CHAPTER 5

PRE-TRIAL PROCEDURE IN GERMANY

Uriel MOELLER*

*Dr.iur., European University Viadrina, Law Faculty, Frankfurt (Oder), Germany
e-mail: umoeller@europa-uni.de

DOI: 10.26650/B/SS26.2020.014.05

ABSTRACT

German criminal procedure is and has been under enormous economic pressure. To relieve the justice system the “deal” or plea-bargain is, as of 2013, officially a part of the German criminal law system. However, the deal is restricted to the main procedure and the initiative of the judge. During the pre-trial procedure, the prosecution is “die Herrin des Verfahrens” (Lord of the procedure). The German Criminal Procedure Code grants the prosecutor vast possibilities to terminate criminal procedures pre-trial. Those possibilities are used extensively in practice. The majority of criminal procedures in Germany are not concluded by the judge, but by the prosecution. This chapter examines the power of the prosecutor to terminate criminal procedures pre-trial in the German criminal law system.

After a brief historical overview, it will show that for all but very grave crimes the prosecution has considerable discretion to terminate the procedure without a conviction, even though a conviction would have been likely. This raises questions of justice and victims’ rights, especially when in practice the prosecution sometimes oversteps its discretion.

This article will also discuss the advantages of such a systematic pre-trial conclusion of criminal procedure. While some claim the costs for “justice” to be high, the economic advantages are considerable, heightening efficiency and focus in a justice system under huge economical restrain while also producing appropriate results in terms of criminal policy.

Keywords: Pre-trial procedure, German criminal law, prosecution, expediency
1. German Criminal Procedure introduction – Aspiring for truth

German criminal procedure aspires for material truth.¹ The objective to reveal the truth in criminal procedure is typical for continental European law systems, which are often classified as “inquisitorial” as opposite to the “adversarial” systems, typical of the UK and its former colonies.² This is not to say there has been no debate about the viability of the latter approach being adopted in Germany, both before and after the inception of the German Criminal Procedure Code (Strafprozessordnung, StPO) in 1879.³ Especially in terms of functionality, both systems seem very capable of reaching verdicts that keep the peace in their respective societies.

But the inquisitorial approach in Germany is not simply rooted in reasons of efficiency or legal tradition. The aspiration for material truth is heavily influenced by German legal culture and philosophy, which both remount to German idealism of the late 18ᵗʰ and 19ᵗʰ century, or, to “name the devil by its name”, Kant. The assumption is that a crime always demands punishment, as famously exemplified by Kant’s “island example”.⁴ That in turn means that the circumstances that constitute crime have to be known, otherwise, there can be no punishment.

It is important to make clear, though, that German criminal law and philosophy have changed dramatically since Kant, and that utilitarian and the related so called “functionalism” of Roxin and others are very prominent, if not dominant, at least in the academic sphere of criminal law.⁵ However, the ideas of Kant and German idealism are still very strong, especially in the German constitution of 1949.⁶ Based on that so called “Basic law” (Grundgesetz), the constitutionality of the German “deal” was assessed by the German Constitutional Court (Bundesverfassungsgericht, BVerfG) as follows:

“The principle of guilt enshrined in the Basic Law and the associated duty to investigate the material truth, as well as the principle of fair, constitutional proceedings, the presumption of innocence and the court’s duty of neutrality preclude the handling of the investigation of truth, legal subsumption and the principles of sentencing from being left to the free disposal of the parties to the proceedings and the court.”⁷

---

¹ Heribert Ostendorf, Strafprozessrecht (3rd edn, Nomos 2017), p. 27.
³ James Goldschmidt, Der Prozess als Rechtslage (1925).
⁴ Immanuel Kant, Die Metaphysik der Sitten (1797).
⁵ Claus Roxin, Kriminalpolitik und Strafrechtssystem (Berlin 1973); Uriel Moeller, Definition und Grenzen der Vorverlagerung von Strafbarkeit (Göttingen 2018), p. 41 seq.
⁶ Philip Kunig, in Grundgesetz Kommentar von Münch/Kunig (6th edn, Munich 2012), Art. 1 ref. no. 19.
The investigation of truth (inquisition principle) is therefore a command of the principle of guilt, enshrined in the Basic Law. Dealing in guilt and punishment is consequently, as a general principle, unconstitutional, even though the German deal was ruled constitutional. This was possible because the German deal differs greatly from the American plea-bargain. For example, the deal only covers sentencing, in other words, the punishment (§ 257c II StPO). It is strictly forbidden to deal in convictions, e.g., assault instead of rape etc.

This chapter will not further discuss the German deal *stricto sensu*, since it is restricted to trial and not a phenomenon of pre-trial procedure. The regulation of plea-bargains in Germany is just one useful example to understand the functionality and underlying principles of the German criminal procedure, which will be the subject of the next part (2.), before focusing on pre-trial conclusion of criminal procedure (3. and 4.).

### 2. German criminal procedure – an overview

German criminal procedure is regulated by the German Criminal Procedure Code, the “Strafprozessordnung” (StPO). The procedure is subdivided in four stages: investigation procedure (Ermittlungsverfahren), interlocutory procedure (Zwischenverfahren), the main procedure (Hauptverfahren, the trial) and enforcement (Vollstreckung). In theory, the prosecution does all investigation (pre-trial) aided by the police – judges are only involved to sanction certain investigation measures the prosecution wants to execute, such as round-the-clock-surveillance (§ 163f StPO) etc. In practice, the majority of investigations are initiated and finalized actively by the police (not by the prosecution), which then hands the investigation over to the prosecution for her to decide how to proceed. The prosecution will then either order further investigations, conclude the investigation pre-trial or charge the accused. In the latter case, it will send the case files with an indictment to the competent judge (no laymen are involved in that stage), automatically initiating the interlocutory procedure.

