very long time. Such overloading amounted up to forty percent, or even more, in criminal cases at the Lower District Court level. The Higher District Courts' overload was also significant but typically lower compared to the Lower District Courts.

Thus, the German State Justice Ministries thought it was a good idea to replace the *Pensenschlüssel* because it illustrated the criminal trial courts' serious overloading all too obviously. This replacement was carried out by enacting PEBB§Y[8] in 2005, resulting in a calculational cover-up of the respective overloads. However, the trial judges concerned easily saw through this ploy and were very critical of it. In the meantime, even PEBB§Y proves an overloading of the trial courts, albeit less obviously so.

II. Typical Causes of the Trial Courts' Overloading

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

It is well established that German criminal trial courts have been personally and materially under-equipped for decades. This is particularly true for established judge positions and the equipment of registries and offices. Furthermore, the inventory of the Lower and Higher District Courts' libraries is, for the most part, wanting. This overloading is a consequence of the fact that the Justice Ministries are typically among the politically weakest ministries of the sixteen German States.

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[7] *See convincingly* Kühne, *supra* note 2, at 822, 828 (following Kudlich, *supra* note 1). Furthermore, the criminal procedure law becomes more and more complex due to the permanent flood of statutes reforming or amending the criminal procedure code. With regard to those erroneous developments, *see infra* Part B.II.3.

[8] PEBB§Y (Personal-bedarfs-berechnungs-system, *i.e.*, a calculation system of the judges' workload) has been in use since 2005. *See* Baden-Württemberg, Justizministerium, *PEBB§Y - Leitfaden für Gerichte und Staatsanwaltschaften*, http://www.bdr-online.de/base/bin/download.php?ID=228 (last visited May 3, 2012).

This political weakness became very obvious in the attempts by some German states to merge the Ministry of Justice with the Ministry of the Interior or to incorporate the former into the State Chancellery of the state's prime minister. Fortunately, such attempts failed since they were highly dubious from a constitutional standpoint.[9]

The poor equipment of the German trial courts, as it concerns criminal courts, as well as the additional circumstance that the justice budgets of the German states are a very marginal part of the states' budgets, ought to lead to the following self-evident insight: Austerity measures in the Justice Ministries' field of responsibility must not affect criminal trial courts, at least not considerably. However, states' budgetary policies strangely lack this insight.

2. Permanent Stress Caused by Specific Features of German Criminal Procedure Law: Short-Term Deadlines for the Completion of Written Judgments (§ 275 StPO);[10] Strict Time-Limit for Pre-Trial Custody Exceeding a Period of Six Months (§§ 121, 122 StPO)

Based on the constitutional principles of a speedy trial and concentration of the main hearing, as well as on the principle of immediacy for evidence-taking, § 275 of the German Criminal Procedure Code—StPO[11]—sets strict time limits for the completion of written judgments.[12]

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[9] Regarding the former, merging the Ministry of Justice and the Ministry of Interior (State of North Rhine-Westphalia, NRW), *see Verfassungsgerichtshof NRW*-State Constitutional Court, 54 JURISTENZEITUNG 1243, 1247 (1999); Volker Krey, *The Public Prosecution's Role in Criminal Proceedings Under the Rule of Law: Legal Situation in Germany with Comparative Law Remarks on UK and USA*, *in* 46 RECHTSPOLITISCHES FORUM 19–20 (Institut für Rechtspolitik an der Universität Trier ed., 2009); Marvin Oppong, *Zwischenruf - Finger weg von der Justiz - Für eine Unabhängigkeit der Staatsanwaltschaft*, 1 ZEITSCHRIFT FÜR RECHTSPOLITIK 22, 23 (2009). Regarding the latter, incorporation into the State Chancellery (among others Mecklenburg-Western Pomerania) *see* Oppong, *supra* note 9, at 23; Thomas Roggenfelder, Staatsanwalt und Richter als Wächter des Gesetzes gegenüber der Polizei im strafprozessualen Ermittlungsverfahren, Ch. 1, § 2, II, III, (forthcoming).

[10] STRAFPROZESSORDNUNG [StPO - Code of Criminal Procedure] [hereinafter StPO].

[11] StPO § 275, subs. 1 reads: "If the judgment including reasons has not been fully incorporated in the record, it shall be placed on file without delay. This must be done no later than five weeks after pronouncement; this time limit shall be extended by two weeks if the main hearing lasted longer than three days, and, if the main hearing lasted longer than ten days, by another two weeks for every ten days of the main hearing or part thereof. Once the time limit has expired the reasons for the judgment may no longer be amended. The time limit may be exceeded only if and so long as the court, due to a circumstance which cannot be anticipated or averted in the particular case, has been prevented from observing it. The date of receipt and any amendment of the reasons shall be noted by the registry."

[12] As to the mentioned principles as basis for StPO § 275, *see inter alia* VOLKER KREY, GERMAN CRIMINAL PROCEDURE LAW, *supra* note 1, at n.66; KREY, 1 DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 3, nn. 66, 466; KREY, 2 DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 1, n. 1160; Hans-Heiner Kühne *in* LÖWE-ROSENBERG (LR), 1 STRAFPROZESSORDNUNG, intro. sec. I, n. 67 (26th ed. 2006).

Missing these deadlines causes an *absoluter Revisionsgrund*, *i.e.*, a fundamental error the claiming of which automatically results in a successful appeal on law (§ 338 no. 7 StPO).[13] Thus, §§ 275, 338 no. 7 StPO form an effective instrument for keeping the trial court judges on their toes. The same holds true for the mercilessly strict case law on § 275 StPO by the German final appeal courts—Federal Supreme Court of Justice and State Courts of Appeals.[14]

In view of large-scale criminal cases, the authors would appreciate the following changes in case law, as well as statutory law, to reasonably reduce the overloading of criminal trial courts.

First, when deciding whether there is a violation of the mentioned deadlines pursuant to § 275 subs. 1 s. 4 StPO, the German final appeal courts ought to be more understanding of the trial judges by way of a more generous application of the aforesaid rule since the law allows judges to exceed the time limit due to an "unavoidable and unforeseeable circumstance."[15] This should particularly apply if the judge who has to complete the written judgment suffers from a protracted illness.[16]

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

Both demands are based on the following rationales.

Additional time to complete the written judgment at hand allows for its higher quality. This quality is a considerable requirement for public acceptance of the court's decision. Moreover, improved quality reduces the risk of a successful appeal on the grounds of insufficient reasoning. To clarify, an assignment of error concerning substantive criminal law is successful where the judgment's reasoning is evidently incomplete due to

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[13] The text of STPO § 338 is available at http://www.gesetze-im-internet.de/englisch_stpo/german_code_of_criminal_procedure.pdf.

[14] Regarding the German system of criminal trial courts and appellate instances, *see* KREY, GERMAN CRIMINAL PROCEDURE LAW, *supra* note 1, at nn.69, 70, diagrams 1, 2.

[15] *See* STPO § 275.