In this phase, the judge will analyse the merit of the indictment, according to the case files, and either launch the main procedure, the trial, or refuse to launch it, if the accused act does not constitute an offence or authorship of the accused is not proven to a sufficient

---

8 See ibd.
9 Gerwin Moldenhauer and Marc Wenske, in *Karlsruher Kommentar zur Strafprozessordnung* (8th edn, Munich 2019), § 257c ref. no. 18c.
10 More precisely, the “deal” is restricted to post-indictment, see § 202a StPO.
12 The „Zwischenverfahren“, see §§199 seq. StPO.
13 Albeit with changes to the indictment, if found necessary, according to § 207 II StPO.
degree to justify a trial. Literally and figuratively, the prosecution, fully responsible for the investigation during pre-trial, hands over the case to the judiciary during interlocutory procedure, where it is decided by the judge if he or she will take the case over by launching trial or, if refusing to, hand the case back to the prosecution. If the court launches the main procedure, not only the case files, but also any further investigation conducted during or before the trial will then be the judiciary’s responsibility. These procedural steps and the competences and roles of the respective bodies are all expressions of the underlying principles of the German criminal procedure.

2.1. The principles of German criminal procedure

In Germany, prosecuting offences is only done by the state, through the prosecution (officiality principle). It is the prosecutions and only the prosecutions competence to charge the accused. Without an indictment (by the prosecution), there can be no trial (accusation principle). The courts would simply ‘dry out’. If the investigations during the pre-trial stage do not unveil enough evidence to merit an indictment, the prosecution will close the case on these grounds (§ 170 II StPO – lack of merit). If there is enough likeliness that an indictment would be followed by a conviction, the prosecution will indict (§ 170 I StPO).

The indictment encompasses the factual basis of the accusation, manifest in the case file, as detailed in the indictment according to its time and place. Example: If the judge finds the accused guilty not only for a theft that has been charged to have been on the 3rd of May, but additionally for a theft on the 5th, which the prosecution has forgotten to charge, the judge can do nothing about it (except to alert the prosecution to charge that crime as well). The court has no legal power to convict for that crime, since there has been no indictment.

However, according to the inquisition principle mentioned in the introduction, the judge is not bound by the factual findings of the indictment, since he also has to find out “the truth”. He can only act on a case when there has been an indictment. But once that indictment occurs and he is handed over the files, he is allowed to investigate himself by ordering additional investigations (see e.g. §§ 155, 202 StPO, even though this rarely occurs in practice). Another

---

14 §§ 199, 204 StPO.
15 This, in theory, is already the case in interlocutory procedure (§ 202 StPO), but in practice, the judge will not investigate in this stage but suggest further investigation by the prosecution.
16 The officiality principle, which postulates that only the state can prosecute and not a private party, is of less importance for the scope of this article. For its exception, the private prosecution according to §§ 374 seq. StPO, see below 3.3.
17 The legal consequences of such an unlawful conviction would be that the case would be crushed, as the lack of an indictment poses an obstacle to proceedings (Federal High Court, Bundesgerichtshof (BGH) (1957) 1244 Neue Juristische Wochenschrift (NJW)).
expression of the inquisition principle is that the legal assessment of the prosecution regarding the indictment is not final. If the prosecution only charged theft on the 3rd of May, but the judge, either by differing legal opinion or by further investigation, concludes that the act constituted a robbery, he is allowed (and obliged, so called “Kognitionspflicht”\(^ {18} \)) to convict for the (much) graver offence of robbery. However, he would have to alert the accused that a conviction for robbery could occur, so that he can defend himself accordingly (§ 265 StPO).

Again, it is apparent that German criminal procedure is generally determined to find the “true” level of guilt and the according “right” amount of punishment, even if that means that the accused is convicted for more than he was indicted for (as long as it is still the same accused act). Another example of this is that the court can convict even though the prosecution pleads not guilty by the end of the main procedure. Once the main procedure is launched, the prosecution is not allowed to retract the indictment (§ 156 StPO).

Besides the mentioned and intertwined principles of officiality, accusation and inquisition, German pre-trial procedure disposes of the basic principles any Rechtsstaat (state of law) does: the presumption of innocence, legal hearing, nemo tenetur se ipsum accusare (“right to remain silent”), ne bis in idem (“double jeopardy”), fair procedure and the acceleration principle.\(^ {19} \) But there are two that directly relate to the scope of this article: the legality principle and the expediency principle.

### 2.2. The “legality principle” and its restraints

Directly linked to the aspiration for truth and the guilt principle is the “legality principle”, enshrined in § 152 and 170 of the German Criminal Procedure Code. This principle postulates that, the prosecution has to charge an accused that, based on evidence, she considers guilty to the point that a conviction is likely (the accused appears “sufficiently suspect of a criminal offence”, § 203 StPO). If that is the case, the prosecution has no discretion not to indict. The German prosecution is legally obliged to enforce the law, to strive for truth and to charge the guilty.\(^ {20} \) This way the accusation principle is supplemented. No trial without indictment, but no discretion of the prosecution not to indict.

---

\(^ {18} \) Ali B. Norouzi, in Münchener Kommentar zur Strafprozessordnung (1st edn, Munich 2016), § 264 ref. no. 49.

\(^ {19} \) For an overview, including the principles of the main procedure, see Heribert Ostendorf, Strafprozessrecht (3rd edn, Nomos 2017), p. 27 and Hans Kudlich, in Münchener Kommentar zur Strafprozessordnung (1st edn, Munich 2014), Einleitung ref. no. 120 seq.

However, this strong and absolute postulate did not survive the economic and political changes that affected Germany in the 20th century. As early as 1924 the provision of § 153 StPO was implemented, allowing the prosecution not to charge an accused of economic crimes of little gravity, so called “bagatelldelikte”.21 The case would simply be closed, to deal with the economical restraints on the system post war22 and the delinquency of the general public that was struggling with poverty. This was the first provision that implemented a new principle in German criminal procedure, directly opposed to the legality principle: the expediency principle (Opportunitätsprinzip).23 Many provisions would follow, the most important of which will be explained below. This led to a prosecution that disposes of wide discretion to close cases without charging the accused, even though a conviction would be possible.

3. The provisions of the expediency principle

The expediency principle is an expression of the proportionality principle and therefore, related to utilitarianism.24 It declares the prosecution of a crime a matter of cost-benefit calculation, acknowledging that it is not worth to accuse every crime that could be accused, because that would be too cost intensive and would bind resources that are needed to prosecute others that should be prioritized.25 The principle therefore diametrically opposes the legality principle, which, as an expression of German idealism, demands punishment for all crimes (that can be punished in due process). While the German deal stricto sensu is heavily restrained, the prosecutions discretion is extrapolated, which can lead to an informal deal: Since the termination of the procedure according to the provisions of the expediency principle often demands that the judge and the accused consent, the prosecution might choose to “offer” a termination under conditions that he thinks the judge and the accused agree to. This can amount to actual “negotiations” pre-trial.26

However, the provisions that allow the prosecution to terminate a procedure that otherwise would have led to punishment, are typically restricted to minor and medium offences. The

21 See Sebastian Peters, in Münchener Kommentar zur Strafprozessordnung (1st edn, Munich 2016), § 153 ref. no. 1-2.
22 See ibd.
24 See on the relationship of proportionality and Uriel Moeller, Definition und Grenzen der Vorverlagerung von Strafbarkeit (Göttingen 2018), p. 183 seq.
25 See Thomas Fischer, in Karlsruher Kommentar zur Strafprozessordnung (8th edn, Munich 2019), § 1 ref. no. 10.
26 But mostly they are a phenomenon of the main procedure (the trial).
prosecution of grave crimes (Verbrechen), that carry a minimum sentence of one year depravation of liberty (§ 12 Criminal Code -Strafgesetzbuch-, the StGB), is mostly excluded from expediency. Regarding these offences (robbery, rape, homicide, theft from within a private home etc.), the legality principle still dominates.\textsuperscript{27}

But while the scope of the expediency provisions is similar, the reasoning behind and applicability of the provisions differs greatly. These provisions are all to be found in §§ 153-154e StPO, the most important of which will now be discussed.

3.1. §§ 153 to 153f

The first provision, both historically and systematically, that allows the prosecution to “close a case” it could prosecute, is § 153 StPO (“Discontinuation of prosecution for minor offences”). It states:

“If the proceedings do not relate to a grave offence, the Public Prosecutor’s Office may, with the consent of the court responsible for opening the main proceedings, refrain from prosecuting the offender if the offender’s guilt would be considered minor and there is no public interest in prosecution. The consent of the court is not required in the case of an offence that is not punishable by a penalty that is increased to a minimum and for which the consequences caused by the offence are minor.”

The discontinuation of prosecution according to § 153 StPO can be very advantageous for the prosecution, court and the accused. For the accused, since he would otherwise face trial for a negligible offence, the costs of which he would have to pay (§ 465 StPO). For the court, because the case is closed without having to be referred to a judge (unless the minimum penalty is raised, which is only the case in medium offences, such as dangerous bodily harm, assault on policemen, theft with weapons and the like). Finally, for the prosecution, because the case is closed quickly, without requiring further measures. Neither the court (for the exception see above) nor the accused have to consent. The prosecution can almost literally just ‘close the case files.’

There is another advantage for the prosecution and the public interest in prosecution she represents: § 153 StPO has no legally binding effect pre-trial (for the partially binding effect in the trial stage, see § 153 II StPO)\textsuperscript{28}. The case can be reopened and the accused charged any time (unless the crime prescribed by then). This, evidently, is a disadvantage for the

\textsuperscript{27} One exception is § 153b StPO in connection with § 46a StGB, since it allows to refrain from prosecution if a sentence of “not more than 1 year” depravation of liberty would be imposed, which could apply also to grave crimes, but only if mitigating circumstances are present.

\textsuperscript{28} Stephan Beukelmann, in \textit{Beck’scher Online Kommentar Strafprozessordnung} (36th edn, Munich 2019), § 153 ref. no. 42.
accused. In turn, there is no immediate consequence for the accused, much like in case of discontinuation due to lack of evidence, i.a. (§ 170 II StPO).

The provisions only apply if no grave crime has been committed, if there is no public interest in prosecution and if “the offender’s guilt would be considered minor”. The provision’s scope is therefore restricted to low to medium level criminality. The offender’s guilt is measured according to several factors, the most important of which are defined according to § 46 II StGB. Regarding § 153 StPO, “minor guilt” is generally excluded if the accused has prior convictions or prior discontinuations of proceedings on the grounds of expediency (§§ 153 seq. StPO). This is due to the fact that § 153 StPO is to be understood as part of an overall criminal policy concept of graduated criminal sanctions. It should only be applied if a deterring effect can be achieved. In other words, notifying the accused that the proceedings against him or her were closed not due to a lack of evidence, but because “this time” the prosecution has shown ’mercy’, can be enough of a warning to the accused and achieve a psychological effect similar to that of a (low) penalty. In a way, having a discontinuation of proceedings according to § 153 StPO is tantamount to a previous conviction. Next time, leniency is not to be expected and, in the author’s experience, occurs only in very special circumstances.

§ 153a (Abstention from prosecution under conditions and instructions) has a different scope and function in German (pre-trial) proceedings. Introduced in 1974, it states as of 2017:

“(1) With the consent of the court competent for the opening of the main proceedings and of the accused, the Public Prosecutor’s Office may provisionally refrain from bringing a public prosecution in the case of a crime that is not grave and at the same time impose conditions and give instructions to the accused, if these are suitable to eliminate the public interest in prosecution and the gravity of the offence is not contrary to it.