[16] Regarding the respective case law, *see* Hanns Engelhardt *in* KARLSRUHER KOMMENTAR (KK) § 275 n.49 (5th ed. 2003); Karl-Peter Julius *in* KARL-PETER JULIUS ET AL., STRAFPROZESSORDNUNG § 275 n.6 (4th ed. 2009); MEYER-GOßNER, *supra* note 3, § 275 nn.13, 15.

insufficient fact-finding, insufficient explanation of the evidence-taking, and/or no plausible weighing of the evidence.[17]

German criminal trial courts generally deal with many cases simultaneously. Therefore, the judges who are obliged to complete the written judgment within the statutory deadline of § 275 StPO usually have to write several judgments at the same time. Unfortunately, final appeal courts' decisions on § 275 StPO do not always give the impression that those trivial insights were taken into deeper consideration.

Legal scholars on comparative criminal law know that Germany is, so to say, the "European Champion" in writing voluminous criminal judgments. In large-scale trials, written judgments may be up to 100 pages, sometimes even many more. Such often grotesque extensiveness is primarily based on disproportionate and unreasonable demands on the written judgment, under § 267 StPO, by the final appeal courts.[18] The authors frankly concede, however, that trial judges sometimes complete the written judgment in an unnecessarily extensive manner due to an exaggerated fear of the final appeal courts. Occasionally, though, professional incompetence may be the reason for disproportionately extensive written judgments because short and concise judgments are typically more difficult to write than are circumlocutory ones.

Under § 121 StPO, pre-trial custody for one and the same offence exceeding a period of six months shall not be executed. A statutory exception to this deadline is only given where "the particular difficulty or the unusual extent of the investigation or some other important reason do not yet admit pronouncement of judgment and justify continuation of pre-trial custody."[19] This strict rule is *per se* acceptable in light of the constitutional principle of a speedy trial, which is also guaranteed by Art. 6 subs. 1 s. 1 of the European Convention on Human Rights (ECHR).[20] Nevertheless, the authors call on the State Courts of Appeals—*Oberlandesgerichte*—and the BVerfG to consider the following aspects more adequately/reasonably when interpreting the mentioned legal elements of § 121 subs. 1

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[17] *See* KREY, 2 DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 1, at nn.1148–50, 1246; MEYER-GOßNER, *supra* note 3, § 267 nn.42–44 (with references to case law).

[18] This holds particularly for the BGH requirements for the judgment's explanations concerning the defendant's personal data—like parents, childhood, debt, criminal record, etc.—although not at all expressly required by statute law. *See* STPO § 267; KREY, 2 DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 1, at n.1148. Also holds for the BGH-requirements concerning the explanation of evidence taking and weighing of the evidence as well as the sentencing.

[19] STPO § 121, subs. 1.

[20] *See* Volker Krey, *The Rule of Law in German Criminal Proceedings. German Constitutional Law and the European Convention on Human Rights, in* 43 RECHTSPOLITISCHES FORUM 12–14 (Institut für Rechtspolitik an der Universität Trier ed., 2008).

StPO (" . . . particular difficulty or the unusual extent of the investigation or some other important reason");[21] this is for the following reasons:

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

(1) In such trials, confessions are rather rare;

(2) The constant need for translation is very time-consuming; and

(3) Very often, it is hard to make foreign witnesses get to the point during their hearing because in many parts of the world, the willingness to simply answer "yes" or "no", instead of answering in an unnecessarily circumlocutory manner or even beside the point, is less common.

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

Second, the authors recall the aforementioned commonplace that trial judges have to deal with several criminal cases simultaneously. In the Higher District Courts—*Landgerichte*, the accused in most of these simultaneous trials is under remand.

Third, defense counsels not residing in the court's district may cause substantial time-loss and thus delay the proceedings, particularly in cases in which there is significant distance between their offices and the court.[22]

Fourth, by now, it should be known, even to the state courts of appeals and the Federal Constitutional Court, the extent to which many defense counsels are prepared to go to severely obstruct the criminal trial's progress, a subject that will be addressed below.[23]

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[21] Regarding the competence of the *Oberlandesgericht* for extending the mentioned six month-deadline under StPO § 121 subs. 1 and StPO § 122. Concerning the constitutional complaint before the BVerfG alleging that the respective Oberlandesgericht has violated constitutional rights of the arrested, *see* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, Art. 93, para. 1 (Ger.); KREY, *supra* note 9, at 10, 11.

[22] Scheduling days for trial by the presiding judge, as well as speedy fulfilment of the defense counsel's functions under StPO §§ 147, 148, 168c, are made more difficult in case of significant distance between the defense counsel's office and the seat of the court—not to mention the increasing costs of the proceeding.

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

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

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

3.1 Delaying the Criminal Proceedings by Defense Counsels

a) Motions Challenging a Judge as Means to Delay Proceedings

Among German trial judges and public prosecutors, there is a widespread opinion that the legal concept of challenging judges for fear of bias is extensively abused. In far too many cases, such motions by the defendant —more precisely by his defense counsel—were filed with the intent to delay the proceedings or with other "intentions irrelevant to the proceedings."[25] Even though there may not be sufficient empirical proof for this criticism,[26] it is a definite reality. In fact, there are many "black sheep" among defense counsels whose behaviour in criminal proceedings may justify such reproval. Due to the mentioned abuse, § 26 a subs. 1 no. 3 StPO, which allows judges to dismiss motions of challenge as inadmissible, was enacted.[27]

b) Motions to Take Evidence as Additional Means to Delay Proceedings

It is a well-established fact that motions to take evidence may be effective instruments for delaying criminal proceedings.[28] The legislator recognized this risk of abuse as well and thus enacted a statutory ground for rejecting such motions "if they are made to protract

[24] *See infra* Part B.III.4.

[25] *E.g.* ALFRED DIERLAMM, AUSSCHLIEßUNG UND ABLEHNUNG VON TATRICHTERN NACH ZURÜCKVERWEISUNG DURCH DAS REVISIONSGERICHT, nn.6 (1994); KREY, GERMAN CRIMINAL PROCEDURE LAW, *supra* note 1, at nn.107, 122, 123.

[26] *See* HANS-HEINER KÜHNE, STRAFPROZESSRECHT, n.732 (8th ed. 2010). *But see* DIERLAMM *supra* note 25, at nn.615 (citing authors that illustrate the mentioned abuse convincingly).