The following in particular may be considered as conditions or instructions: 1. to provide a specific benefit to compensate for the damage caused by the offence, 2. to pay a sum of

---

29 Ibid.
30 Herbert Diemer, in Karlsruher Kommentar zur Strafprozessordnung (8th edn., 2019), § 153a ref. no. 1.
31 Relevant factors are “the motives and objectives of the perpetrator, including in particular racist, xenophobic or other inhuman acts, the disposition that speaks from the deed, and the will that is exerted in the deed, the extent of the breach of duty, the manner of execution and the culpable effects of the act, the previous life of the offender, his personal and economic circumstances and his behaviour after the offence, especially his efforts to repair the damage and the offender’s efforts to reach a settlement with the injured party.”
32 Sebastian Peters, in Münchener Kommentar zur Strafprozessordnung (1st edn, Munich 2016), § 153 ref. no. 20.
33 See also below 4.2.
34 A confession is a very strong argument to apply § 153 StPO, but not required, see Sebastian Peters, in Münchener Kommentar zur Strafprozessordnung (1st edn, Munich 2016), § 153 ref. no. 24. In case of prior convictions, a confession will rarely justify the application of § 153 StPO, since the purpose of “being enough warning” will not pertain.
money for the benefit of a charitable organisation or the State Treasury, 3. to otherwise provide services of public utility, 4. to meet alimony obligations up to a certain amount, 5. to make a serious effort to reach a settlement with the injured person (offender-victim settlement) and in doing so to make good his or her crime in whole or in part or to seek reparation for it, 6. participate in a social training course, or 7. to participate in a seminar pursuant to § 2b (2) sentence 2 or in a driving aptitude seminar pursuant to § 4a of the Road Traffic Act. (...) If the accused fulfils the conditions and instructions, the act may no longer be prosecuted, unless in case of a grave crime."

The function of § 153a StPO in the German pre-trial procedure is quite different from that of § 153 StPO, as evident by the numerous discrepancies. First of all, the accused has to consent to the termination of the procedure. This might be surprising at first glance, since the termination of procedure without an indictment is a very favourable outcome for him or her. Yet, it is indispensable, since § 153a StPO demands some sort of contribution of the accused, specified in sentence two of the provision (payment of a sum of money etc., see above). This contribution comes without proven guilt of the accused – at this state of the proceedings, he is only that, an accused. Sanctioning the innocent is unheard of in a state of law. Therefore, the payment or other effort according to § 153a StPO can only be regarded as a contribution, which naturally depends on the consent of the accused. He will do so for three reasons in particular: to avoid trial, a conviction and the heighten costs that go with it; to avoid having a prior conviction in case of recidivism, since a discontinuation of proceedings only shows in the registry of the prosecution, not that of judges and employers etc.; and to have the case closed and the issue settled, since, if he fulfils the conditions, the act is no longer prosecutable. The termination of the procedure is legally binding, unless new evidence arises that the act was actually a grave crime, for which the provision cannot apply. It is also important to highlight that, different from § 153 StPO, the provision is applicable if “the gravity of the offence is not contrary to it”, as explicitly stated in § 153a StPO. This means that the criminal act and the guilt of the accused can be considerable, and not only “minor”. Yet, since in this case there is a consequence that is, in its effect, similar to a penalty, this might be enough to “eliminate the (existent, differently from § 153 StPO) public interest in prosecution”. In addition, the court has to consent, unless the crime the accused is suspected of committing has no heightened minimal sentence (see above). This provision is often mentioned when discussing “the deal”

35 Stephan Beukelmann, in Beck’scher Online Kommentar Strafprozessordnung (36th edn, Munich 2019), § 153a ref. no. 7 seq.
36 On this latter point see Stephan Beukelmann, in Beck’scher Online Kommentar Strafprozessordnung (36th edn, Munich 2019), § 153 ref. no. 41.
in Germany\textsuperscript{37}, since the need for consent and the paying of a sum or other contributions can lead to actual negotiations.\textsuperscript{38}

Additionally, there are the provisions § 153b to 153f. § 153b StPO allows the prosecution to refrain from indicting if, in the case of a trial, the court would be allowed to refrain from punishment. This hypothetical reasoning has to be sanctioned by the competent court, which would be responsible for the (hypothetical) trial. This provision applies especially in cases of “offender-victim-compensation” (§ 46a StGB), whereby the offender and the victim reach an agreement and the public interest in prosecution is consequently void, which in turn is only possible if the expected punishment in the concrete case was not more than one year deprivation of liberty. The decision is not legally binding.\textsuperscript{39}

According to § 153c, prosecution can be dispensed for foreign offences (unless the offence was committed within the EU, in that case, Art. 54 Schengen Implementing Agreements applies). The prosecution can refrain to indict offences against the State for reasons of overriding public interests (§ 153d StPO), offences against the State if there has been active repentance (§ 153e StPO) and offences under the International Criminal Code (§ 153f StPO).

\textbf{3.2. §§ 154 to 154e}

While §§ 153 seq. StPO mostly allow the prosecution to refrain from indictment in case of minor crimes, the §§ 154 seq. have a different approach. According to these provisions, partly introduced as early as 1924,\textsuperscript{40} even grave crimes do not have to be prosecuted if the accused is prosecuted for other (grave) crimes, and another conviction would not greatly increase the expected punishment:

“§ 154 (partial termination for multiple acts) (1) The public prosecutor’s office may refrain from prosecuting a crime, 1. if the penalty or measure of improvement and detention which the prosecution may give rise to is not of considerable weight in addition to a penalty or measure of improvement and detention which has been finally imposed on the accused for another offence or which the accused can expect to receive for another offence (…)”

\textsuperscript{37} Thomas Fischer, in \textit{Karlsruher Kommentar zur Strafprozessordnung} (8th edn, Munich 2019), Einleitung ref. no. 119.

\textsuperscript{38} However, since during the pre-trial stage there is rarely a verbal exchange between accused, prosecution and court, a real “bargaining” is a rare occurrence. In that stage, the prosecution will typically just make a suggestion that takes into account that the accused will have to consent. This situation is very different in the trial stage, where open and dynamic negotiations take place in the courtroom, according to § 153a II StPO.

\textsuperscript{39} Stephan Beukelmann, in \textit{Beckscher Online Kommentar Strafprozessordnung} (36th edn, Munich 2019), § 153b ref. no. 11.

\textsuperscript{40} Dirk Teflmer, in \textit{Münchener Kommentar zur Strafprozessordnung} (1st edn, Munich 2016), § 154 ref. no. 2.
This provision makes sense when German sentencing is taken into account. According to German Criminal Law, several criminal acts can and should be judged jointly, resulting in one punishment. This punishment is not allowed to be the sum of the individual punishments for each criminal act (§ 54 StGB), it has to be lower: ‘The main reason given for not cumulating the individual penalties following the motives for the Criminal Code is that the severity of the penalty does not increase linearly with the level of the penalty, but progressively’. This means that, e.g., if a perpetrator robs 5 people on 5 different occasions, and the court finds the just punishment for each individual case to be 7 years depravation of liberty, it will not and is not allowed to sentence the accused to 35 years depravation of liberty, but only to the maximum penalty of 15 years depravation of liberty (§§ 54 II2, 38 II StGB). Before this background, § 154 StPO can be explained. If 4 of these 5 robberies are already indicted, a sentence of 7-10 years seems highly likely. The penalty for the 5th robbery (maybe a year or a few months more) would not be “of considerable weight in addition to a penalty (…) which the accused can expect to receive for another offence”. The prosecution can refrain from indicting.

Pre-trial conclusion of cases according to this provision do not require the accused nor the courts consent. They are not legally binding (in the trial stage, they are partially legally binding, § 154 II StPO). They carry no sanction or other similar consequence. However, the court may consider the concluded procedure as an aggravating circumstance in sentencing, if the procedure and its underlying facts have been assessed by the court during trial.

Similarly, § 154a StPO allows the prosecution not to indict for all crimes that have been committed during the same criminal act, if the punishment resulting of the indictment for all crimes would not be considerably higher than without all crimes (e.g., indicting only for robbery but not the insult that occurred during that robbery). Preconditions and consequences are quite similar to those of § 154 StPO as well, with the only difference being that even in the trial stage the application of § 154a StPO is not legally binding (§ 154a II, III StPO).

The prosecution may also terminate the procedure to allow for extradition and expulsion in case of § 154b StPO. Additionally, several provisions cover complex situations, for example where the accused also accuses the victim. According to § 154c StPO, if coercion or extortion (§§ 240, 253 of the Criminal Code) has been committed by threatening to disclose a criminal

---

41 See §§ 52 seq. StGB.
42 See Helmut Fischer, in Nomos Kommentar Strafgesetzbuch (5th ed. 2017), § 53 ref. no. 2, also regarding his and other critical voices.
43 See also BGH, judgement on the 21.08.2003 (3 StR 234/03).
44 BGH (1981) 2422 NJW.
offence, the prosecution may refrain from prosecuting the act whose disclosure has been threatened, unless atonement is indispensable due to the gravity of the act. § 154d StPO covers cases that require preliminary civil or administrative proceedings/judgment. Finally, § 154e StPO allows that the public prosecution of a false suspicion or insult (sections 164, 185 to 188 of the Penal Code) is waived as long as criminal or disciplinary proceedings are pending in respect of the act reported or alleged.

3.3. Lack of public interest (especially § 376 StPO)

As mentioned regarding the §§ 153 to 153f StPO, the refraining from prosecution is only allowed in case that “public interest” does not demand it. This rather broad term does not establish a condition for the applicability of the provision, but rather grants the prosecution full discretion, since it is the prosecution’s role to defend the public interest. This discretion is not only granted in case of the §§ 153 seq., but in other provisions as well, that are not directly related to the expediency principle, but still an explicit restriction of the legality principle.

According to § 376 StPO, “the public prosecutor’s office will only indict offences referred to in Section 374 if this is in the public interest.” These offences are, inter alia, trespassing, insult, violation of the highly personal sphere of life by taking pictures, violation of the secrecy of correspondence, (simple) bodily injury, coercion or a threat and damage to property. These are offences that can be prosecuted by means of a private action by the injured party, without the need for prior referral to the public prosecutor’s office (§ 374 StPO). “The purpose of private actions is to decriminalise petty offences in everyday disputes which have little impact on the general welfare of society and which are generally not so important for the persons concerned that there would always be a legitimate need for punishment”. If the prosecution denies public interest, the case is closed and the injured person is referred to take private action. The prosecution has free discretion to deny public interest according to § 376 StPO. The case is closed according to § 170 II StPO.

A similar instrument is the “criminal complaint” or the absence of it (§§ 77 ff. StGB). Some crimes (e.g. trespassing) require a criminal complaint to be prosecuted. Others (e.g. simple bodily injury, § 223 StGB) can be prosecuted without criminal complaint, but only have to be in case of public interest, that is, if the prosecution sees it fit (§ 230 StGB). The above mentioned provision regarding private action is therefore especially relevant in the

45 Sebastian Peters, in Münchener Kommentar zur Strafprozessordnung (1st edn, Munich 2016), § 153 ref. no. 27.
46 Mehmet Gürcan Daimagüler, in Münchener Kommentar zur Strafprozessordnung (1st edn, Munich 2019), before § 374 ref. no. 2.
47 Angelika Walther, in Karlsruher Kommentar zur Strafprozessordnung (8th edn, Munich 2019), § 376 ref. no. 1.
cases where a criminal complaint is made (otherwise, in case of most offences mentioned in § 374 StPO, the case could be closed on the grounds of its absence already), but the prosecution does not consider the prosecution to be of public interest.

3.4. Victims’ rights, §§ 170 ff. StPO

The possibility to refrain from prosecuting for reasons of expediency creates tensions not only with the public interest in prosecution (legality principle), but also with the individual interests of the victims of crime. The law allows for an alliance of the victim and the legality principle in § 172 StPO, if the prosecution refrains from indictment because it (erroneously) denies a sufficient probability of conviction. § 172 StPO paragraph one StPO (enforcement of proceedings) states that if the complainant in criminal proceedings (the person that has issued a criminal complaint, see above) is also the injured party, he or she shall be entitled to appeal against the decision to refrain from prosecution according to § 170 II StPO. In that case, if the prosecution is not reopened, the court will have to decide if the case merits an indictment and, if it does, the prosecution is compelled by the court to indict (§ 175 StPO).