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

[28] *See* Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 252/91, Nov. 7, 1991, 38 BGHST 111 (Ger.); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 129/05, June 14, 2005, 2005 NJW 2466 (Ger.); Bundesgerichtshof [BGH - Federal Court of Justice], 1 StR 484/08, Sept. 23, 2008, 52 BGHST 355 (Ger.); *see also infra* Part II.3.1.b.i–iii; KREY, 2 DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 1, at nn.1081–82 (with further references).

the proceedings."[29] However, the case law established by the final appeals courts has mitigated this instrument to a large extent by imposing exceptionally strict requirements for its application.[30]

The following spectacular and highly controversial decisions by the German Federal Supreme Court of Justice—BGH—may illustrate the extent to which some defense counsels and defendants are prepared to go to sabotage criminal proceedings. Furthermore, these decisions demonstrate new legal instruments enacted by the Court to fight such sabotage.

i. Judgment Dated 7 November 1991[31]

The *Große Strafkammer des LG*—a panel usually consisting of two, sometimes three, professional judges and two lay judges at the Higher District Court—had examined and subsequently rejected 106 motions to take evidence by the defendant. After a detailed analysis of those motions, the court decided on 18 May 1990:

> An assessment of the motions in their entirety regarding content, character and sequence illustrates that the defendant's sole intention was to sabotage the proceedings. Therefore he was barred from filing such motions in person. From now on, he was only allowed to file motions to take evidence through his defense counsel.[32]

The BGH has approved this decision.[33] Despite wide-spread criticism by legal scholars,[34] the authors agree with the Court's standpoint, which may be explained as follows:

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[29] StPO § 244 subs. 3, sentence 2.

[30] *See* Gerhard Herdegen *in* KARLSRUHER KOMMENTAR, *supra* note 16, § 244 nn.86; KREY, *supra* note 28; MEYER-GOßNER, *supra* note 3, § 244 nn.67.

[31] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 252/91, Nov. 7, 1991, 38 BGHSt 111 (Ger.).

[32] *Id.* at 112.

[33] *Id.* at 112-113.

[34] *See* BEULKE, *supra* note 3, at nn.16, 150; Hans-Heiner Kühne, 65 JURISTENZEITUNG 821, 826 (2010). *See also* HELLMANN, *supra* note 3, at nn.773, 774; KREY, DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 3, at nn.480, 481; VOLKER KREY, DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 1, at nn.1066, 1067 (with further references); MEYER-GOßNER, *supra* note 3, at § 244, n.69 (with further references pro and contra).

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

This legal point of view may also be based on the previously mentioned principle of ensuring an effective criminal justice system[35] and upon the following additional arguments:

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

Second, the wide-spread reasoning that the prohibition of abuse of rights was an element alien to German criminal proceedings and could never restrict the procedural rights of defendants and their counsel is unconvincing. Rather, such reasoning is solely a *petitio principii*—begging the question—as it is contrary to the principle of uniformity of the legal system.[36]

Third, some legal scholars argue that the Court has decided *contra legem*.[37] This view is mistaken. The respective motions to take evidence could be rejected as inadmissible pursuant to § 244 subs. 3 s. 1 StPO[38] without violating the law because they were evidently never meant to establish the truth.

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[35] Concerning this principle, *supra* A. with note 3.

[36] Opposing the recourse to the *prohibition of abusing rights* as basis for restricting defendant's and defense counsel's rights, *see* Kühne, *supra* note 34, at 826, 827 (with further references); ROXIN & SCHÜNEMANN, *supra* note 3, at 19/13. *Contra*, the Supreme Court's practice, *supra* note 28 and the leading opinion among legal scholars, *see* BEULKE, *supra* note 3, at n.126a; VOLKER KREY, GERMAN CRIMINAL PROCEDURE LAW, *supra* note 1, at n.26; VOLKER KREY, 1 DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 3, at nn.233, 480, 481 (with further references); VOLKER KREY, 2 DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 1, at nn.1010, 1066, 1070, 1242; Kudlich, *supra* note 1, at C8990; MEYER-GOßNER, *supra* note 3, at intro. n.111 (with further references).

[37] *See e.g.* Kühne, *supra* note 34, at 826, 827 (with further references).

[38] *Available at* http://www.gesetze-im-internet.de/englisch_stpo/index.html (last visited May 1, 2012).

ii. Ruling Dated 14 June 2005[39]

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

(1) Successively filing a total of 320 motions to take evidence without any discernible legitimate interest,[40]

(2) Answering the court's rejections of these motions with voluminous motions for reconsideration—*Gegenvorstellung*—and with mostly inadmissible motions for challenge,[41] and

(3) Announcing numerous further motions to take evidence.[42]

In reaction to such tactics, the Higher District Court stated in its rulings dated 28 November 2002 and 5 December 2002, as well as 7 January 2003, that the Court was not willing to decide on motions to take evidence filed after 9 January 2003 at noon. Only *Hilfsbeweisanträge*[43]—which are not to be decided by the court until the written judgment's reasoning—were exempted. § 244 subs. 2 StPO[44] remained unaffected.

In light of the case's characteristic features, the BGH accepted the trial court's proceeding on the following principles:

(1) Prohibition of abuse of rights;

(2) Principle of speedy trial; and

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[39] *See* Bundesgerichtshof [BGH – Federal Court of Justice], June 14, 2005, 5 StR 129/05, 2005 NJW 2466 (Ger.). *Critical remarks by* Gunnar Duttge, *BGH , 14.6.2005 - 5 StR 129/05: Exzessive Beweisantragstellung in Prozessverschleppungsabsicht,* 2005 NEUE JURISTISCHE WOCHENSCHRIFT 2466, 2466–69. *Available at* http://www.hrr-strafrecht.de/hrr/5/05/5-129-05.php.

[40] *Supra* note 39 (online version), at n.11.

[41] *Supra* note 39 (online version), at n.5. As to such motions, *see supra* Part B.II.3.1.a.

[42] *Supra* note 39 (online version), at n.5.

[43] *Hilfsbeweisantrag* is a motion to take evidence, only filed for the eventuality of the defendant's conviction. *See* MEYER-GOßNER, *supra* note 3, § 244 n.22; Julius, *supra* note 16, § 244 nn.19, 58.

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

(3) Principle of ensuring an effective criminal justice system.[45]

In this context, the Court has summed up its standpoint in the following *Leitsatz*—headnote:

> Where a main hearing was delayed to an extreme extent, namely by motions to take evidence intended to protract the proceedings, the following procedural measure to fight such abuse may be taken into consideration: Setting a deadline after which motions to take evidence will no longer be decided each by a separate court ruling, but only later on in the written judgment's reasoning.[46]

The authors agree with this legal standpoint because the sometimes excessive criticism among legal scholars is mistaken for the same reasons as provided above.[47]

iii. Ruling Dated 23 September 2008[48]

Under § 246 subs. 1 StPO, a motion to take evidence may not be refused solely on the grounds "that the evidence or the fact which is to be proved was submitted too late."[49] This provision often serves defense counsels as animation for delaying the proceedings by filing such motions after the taking of evidence has been concluded. According to case law and prevailing scholarly opinion, these belated motions may be filed until the beginning of the pronouncement of judgment.[50] In order to fight cases of intolerable misuse of the previously mentioned possibility to sabotage the proceedings, the BGH has permitted the trial courts to proceed as follows:

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[45] *Supra* note 39 (online version), at n.27.

[46] *Supra* note 39 (online version), at Leitsatz 1.

[47] *See* KREY, 1 DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 3, at nn.480, 481; KREY, 2 DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 1, at nn.1068, 1069; *see also* MEYER-GOßNER, *supra* note 3, § 244 n.69b (with further references). *Contra* BEULKE, *supra* note 3, at n.452; apparently also MEYER-GOßNER, *supra* note 3, § 244 n.69b.

[48] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 484/08, Sept. 23, 2008, 52 BGHST 355 (Ger.).

[49] STPO § 246(1).

[50] *See* MEYER-GOßNER, *supra* note 3, § 244 n.33, § 246 n.1 (with further references).

Because of the presiding judge's right and obligation to conduct the hearing, he was authorized to set a deadline for motions to take evidence filed by the parties of the proceedings—particularly the defendant and his counsel. This authorization was not opposed to the aforementioned § 246 subs. 1 StPO.[51]

In the case of filing motions to take evidence after the set deadline, this violation of limits might be a serious indication of the intention to delay the proceedings, unless the applicant gave plausible and substantiated reasons for his motion's delay. However, where the respective evidence-taking was required by § 244 subs. 2 StPO—*Aufklärungspflicht des Richters*—the duty of judicial inquiry,[52] such indication was inapplicable.[53]

This third decision by the BGH is subject to heavy criticism among legal scholars[54] but is accepted as constitutional by the German Federal Constitutional Court which stated in a chamber ruling: "The latter has neither found an unconstitutional interference with constitutional rights of the defendant and/or his counsel nor reproved that the BGH had decided *contra legem* by disregarding § 246 subs. 1 StPO."[55]

The authors tend to consent to the BGH ruling and thereby to the BVerfG chamber ruling as well, for several reasons.

(1) In doing so, one should not simply take recourse to § 31 subs. 1 Federal Constitutional Court's Act (BVerfGG). Indeed, this provision sets down a binding force—in the sense of stare decisis—of BVerfG's decisions for all other courts. However, such binding force holds, predominantly, for judgments of the Court's Senates, not for their chambers, as the First and Second Senate of the BVerfG, and not their chambers, are entrusted with the genuine development of constitutional law. Whether chamber rulings generally have binding force under § 31 subs. 1 BVerfGG is in dispute;[56] yet this question can be set aside

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[51] S*upra* note 48, at Leitsatz 1.

[52] StPO § 244(2).

[53] S*upra* note 48, at Leitsatz 2.

[54] *See inter alia* BEULKE, *supra* note 47; Kühne, *supra* note 2, at 826; *see also* MEYER-GOßNER, *supra* note 47 (with further references).

[55] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2580/08, Oct. 6, 2009, 2010 NJW 592 (Ger.).

[56] *See* Andreas Heusch *in* BUNDESVERFASSUNGSGERICHTSGESETZ. MITARBEITERKOMMENTAR UND HANDBUCH (Dieter C. Umbach, Thomas Clemens & Franz-Wilhelm Dollinger eds., 2nd ed. 2005), § 31 n.55 (with further references); lately Bundesgerichtshof [BGH - Federal Court of Justice] Case No. 4 ARs 16/09, Feb. 18, 2010, 2010 NSTZ-RR 177 (Ger.).

here. For at least in case of such chamber rulings only decreeing the non-acceptance of a constitutional complaint, the respective binding force would be inadequate because no unsettled issues of constitutional law are being decided.[57]

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

(2) These reasons are largely those that the authors have referred to while discussing the first and second decisions of the BGH. In summary, the Court has not disregarded § 246 StPO—rather it has solely reduced the possibility of delaying the proceedings through defendant's and/or his counsel's abuse of this rule. More precisely, the BGH has not decided *contra legem* but has only carried out a so-called *teleologische Reduktion*, *i.e.*, a limitation pursuing sense and purpose of the law and of the statute's scope of application.

3.2 Problems for Presiding Judges in Scheduling Days for Hearings

An additional fact that often causes difficulties for the speedy resolution of the proceedings, particularly in large-scale trials, concerns scheduling days for the main trial—the number of which is estimated by the presiding judge. The same holds true with scheduling days for continuing the hearing—*Fortsetzungstermine*—when the trial lasts longer than initially expected, which happens quite frequently. Nowadays, Germany is ironically characterized as a leisure park and the typical German as a world champion in traveling. This essentially correct assessment results in negative consequences for scheduling hearing days, especially days for continuing the hearing, as absence due to previously booked vacations of the respective judges and lay judges, defense counsels, experts, and essential witnesses are taken into consideration.

In this context, the statutory limitation for interrupting the hearing must be observed as well. Under § 229 subs. 1 StPO, a main hearing may only be interrupted for a period of up to three weeks.[58]

The presiding judge's scheduling of the hearing is additionally aggravated by the fact that defense counsels and experts typically have to appear in simultaneous trials. A reasonable cooperation between the presiding judge and defense counsels is therefore desirable but

[57] *See* Andreas Heusch, *supra* note 56.

[58] Yet, StPO § 229(2)–(4) allows for longer periods of interruption in a limited number of enumerated cases.

not always ensured with *Konfliktverteidigern*.[59] This is unfortunate because the state courts of appeals and the BGH trend toward requiring such cooperation.[60]

4. The Ever-Increasing Complexity of German Criminal Procedure Law, Particularly Its Law of Evidence, by a Net of BGH and BVerfG Decisions Constantly Becoming More Closely Enmeshed

Germany is part of the continental European legal system, the Civil Law system in contrast to the Common Law system. Hence, one could assume that the legal regulation of criminal proceedings is primarily carried out by statute, more precisely by the German Criminal Procedure Code—StPO—and Judicature Act—*Gerichtsverfassungsgesetz*, GVG. However, the law in action in Germany is quite different. Indeed, the StPO, as comprehensive codification supplemented by the GVG, forms the core of German criminal procedure law. Nevertheless, in today's legal reality, criminal proceedings are predominantly regulated by case law. Since the founding of the Federal Republic of Germany in 1949, the BGH, State Courts of Appeals, and ultimately the Federal Constitutional Court—BVerfG—have severely restricted the trial courts' scope of decision-making by a net of precedents that are constantly becoming more closely enmeshed, overly complex, and covering nearly every imaginable question of detail.

This particularly holds true for the law of evidence. Therefore, Kühne rightly names "the increasing complexity . . . caused by ever stricter procedural requirements on evidence taking and weighing"[61] as an important reason for trial courts' overloading. This view is shared by most trial judges and corresponds to the impression that co-author Krey gained during his twenty years as a judge on the State Court of Appeals—*Oberlandesgericht Koblenz*.

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

For example, consider the BGH's case law regarding whether or not the examination of witnesses in the main trial is admissible when they are protected by optical and acoustical

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[59] *See supra* B. II. 2. b, Fourth with note 23.