However, there is no such provision when it comes to case termination according to the provisions of expediency. § 172 II StPO states the following: The application shall not be admissible if the proceedings relate exclusively to a criminal offence that can be prosecuted by the injured party by way of private action (see above), or if the Public Prosecutor’s Office has refrained from prosecuting the offence in accordance with § 153 paragraph 1, § 153a paragraph 1 sentence 1, 7 or § 153b paragraph 1; the same applies in the cases of §§ 153c to 154 paragraph 1 and §§ 154b and 154c.

This is evidently quite significant. If the prosecution does not indict because it sees no grounds to do so, the victim disposes of legal remedies. Yet, if the prosecution does not indict on grounds of expediency, the victim is left with no (legally binding) remedies. This represents an immense strengthening of the expediency principle, which, from a practical standpoint, might incite the prosecution to close controversial cases on grounds of expediency, to avoid legal scrutiny by the victim. Yet, it is his/her right to make extensive use of her discretion. In a 2002 ruling, the constitutional court (BVerfG) declared:

“§ 153a I 1 StPO is not intended to protect the person injured by a criminal offence. The main regulatory purpose is to compensate for the public interest in criminal prosecution by fulfilling conditions and instructions. A violation of the rights of the person injured by a criminal offence is generally ruled out when it is up to the public prosecutor’s office to assess the public interest in criminal prosecution (…).
§ 153a of the Code of Criminal Procedure serves to reduce punishment in the area of small and medium-sized crime; in this area, the interests of the person injured by a criminal offence do rarely weigh particularly heavily. Furthermore, it would be incompatible with the assumption of an obstacle to prosecution if the injured party were able to assert his or her interests through the courts in the cases of § 153a I StPO. An arbitrary handling of this provision by the public prosecutor’s offices is also counteracted by the fact that proceedings under § 153a I StPO may only be discontinued with the consent of the court responsible for the main proceedings. Moreover, the constitution does not guarantee any right to prosecution of another by the state.\textsuperscript{48}

These clear statements of the constitutional court have taken the heat out of the discussion on victims’ rights regarding the expediency principle.\textsuperscript{49} On one hand, because it is true that the above mentioned provisions generally do not apply in case of grave crimes, which are typically the crimes of special significance for the victim and that are also highly politicised (rape, homicide or child abuse). On the other hand, because it is generally accepted that even though the prosecution has free discretion to refrain from prosecuting in case of the §§ 153 seq. StPO, she only is allowed to do so if the provisions really do apply. If the prosecution refrains from prosecuting a rape on the grounds of § 153a StPO, § 172 StPO could be applied, so that the court could force the prosecution to indict.\textsuperscript{50} This is possible, even though not stated explicitly in the law, since the free discretion of the prosecution is reduced to the cases that the expediency principle is applicable. In cases that the prosecution uses “discretion” without legal power, the exclusion of legal remedies according to § 172 paragraph 2 StPO does not apply.\textsuperscript{51}

In other words: The prosecution has free discretion within the limits of the law, but no discretion where the law does not grant it. On the grounds that the expediency provision did not apply, any termination of the prosecution according to §§ 153 seq. can be reviewed by a court. On the grounds that the provisions “should not have been applied”, none can. This, in case of § 153a StPO, corresponds with the scope of the legal binding force the closure of proceedings has (see above), safeguarding the rights of the accused.

3.5. The current practice of pre-trial conclusion of cases (statistics)

To consider the relevance of pre-trial conclusion of cases according to the expediency principle, this article will rely on the data of the German Federal Ministry of Justice more

\textsuperscript{48} BVerfG (2002) 815 NJW.
\textsuperscript{49} Yet, this debate is being revived by the European Directive on victims rights from 2012, see Ralf Kölbl, in Münchener Kommentar zur Strafprozessordnung (1st edn, Munich 2016), § 172 ref. no. 10.
\textsuperscript{50} See on grave crimes and §§ 153 seq., § 172 StPO, Claudia Gorf, in Beck’scher Online Kommentar Strafprozessordnung (36th edn, Munich 2019), § 172 ref. no. 22.
\textsuperscript{51} Ralf Kölbl, in Münchener Kommentar zur Strafprozessordnung (1st edn, Munich 2016), § 172 ref. no. 30.
than on the existent personal experience of the author. The latest statistics, concerning the year 2018, show 4,939,174 criminal proceedings in the Federal Republic of Germany.\textsuperscript{52}

This number does not mean that there has been the same amount of criminal investigations, as the data relies on formal (and mostly digital) information.\textsuperscript{53} For example, the referral of a proceeding to the prosecutions office of another district is also registered as the “conclusion” of a proceeding (ca. 300,000), which in turn means that the proceeding/investigation that follows the acceptance of the referral will figure in the total number of proceedings, even though materially, it is the same proceeding.

Of the ca. 4.9 Million proceedings in 2018, about 8\% (423,143) conclude with an indictment and another ca. 11\% (539,384) with a Strafbefehl, an equivalent to an indictment that is followed by a judicial decision which imposes punishment (mostly pecuniary) without a trial in non-grave cases. In sum, only ca. 19\% of criminal proceedings in Germany end with an indictment or equivalent.

Conversely, ca. 33\% are concluded on the grounds of expediency (1,589,955), while another 28\% are concluded because a conviction was not sufficiently likely (1,403,798), that means that the accused was innocent or there was a lack of evidence and the like. When these three major types of outcome (indictment, expediency and no merit) are added, they account for ca. 80\% of all outcomes in the German criminal law system. Another ca. 20\% are mostly non-material conclusions such as referral to other authorities or temporary conclusion etc., all of which, if not material, might result in indictment or any other outcome, without necessarily counting as such in 2018. In conclusion, in this macro perspective, nothing is more likely to happen to any given criminal proceeding than to be concluded according to provisions of expediency, highlighting the major importance of these provisions in German pre-trial proceedings.