[60] *See* HELLMANN, *supra* note 3, at n.617 (apparently arguing in favor); Klaus Tolksdorf *in* KARLSRUHER KOMMENTAR, *supra* note 16, § 213 nn.4-4b; KREY, 1 DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 3, at 299 & n.200; MEYER-GOßNER, *supra* note 3, § 213 n.6 (both taking an intermediary position).

[61] Kühne, *supra* note 2, at 822, 828.

shielding—mummery and distortion of voice. The question was historically answered in the negative by the Court's Joint Panel in Criminal Cases (GS), yet newer Court decisions answered it in the positive in context of simultaneous audio-visual transmission of a witness's testimony from another place into the courtroom under § 247 a StPO.[62] Another example is the question of whether such interrogation by way of simultaneous audio/visual transmission takes priority over maintaining the secrecy of the witness's identity in criminal proceedings under § 110 b subs. 3 s. 3 StPO. Such audio/visual presentation of witnesses "without face and voice" at court, instead of maintaining the secrecy of their identity in the main trial, is nowadays accepted by some decisions of the BGH,[63] but is considered questionable by other decisions of the Court due to lack of sufficient protection of endangered undercover agents (*Verdeckter Ermittler*) and police informers (*Vertrauenspersonen der Polizei*).[64]

The witness's examination under visual and acoustical shielding is questionable due to

(1) The witness's human dignity, as well as the court's dignity;

(2) The fact that such method of interrogation pretends, rather than guarantees, a possibility for the defendant and/or his counsel to confront the prosecution witness; and

(3) The fact that there is often insufficient protection from unmasking, despite mummery and voice distortion.[65]

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

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[62] *See* Bundesgerichtshof [BGH - Federal Court of Justice] Case No. GSSt 1/83, Oct. 17, 1983, 32 BGHST 115, 124 (Ger.). *Contra* Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 111/02, Sept. 26, 2002, 2003 NJW 74 (Ger.); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 1 StR 315/04, Aug. 17, 2004, 2005 NSTZ 43 (Ger.).

[63] Bundesgerichtshof [BGH - Federal Court of Justice] Case No. 1 StR 315/04, Aug. 17, 2004, 2005 NSTZ 43 (Ger.).

[64] Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 3 StR 316/02, Sept. 11, 2003, 2004 NSTZ 345–47 (Ger.). A chamber of the Bundesverfassungsgericht [BVerfG - Federal Constitutional Court] acknowledges this danger in Case No. 2 BvR 547/08 (Oct. 8, 2009) (Ger.), http://www.bverfg.de/entscheidungen/rk20091008_2bvr054708.html, nn.23, 24.

[65] *See* KREY, 2 DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 1, at nn.919–23. Unfortunately, the BVerfG has accepted this "audio-visual masquerade" as not being unconstitutional. Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 547/08, (Oct. 8, 2009) (Ger.), http://www.bverfg.de/entscheidungen/rk20091008_2bvr054708.html (decreeing the non-acceptance of a constitutional complaint, chamber ruling). However, this ruling is neither binding, *see* cases cited *supra* note 56, nor viably reasoned.

In any case, the BGH has created new trouble for trial judges, especially at the Higher District Courts. Such troubles are difficult to solve due to the inconsistency between the BGH's newer decisions, its prior decision by the Joint Panel in Criminal Cases (GS), and the contradictions between different panels of the Court.

b) The aforementioned constriction of trial courts by the German final appeal courts is further aggravated by the BVerfG's sweeping case law, primarily consisting of rulings of the Court's chambers. Senates and particularly chambers of the BVerfG[66] have shaped the German criminal procedure law through an almost countless number of decisions, forming an additional closely-meshed net. This development has led to the phrase "criminal procedure law as applied constitutional law."[67] It describes the BVerfG's practice well but, at the same time, it illustrates a highly questionable aberration of the Court's function from the German Federal Constitutional Court to a de facto super-appellate court in criminal matters.

Examples of such aberrations are the BVerfG's decisions regarding the stand-by duty of trial court judges in preliminary proceedings in cases of search and seizure measures, arrest warrants, and other serious procedural interference with civil rights. Those decisions, now nearly innumerable, were enacted in order to protect the requirement of a court order—reservation of judicial authority—for such interference against erosion via extensive recourse to public prosecution's and police's subsidiary powers in exigent circumstances.[68] The respective case law of the BVerfG has been established since the beginning of the new century and, from that time on, has caused numerous new legal issues, the solving of which is a problem for the trial courts.

Prior to expanding on these issues, the content of such stand-by duty and its extension of the concerned judges' workload shall be explained. During the last decades of the 20th century, there was a stand-by duty for judges at lower district courts solely for arrest warrants and it was restricted to midday during weekends and public holidays. The lack of

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[66] *See* cases cited *supra* note 1.

[67] *See e.g.*, Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 28/71, Mar, 8, 1972, 32 BVERFGE 373, 383 (Ger.); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 519/63, Feb. 21, 1964, 19 BGHST 325, 330 (Ger.). For criticism *see* KREY, GERMAN CRIMINAL PROCEDURE LAW, *supra* note 1, at n.28.

[68] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1444/00, Feb. 21, 2001, 103 BVERFGE 142 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2292/00, May 15, 2002, 105 BVerfGE 239 (Ger.). Both are decisions of the Second Senate. For references to the innumerous further Court decisions (chamber rulings) *see* Thomas Trück, *Mündliche Entscheidung des Ermittlungsrichters ohne Akten? - Überlegungen zu Zweck und Tragweite des strafprozessualen Richtervorbehalts am Beispiel von Durchsuchung und Blutprobenentnahme,* 65 JURISTENZEITUNG 1106 in footnote 16 *et passim* (2010). As to such subsidiary powers in exigent circumstances, see *infra* note 69.

a more comprehensive stand-by service at the trial courts led to an over-extensive use of subsidiary powers by public prosecution and police.[69]

To counter that undesirable development, the BVerfG created a duty to establish an additional, much wider-ranging stand-by service beyond the judges' regular working hours, covering all working days, weekends, as well as public holidays.[70] The trial courts for civil and criminal cases have been burdened with this duty, causing a further extension of their workload.[71]

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

The judges at every Lower District Court—*Amtsgericht*, AG—within the mentioned circuit, except the Lower District Court Trier,[72] and the judges at the Higher District Court—*Landgericht*, LG—are saddled with the stand-by duty, each judge concerned for one week per year during the following hours:

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[69] *See e.g.*, in veiled terms Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1444/00, Feb. 21, 2001, 103 BVERFGE 142, 153 (Ger.). The mentioned phrase "subsidiary powers in exigent circumstances" means the public prosecution's (and often also the police's) power to order interference with civil rights like seizure in preliminary proceedings instead of waiting for a court order which is in principle required by law. Such subsidiary powers are laid down in numerous provisions of the StPO. *See, e.g.*, STPO §§ 98(1), 105(1); *see also* GG Art. 13, para. 2. In this context, the following formulation of the law is common: The respective measure "may be ordered only by the court and, in exigent circumstances, by the public prosecution's office . . . ." However, there are some corresponding regulations that conform in content, but differ in wording. *See, e.g.*, STPO § 81a(2) ("The authority to give such order shall be vested in the judge and, if a delay would endanger the success of the examination, also in the public prosecution office including the officials assisting it (§ 152 of the Federal Judicature Act).").

[70] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1444/00, Feb. 21, 2001, 103 BVERFGE 142 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2292/00, May 15, 2002, 105 BVERFGE 239 (Ger.); MEYER-GOßNER, *supra* note 3, Gerichtsverfassungsgesetz [GVG] [Judicature Act], Sept. 12, 1950, § 22c nn.2, 3 (Ger.).

[71] *See* Dirk Herrmann, *Neuregelung des richterlichen Bereitschaftsdienstes und richterliche Unabhängigkeit*, 2004 DEUTSCHE RICHTERZEITUNG 316, 319, 321; remarks by Malte Rabe von Kühlewein, Bundesverfassungsgericht [BVerfG - Federal Constitutional Court] NJW 2007, 1345 *in* 2007 JURISTISCHE RUNDSCHAU (JR) 516, 519; Deutscher Bundestag [BT] DRS. 14/9166 (Ger.). *But see* Christoph Krehl, *Die Bindungswirkung verfassungsgerichtlicher Entscheidungen und richterlicher Bereitschaftsdienst bei Gefahr im Verzug,* 2002 ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT (WISTRA) 294, 296 (supporting an optimistic outlook that has been refuted by legal reality).

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

Monday until Friday from 6 to 8 AM, and Monday until Thursday from 5 to 9 PM, as well as Friday from 1 to 9 PM, additionally on weekends and public holidays from 6 AM to 9 PM.[73]

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

Due to the BVerfG's establishment of such comprehensive stand-by service, several legal issues have arisen.

First, there is an issue of equal treatment of statutory reservations of judicial authority without constitutional rank, *e.g.*, §§ 81 a subs. 2 and 163 f subs. 3,[74] on the one hand, and reservations of judicial authority explicitly laid down in the German Federal Constitution, *e.g.*, Art. 13 subs. 2, subs. 3–5 and Art. 104 subs. 2 GG,[75] on the other. The BVerfG's case law on this question is rather inconsistent.[76]

In the meantime, Tolksdorf, President of the BGH, has plausibly declared the stand-by duty in cases of solely trivial measures in preliminary proceedings, like for blood tests, unnecessary from a factual and a legal standpoint.[77] Insofar, the reservation of judicial authority should be abolished. Corresponding in content, the German State of Lower

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[73] In FESTSCHRIFT FÜR HANS ACHENBACH (Christian Schröder & Uwe Hellmann eds., 2011), the authors unfortunately described this additional stand-by duty on weekends and public holidays as lasting from 8 AM (instead of 6 AM) to 9 PM due to a typing error.

[74] As to physical examination/blood test, *see* STPO § 81a. As to longer-term observation, *see* STPO § 163f.

[75] Regarding the inviolability of the home, more precisely house searches, GG Art. 13(2) (as well as electronic surveillance of private homes ("bugging operations")), GG Art. 13(3)–(5), and Deprivation of Liberty, GG Art. 104(2). Whether, and if so, in which cases, there are reservations of judicial authority with constitutional rank despite the lack of expressive regulation in the German Federal Constitution shall not be discussed here. Nevertheless it should be emphasized that the BVerfG accepts such unwritten constitutional reservations when the respective interference with civil rights is very serious. *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court] Case Nos. 2 BvR 1596 & 2346/10 (Feb. 24, 2011) (Ger.), http://www.bverfg.de/entscheidungen/rk20110224_2bvr159610.html *at* n.17.

[76] In principle including even cases of simple blood tests within the scope of the stand-by duty, *see* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 273/06, Feb. 12, 2007, 10 BVERFGK 270 (Ger.). *See also* MEYER-GOßNER, *supra* note 3, § 105 nn.2, 3, § 81a nn.25a, 25b and Trück, *supra* note 68, 1108. More restrictive lately: Bundesverfassungsgericht [BVerfG - Federal Constitutional Court] Case Nos. 2 BvR 1596 & 2346/10 (Feb. 24, 2011) (Ger.), http://www.bverfg.de/entscheidungen/rk20110224_2bvr159610.html (emphasizing that the reservation of judicial authority in STPO § 81a has no constitutional rank).

[77] *Alkohol am Steuer: BGH-Präsident will Blutprobe ohne Richterbeschluss*, DER SPIEGEL, Feb. 5, 2010, http://www.spiegel.de/auto/aktuell/0,1518,676185,00.html (last visited May 5, 2012).

Saxony has introduced a draft bill[78] to limit the detriments caused by an overexpansion of the mentioned stand-by duty.

Second, the issue of whether, and if so to what extent, the stand-by judge's order by telephone instead of a written ruling may be sufficient.[79]

Third, the issue of whether or not a hearing of the person concerned has to be carried out in the presence of the judge.[80]

Fourth, the question of whether a 24-hour stand-by duty is demanded by law.[81]

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

The relevant Senate decisions of the BVerfG[82] are only concerned with reservations of judicial authority expressly laid down in the German Federal Constitution, Art. 13 subs. 2

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[78] *See* BUNDESRAT DRUCKSACHE [BR-DRS.] 615/10 (Ger.); BUNDESRAT DRUCKSACHE [BR-DRS.] 615/1/10 (Ger.). In the meantime, it has been accepted by the *Bundesrat* and passed on to the *Bundestag*. *See* Deutscher Bundestag [BT] 615/10 (Ger.).

[79] Allowing orders by telephone *e.g.*, Bundesgerichtshof [BGH - Federal Court of Justice] 51 BGHST 285, 295 (Ger.) ; Bundesverfassungsgericht [BVerfG - Federal Constitutional Court] Case No. 2 BvR 2267/06 (July 23, 2007) (Ger.), http://www.rechtsportal.de/Rechtsprechung/Rechtsprechung/2007/BVerfG/Anforderungen-an-die-Begruendung-eines-Durchsuchungsbeschlusses-in-Eilfaellen (paid subscription), n.4. *See also* MEYER-GOßNER, *supra* note 3; Trück, *supra* note 68, 1108-1115 (both with further references).