When analyzing the individual types of expediency conclusions, as discussed above, the data shows the following:

167,775 conclusions of proceedings followed a contribution or effort of the accused, of which 140,035 were based on § 153a para. 1 s. 2 no. 2 (paying a sum of money). 1,222,234 conclusions of proceedings had no financial contribution or similar consequence for the accused, of which 470,407 were based on § 153 StPO and 342,143 on § 154 Abs. 1 StPO.


\textsuperscript{53} See page 5 of the report supra.
Finally, in 2018 a total of 199,946 proceedings were concluded on the grounds of § 376 StPO, meaning that public interest was denied and the victim was referred to private action. The other conclusions were founded on other provisions mentioned above or expressions of the expediency principle in special laws such as the law on narcotics (Betäubungsmittelgesetz).

4. Advantages and disadvantages of pre-trial case conclusion

When looking at the bare statistical data, the German criminal law system seems to have distanced itself greatly from its former ideals of truth and legality. And it might seem hard to argue that, from the point of view that any crime that has been committed deserves punishment, German criminal justice is anything but a failure. But to reach that conclusion, one should first carefully weigh the advantages and disadvantages of the current system.

4.1. Disadvantages

The disadvantages of the current practice in pre-trial proceedings are evident from the victim’s perspective. Even though refraining from indictment on grounds of expediency is also possible in case of ‘victimless crimes’ such as possession of ‘light drugs’, in many cases, there is a victim, and that victim has no effective legal remedy to oppose expediency. This is problematic, since criminal law proceedings are legitimized partly by the assumption that they are apt to keep or reestablish peace. In the case the prosecution refrains from indicting the culprit, peace might be fragilized.

Additionally, the unchecked discretion of the prosecution in those cases poses a risk to trust in the legal system. The possibility to deny public interest even when the public is wide aware and interested in the case, is problematic. In a very prominent case, the Formula 1 celebrity Ecclestone who was accused of bribery (§ 334 StGB, Bestechung), was spared conviction on the grounds of § 153a StPO, having to pay 74,000,000 € to the Bavarian State. Distrust could in such cases stem from the suspicion that the prosecution will only make use of the expediency provisions in case of “famous” or “rich” accused, even though the facts speak against it, considering the high numbers of cases closed according to these provisions above. The accused (rich or poor) has no “right” to a conclusion according to § 153a StPO. Legally speaking, no money in the world can buy him or her out of being charged if the prosecution wants to charge (in a case that § 153a StPO could be applied). Being rich or poor is not a guilt-shaping factor, and only the guilt of the accused is relevant to criminal procedure and

54 For a critique regarding the perspective of the accused, see Stephan Beukelmann, in Beck’scher Online Kommentar Strafprozessordnung (36th edn, Munich 2019), § 153a ref. no. 2.
the application of § 153a StPO. No case is known of a directive or incentive to ‘gather money’ for the State by closing cases according to § 153a StPO, and, except for the Ecclestone case, no such allegations are made in the academic debate. In fact, critics more commonly point out that according to § 153a StPO the State can ‘get more out of’ (rich) accused than with a conviction (which knows a maximum pecuniary punishment of 21,600,000 € according to §§ 40, 54 StGB), worrying about a discrimination of the rich more than of the poor.\textsuperscript{56}

Since the public interest in prosecuting a highly publicized case is higher than one the general public knows nothing about, the effect might be opposite: the prosecution might “discriminate” the rich and famous.\textsuperscript{57} If the prosecution agrees to close a case according to § 153a StPO if the accused pays a sum, but the accused is poor and therefore not able to do so, the prosecution can change the contribution into charitable work or similar non-financial contributions (which happens regularly, see § 153a StPO Nr. 3 above). The prosecution is free to do so, since § 153a StPO is only legally binding once the “conditions or instructions” (payments or similar) are fulfilled.

The mentioned “deals through the backdoor” are clearly signs of a major shift in German criminal law culture, which has, indubitably, distanced itself from the noble pursuit of truth,\textsuperscript{58} since the conclusion of proceedings on the grounds of expediency also leads to a conclusion with no verdict on the facts. It is the very objective of expediency to spare the criminal law system the need to investigate truth to a point where a court “unveils” the set of facts that society can treat as “the truth” of what happened. Expediency means no closure, at least for the general public, since there is no publication of factual findings in these cases.

4.2. Advantages

One might think that the advantages of pre-trial conclusion on grounds of expediency are purely economic. While it is evident that concluding the 33 % of all proceedings that are now concluded on grounds of expediency with an indictment or similar, practically tripling the cases of indictment observed currently, would figuratively implode the judicial system, especially on the side of the judges. It is a relief for the prosecution to be allowed to conclude cases according to the §§ 153 seq. of the StPO, but the prosecution still needs to investigate all those cases and

\textsuperscript{56} See already above on the issue of the alleged privilige of wealthy accused Hans Kudlich, ‘Ecclestone, Verständigungsgesetz und die Folgen – Reformbedarf für § 153a StPO?’ [2015] Zeitschrift für Rechtspolitik 10, i.a.


\textsuperscript{58} Strongly critical of this development Frank Saliger and Stefan Sinner, ‘Abstraktes Recht und konkreter Wille’ [2007] Zeitschrift für Internationale Strafrechtsdogmatik 476.
evaluate if a conclusion on these grounds is possible and useful. The judges, unless they have to give consent (see above), do not even see those proceedings in their practice and are spared from having to deliberate on them in any way. Changing that would mean an immense effort, especially in recruiting the necessary amount of judges (and supporting staff!), and would consequently cost the tax payer greatly. These are the budgetary advantages.