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

[81] *See* Oberlandesgericht Hamm [OLG - Higher Regional Court], Case No. 3 Ss 293/08, Aug. 18, 2009, 2009 NJW 3109 (Ger.) (3. Strafsenat, answering affirmatively even in the case of STPO § 81a, blood test); MEYER-GOßNER, *supra* note 3, § 105 n.2. *But see* Oberlandesgericht Hamm [OLG - Higher Regional Court], Case No. 4 Ss 316/09 (Sept. 9, 2010) (Ger.), http://dejure.org/dienste/vernetzung/rechtsprechung?Text=4%20Ss%20316%2F09&Suche=4%20Ss%20316%2F09 (4. Strafsenat, and other Strafsenate, answering negatively). More vaguely, *see* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1481/02, Dec. 10, 2003, 2 BVERFGK 176 (Ger., chamber ruling); BVerfG [BVerfG - Federal Constitutional Court], Case Nos. 2 BvR 1596 & 2346/10 (Feb. 24, 2011) (Ger.), http://www.bverfg.de/entscheidungen/ rk20110224_2bvr159610.html (left undecided, chamber ruling); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1444/00, Feb. 21, 2001, 103 BVERFGE 142 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2292/00, May 15, 2002, 105 BVERFGE 239 (Ger.) (refusing, correctly, to demand a 24-hour stand-by duty, senate decision); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2292/00, May 15, 2002, 105 BVERFGE 239 (Ger.) (same, senate decision).

[82] *See* cases cited *supra* note 68.

and Art. 104 subs. 2 GG.[83] This fact alone illustrates that the extensive application of stand-by duties regarding reservations of judicial authority without any constitutional rank by chamber rulings of the Court and by State Courts of Appeals decisions is questionable.

Such rulings and decisions are insofar inadequate and unreasonable as they, de facto, bluntly express that ordering criminal procedural interferences with civil rights by the public prosecution—and all the more the police—is undesirable. This standpoint seems to be somewhat one-sided, at least in the case of reservations of judicial authority without constitutional rank, because it contradicts the German public prosecution's role as "master of the preliminary proceedings" and as "guardian of the law."[84]

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

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

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

From a comparative law perspective, such intensity of supervision is in any case grotesque. In comparison, the Supreme Court of the United States, despite being the federal supreme court of justice and simultaneously the federal constitutional court, hears less than 100 cases per year, concerning both civil *and* criminal matters. The multitude of appeals to the twelve US federal courts of appeals are no counter-argument, since the authors do not even refer to the nearly innumerable appeals on law to the German state courts of appeals—*Oberlandesgerichte*, OLG—not to mention the fact that even German state constitutional courts concern themselves with criminal cases.[85]

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[83] *See supra* note 75.

[84] *See* KREY, *supra* note 9; KREY, GERMAN CRIMINAL PROCEDURE LAW, *supra* note 1, at nn.143–45, 154, 166–72.

[85] *See, e.g.*, Berlin Bundesverfassungsgericht [BerlVerfGH - Constitutional Court of the State of Berlin], Case No. VerfGH 55/92, Jan. 12, 1993, 1993 NJW 515 (Ger.) (so called "Honecker" case); KREY, GERMAN CRIMINAL PROCEDURE LAW, *supra* note 1, at nn.31, 32 (with further references).

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

III. Consequences of the Overloading of Trial Courts

Here, some short remarks shall be sufficient.

(1) The German states, as public law employers of the State judges, violate their duty of care as also owed to trial judges.

(2) This overloading of trial courts necessarily leads to considerable delays in criminal proceedings and/or loss of quality in the trial courts' completion of criminal cases. Of late, the former may result in detriments for the concerned trial judges: Where OLG or BVerfG has reprimanded a trial court for violations of § 121 subs. 1 stop,[86] increasingly the respective State ministry of justice initiates disciplinary measures of supervision—*e.g.*, censure—against the judge concerned, even if the reason for that violation lay in the judge's serious overloading. Such a reaction may be more convenient than creating new trial judge positions.[87]

(3) Where the trial judges' overload does not allow for speedy, as well as thorough, completion of criminal trials, judicial independence is endangered.[88]

(4) For decades, there has been an increasing *escape into the deal—Flucht in die Absprache*—in German criminal trials in response to such overload. Despite heavy criticism of this development, even the legislature has accepted it by enacting a legal regulation of the so-called *Absprachen in Strafsachen*—deal in criminal proceedings—by amending the StPO in 2009.[89]

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[86] *See supra* Part B.II.2.b.

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

[88] *See* the convincing and blistering criticism by Heribert Prantl, *Die Abhängigkeit der Unabhängigen*, SÜDDEUTSCHE ZEITUNG, Dec. 10–11, 2005; *see also* KREY, GERMAN CRIMINAL PROCEDURE LAW, *supra* note 1, at n.66; KÜHNE, *supra* note 26, at n.110.

[89] *See* STPO §§ 257c, 273 subs. 1a sentence 2.

Before, and after, this expressive acceptance by law, the deal in criminal proceedings was severely criticized by many legal scholars[90] and even by some judges of the BGH.

In contrast, the authors consider the deal to be acceptable at its core.[91] Only some short remarks shall be presented[92] since a thorough reasoning would demand its own article. The deal is acceptable because BVerfG and BGH, even its Joint Panel in Criminal Cases (GS), have accepted the deal for a long time,[93] the need to reduce trial judges' overload through informal agreements—deals—is widely accepted, an unreserved and comprehensive confession at an early stage has always been recognized as a legitimate ground for mitigation of punishment as long as such mitigation is not disproportionate, deals serve the principle of speedy trial, and, furthermore, they serve the protection of witnesses.

As to counterarguments typically presented by legal scholars opposed to the deal, the authors refer to the earlier reasoning of co-author Krey.[94]

C. Qualitative Overcharging

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

I. Considerable Burdening with Matters of Police Law—Averting of Dangers

Surprisingly, under the German State Police Acts, the requirement of a court order in cases of police interference with civil rights—*Richtervorbehalt*—is not entrusted to the

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[90] For criticism, *see* Karsten Altenhain & Michael Haimerl, *Die gesetzliche Regelung der Verständigung im Strafverfahren - eine verweigerte Reform*, 65 JURISTENZEITUNG 327–37 (2010). For extremely harsh criticism, *see* Michael Hettinger, *Die Absprache im Strafverfahren als rechtsstaatliches Problem*, 66 JURISTENZEITUNG 292–301 (2011); Kühne, *supra* note 2, at 824, 825; MEYER-GOßNER, *supra* note 3, § 257c n.3; ROXIN & SCHÜNEMANNN, *supra* note 3, at 44/64–65, 17/19. Regarding the statutory regulation of the deal, *see* BEULKE, *supra* note 3, at nn.394–96 (with further references).

[91] Likewise, *inter alia*, Kudlich, *supra* note 1, at C65. Most German defense counsels favor the deal.

[92] *See* KREY, 2 DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 1, at nn.776, 987, 1040–55 (with further references).

[93] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court] Case No. 2 BvR 1133/86, Jan. 27, 1987, 9 NSTZ 419, 420 (Ger.) (chamber ruling); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. GSSt 1/04, Mar. 3, 2005, 50 BGHST 40 (Ger.).

[94] *See* KREY, 2 DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 1, at nn.1040.

administrative courts. Rather, despite the cases concerned being police law by their nature—averting of dangers—are entrusted to the trial courts for civil and criminal law.[95]

In the State of Rhineland-Palatinate, this avoidance of the administrative courts' general jurisdiction in matters of police law has been enacted by the State Police Act (*Polizei- und Ordnungsbehördengesetz*, POG)[96] for the following preventive police measures:

(1) Checking in order to verify a person's identity;[97]

(2) Enforcement of a summons by force;[98]

(3) Preventive police detention—to avert concrete dangers;[99]

(4) Molecular-genetic analysis;[100]

(5) Search of homes;[101]

(6) Special means of secret data acquisition—*e.g.*, use of undercover agents (*Verdeckte Ermittler)*, police informers, secret use of technical means for recording pictures and conversations, and electronic surveillance;[102] and

(7) Data acquisition by secret use of technical means against homes, *i.e.*, bugging.[103]

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[95] This through application of the exception rule in *Verwaltungsgerichtsordnung* [VwGO] [Administrative Courts Act], Jan. 21, 1961, Bundesgesetzblatt, Teil I [BGBL. I] at 17, § 40(1) (Ger.).

[96] Polizei- und Ordnungsbehördengesetz [POG] [State Police Act], Nov. 10, 1993, Gesetzes- und Verordnungsblatt [GVBL.] S. 595 last amended by Dec. 20, 2011 Gesetz [G], Dec. 20, 2011, GVBL. at 427, § 7 (Ger.).

[97] *Id.* §§ 10(2)–(3), 15.

[98] *Id.* §§ 12(3), 15.

[99] *Id.* §§ 14, 15.

[100] *Id.* § 11a(3).

[101] *Id.* § 21(1).

[102] *Id.* § 28(5).

[103] *Id.* § 29(7).

In this context, jurisdiction lies with the *Amtsgericht*, usually exercised by the investigating judge/examining magistrate (*Ermittlungsrichter*), outside the judges' regular working hours by the respective stand-by judge.[104]

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

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

II. Extension of the Adhäsionsverfahren[105] *Intended by the Legislator as an Additional Burden on Criminal Judges*

The expansion of the victims' criminal procedural rights since 1986 is an expression of the zeitgeist and, in principle, is to be welcomed. However, the 2004 enacted overexpansion of the *Adhäsionsverfahren* in the German Criminal Procedure Code (StPO)[106] is inappropriate.

Krey and Wilhelmi have emphasized in detail, and with comments on legal history as well as comparative law, that this overexpansion simply means being on the wrong track.[107] This is because a strict enforcement of the 2004 amended *Adhäsionsverfahren* would severely burden the criminal judges with additional matters not sufficiently connected to criminal law. Fortunately, the criminal courts' practice has mostly refrained from applying this over-expanded instrument until this day.

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[104] *Id.* §§ 11a(3); 15(2); 21(1); 28(5); 29(10). Regarding the stand-by duty, see *supra* Part B.II.4.b.

[105] *See supra* note 4.

[106] *See supra* note 5.

[107] *See supra* note 5.

D. The Overexpansion of Criminal Justice

I. Constant Expansion of Criminal Law Against Its Nature as Ultima Ratio

As previously mentioned, legal scholars such as Kudlich and Kühne identify the constant extension of criminal law by incessantly enacting new criminal offences as an important reason for the criminal courts' overloading.[108] This expansion particularly takes place in the field of supplementary criminal law—criminal law regulated outside the Criminal Code.[109]

To exemplify the latter, the authors refer to the following facts:

(1) The flood of blanket statutes in the field of criminal law that refer to EU Ordinances—in wine law, for example—which are often barely comprehensible due to strings of references, *Verweisungsketten,* to other EU Ordinances,[110] with additional problems arising when the object of reference is being substituted[111] and

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

But even in the so-called *Kernstrafrecht*, the previously mentioned special part of the StGB, a massive expansion occurs, for example, by including grossly negligent/reckless forms of committing offences against property,[112] furthermore by increasing inclusion of any form of negligence, in particular in environmental criminal law. Finally, there is an incremental number of criminal offences whose necessity is not obvious from a criminal policy standpoint, for example, obtaining credit by deception.[113]

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[108] *See supra* note 7.

[109] *See* in detail Hans-Heiner Kühne, DAS NEBENSTRAFRECHT DER BUNDESREPUBLIK DEUTSCHLAND (Korean Institute of Criminology, 2008).

[110] BERND HECKER, EUROPÄISCHES STRAFRECHT, 7/76-104 (3rd ed. 2010); Volker Krey, *Zur Verweisung auf EWG-Verordnungen in Blankettstrafgesetzen*, *in* EWR: SCHRIFTENREIHE ZUM EUROPÄISCHEN WEINRECHT 109–201 (1981); DIETMAR MOLL, EUROPÄISCHES STRAFRECHT DURCH NATIONALE BLANKETTSTRAFGESETZGEBUNG (1998).

[111] HECKER, *supra* note 110, at 7/88-92.

[112] STRAFGESETZBUCH [StGB] [Penal Code] §§ 261(5); 264(4) (Ger.).

[113] *See, e.g.*, THOMAS FISCHER, STRAFGESETZBUCH STRAFGESETZBUCH UND NEBENGESETZE § 265b nn.4, 5 (57th ed. 2010): This criminal offence was unnecessary (with further references).

This development contradicts an unwritten constitutional principle expressed in the term subsidiary nature of criminal law—*ultima ratio*.[114]

This undesirable development is complemented by another: There is an increasing number of criminal offences, like § 261 *StGB*—money laundering, which are almost incomprehensible due to their unbelievable extensiveness and complexity.

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

The latter insight concerning criminal law leads to a concluding remark on an additional nuisance causing criminal trial court judges difficulties: The increasing complexity of criminal procedure law due to permanent amendments,[115] which are often insufficiently thought-out. In this context, consider the following examples:

First, today's version of § 68 StPO as amended by the Act on Fighting Organized Crime of 1992 (*Gesetz zur Bekämpfung . . . der Organisierten Kriminalität*, OrgKG), has partially left open previous controversies and, furthermore, has *de facto* made the unmasking of endangered witnesses, particularly of undercover agents and police informers, possible.[116]

Second, the application of § 247 StPO—removal of the defendant from the courtroom, for example, due to serious endangerment of witnesses—can lead to successful appeals on law when other evidence-taking is carried out in context with the testimony of the respective witness during the defendant's absence, which happens easily.[117]

Third, the previously mentioned § 247a StPO—simultaneous audio-visual transmission of a witness's testimony from another place into the courtroom.[118]

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[114] Regarding the Criminal Law as *ultima ratio* among the instruments of the legislator, *see*, *e.g.*, VOLKER KREY, 1 DEUTSCHES STRAFRECHT, ALLGEMEINER TEIL, nn.1–15, 16–27, 28 (2002).

[115] *See* Kühne *in* LR, *supra* note 12, Einl. F nn.151–63.

[116] *See* KREY, 2 DEUTSCHES STRAFVERFAHRENSRECHT, *supra* note 1, at n.913.

[117] *See* MEYER-GOßNER, *supra* note 3, § 247 nn.7, 20b.

[118] *See supra* Part B.II.4.a, notes 62–64.