Yet, the advantages can also be seen in the fields of criminal policy and, in lack of a better word, justice. The idea to allow for the pre-trial conclusion of cases of little to medium gravity is also based on criminology, assuming that, in many cases, the investigation against the accused and his or her confrontation with his or her doings is enough to deter him or her from recidivism. When considering this argument, it is important to remember that while it seems “unjust” to refrain, e.g., from indicting the group of brutes that beat up an innocent bystander of a football match, which would be possible as a case of medium gravity, § 224 Abs. 1 Nr. 4 StGB, these are extreme cases which are not quotidian for the prosecutor. A vast amount of cases that are concluded are little thefts and “victimless crimes” such as possession of lighter drugs or carrying weapons such as knives of a certain length or unlicensed pepper spray and the like. The amount of time and resources saved by giving the accused in those cases a ‘warning shot’ by informing them that, on the present occasion, ‘no further action will be taken’, is enormous, considering that those crimes account for the majority of registered offences in Germany.

It also seems excessive to prosecute, for example, the 45 year old housewife that carries unlicensed pepper spray to defend herself, committing the offence of illegal possession of a weapon (§ 52 III WaffG). It is very possible that she might not have known that she was doing something criminal (but, since she could have known, she would still be criminally liable, § 17 StGB). After closing the case according to § 153 StPO, she will be notified and next time she will know. If she is caught again, she will probably be charged, which seems to be the proportionate reaction. In cases of foreign perpetrators that are just passing through, the expediency provisions are of immense usefulness. The Polish train passenger who has not bought a train ticket does not have to be prosecuted, which would require translation of documents, getting a hold of him in his homeland etc. etc. He will often be asked to pay a

59 See already above Sebastian Peters, in Münchener Kommentar zur Strafprozessordnung (1st edn, Munich 2016), § 153 ref. no. 20.

60 For example, theft still amounts to ca. 30 % of all registered crime in Germany, see the official data of the Polizeiliche Kriminalstatistik 2019, p. 16, download at https://www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2019/pks2019_node.html (accessed 05th of May 2020).

61 As in one case the author prosecuted.
sum of money to cover the costs of his prosecution (§ 127a StPO, ca. 100-200 €) and asked if he would consent to a conclusion of the case according to §§ 153, 153a StPO. When the file reaches the prosecution a few weeks later, she will then see if he has any priors. If he hasn’t, the case will be closed, and the sum of money will be confiscated as a contribution, paying the state at least part of the costs of the procedure. Case closed.

The victim might also be satisfied with an expedient outcome. In case of § 153a StPO, he or she will receive a payment of the accused, if the prosecution demands it. But also in the cases of § 153 StPO many are relieved to see that public action was taken and that a decision was reached that does not declare the accused innocent. To many, in the author’s experience, that is enough.

Lastly, many of the cases of social unrest brought to the prosecution are of undeniable triviality. Neighbor disputes, traffic insults or customers who refuse to pay their bills. It seems not only defendable, but even desirable, to leave these conflicts to be resolved (peacefully) in the private sphere as much as possible, and not to intervene with indictments “left and right” unless there is a public, not only private or civil, interest in prosecution. These arguments only hold up in case of minor or medium offences though. It is important that grave crimes are kept out of this debate. After all, a strong argument to implement the expediency principle is to free up resources to investigate and prosecute grave crimes, since in those cases, it is neither public interest nor criminologically viable to refrain from prosecution for reasons of “expediency”.

5. Conclusion

While German criminal law procedure structurally aspires for truth, for almost a hundred years the legislator has introduced provisions that allow the prosecution to refrain from indicting on grounds of expediency. In those cases, the facts are never judged by a court, no ‘truth’ is unveiled and, according to most provisions, the accused will not have to pay anything or suffer any other similar ‘sanction’ for the crime that the prosecution thinks he has committed. According to the latest available data, nothing is more likely to happen to a German criminal procedure than to be closed according to these provisions.

This creates tensions with victims’ rights, since the victims have an interest in seeing the perpetrator punished. This interest of the victim is recognized by the law, since the victim has the right to challenge the prosecutions decision to close a case for a lack of merit (§ 170 II StPO). Yet, the victims have no legal remedy to challenge the prosecutions decision to close a case on grounds of expediency (as long as the respective provisions did apply).
The provisions of expediency can therefore be criticized due to the considerable discretion the prosecution has to refrain from prosecuting crimes it thinks, or knows, have been committed. This can generate distrust in the legal system since, ultimately, it may seem like ‘justice’ itself will be left to the will of the prosecution. Additionally, the fact that no ‘truth’ is established by a court in case of offences with a victim might leave the underlying conflict unresolved.

However, the provisions of expediency largely only apply in case of light to medium crimes, where the victims and the public’s interest is generally lower. Equally important is the function of the pre-trial conclusion of cases according to expediency in a holistic approach of criminal policy. The pre-trial procedure is in itself a weight on the accused and a relief for the victim. In many cases, pre-trial conclusions work like a last warning for the accused and are treated like that by the prosecution. In these cases, were they represent a proportionate State response to crime, they are not only the cheaper solution – but the better.

References
Angelika Walther, in Karlsruher Kommentar zur Strafprozessordnung (8th edn, Munich 2019).
BGH (1957) 1244 NJW.
BGH (1981) 2422 NJW.
BGH, judgement on the 21.08.2003 (3 StR 234/03).
BVerfG (2013) 1058 NJW.
BVerfG (2002) 815 NJW.
Claudia Gorf, in Beck’scher Online Kommentar Strafprozessordnung (36th edn, Munich 2019).
Claus Roxin, Kriminalpolitik und Strafrechtssystem (Berlin 1973).
Dirk Teßmer, in Münchenener Kommentar zur Strafprozessordnung (1st edn, Munich 2016).
Gerwin Moldenhauer and Marc Wenske, in Karlsruher Kommentar zur Strafprozessordnung (8th edn, Munich 2019).
Hans Kudlich, in Münchenener Kommentar zur Strafprozessordnung (1st edn, Munich 2014).
Immanuel Kant, *Die Metaphysik der Sitten* (1797).

James Goldschmidt, *Der Prozess als Rechtslage* (1925).


Polizeiliche Kriminalstatistik 2019.


Statistisches Bundesamt (destatis), Rechtspflege-Staatsanwaltschaften 2018 (2019).


Thomas Fischer, in *Karlsruher Kommentar zur Strafprozessordnung* (8th edn, Munich 2019).