Speech: Characteristic Features of German Criminal Proceedings—An Alternative to the Criminal Procedure Law of the United States?

Volker F. Krey

Recommended Citation
Available at: http://digitalcommons.lmu.edu/ilr/vol21/iss4/2
SPEECH

Characteristic Features of German Criminal Proceedings—An Alternative to the Criminal Procedure Law of the United States?

VOLKER F. KREY*

I. INTRODUCTION. THE SIGNIFICANCE OF COMPARATIVE LAW, [SPECIFICALLY] REGARDING THE UNITED STATES AND GERMANY AS “LAW-EXPORTING NATIONS”

Comparative law, especially between U.S. law and German law, is very significant because both countries may be regarded as highly influential in terms of “exporting” legal ideas and even rules. U.S. law, as well as German law, has gained great influence on the legal orders of many other countries. As examples of the influence of U.S. law, I want to mention the areas of business law in general, corporate law in particular, [and the] law of criminal
procedure. Nowadays, examples of the “exporting” of German law are mostly criminal law (in particular, the general part) [and] the law of criminal procedure.

The influence of German criminal law is especially considerable in Southern Europe, Eastern Europe (after the fall of the former communist regimes), Japan, and South Korea. In several of these countries, for instance in Japan and in Hungary, however, there exists a healthy competition between the U.S. and Germany with regard to the influence of their respective criminal procedure laws.

II. CONSTITUTIONAL BACKGROUND

Before I continue, let me remind you that the subtitle of my speech is only an interrogation. Furthermore, I want to underline that we will never forget that it was [the United States] that brought back freedom and the rule of law to Germany after the Second World War.

A. Germany as a Federal Republic

Like the Unites States, Germany is a federal republic. My country [Germany], with its eighty-two million inhabitants, consists of sixteen individual states of which Bavaria is probably the best known abroad, maybe because of its famous beer!

1. Germany has Federal Criminal Law and Law of Criminal Procedure;\(^1\) But There are Neither Criminal Codes Nor Criminal Procedure Codes within Each of the Sixteen German States

The states within the Federal Republic of Germany do not have their own criminal or criminal procedure law. The [German] Criminal Code and the Criminal Procedure Code are federal laws.\(^2\) Compared to U.S. criminal law, with its fifty state criminal codes and additional federal criminal law, the disadvantage of the German system is, inter alia, that there are more possibilities for crea-

---

1. Besides, as of today, the European Community (EC) is not responsible for criminal matters: there is neither a European Criminal Code nor a European Code of Criminal Procedure. However, the organs of the EC claim the right for the Community to force the member states by means of EC law to protect community interests by creating corresponding national penal acts.

2. GRUNDGESETZ [Constitution] [GG] art. 74, Abs. 1, Nr. 1 (F.R.G).
tive legislative experiments in the U.S. system. The *advantage* of German law, though, is its legal uniformity: to us [Germans], it seems hardly comprehensible that capital punishment can be imposed in the majority of the [U.S.] States, [while not in others].

2. The Sixteen States, Not the Federal Supreme Court of Justice
Nor the Federal Constitutional Court, are Responsible for the German Court Structure

All German courts are state courts. Therefore, all professional judges are state officials, not federal officials. An exception to this rule applies only to the Federal Supreme Court of Justice (civil and criminal jurisdiction) as well as to some other Federal Supreme Courts (i.e., for tax law) and to the Federal Constitutional Court.

Consequently, the German criminal courts are state courts, and there exists just one single exception, which is the above-mentioned criminal jurisdiction of the Federal Supreme Court of Justice. But this court is only a court of appeals. There exists no federal criminal court as a court of first instance.

Thus, German jurisdiction, in criminal cases, means application of the Federal Criminal Code as well as the Federal Criminal Procedure Code by state courts.

**B. The Significance of the Federal Constitution and the Federal Constitutional Court Regarding German Criminal Proceedings**


Similar to the United States, the German law of criminal procedure, is to a great extent, shaped by the Federal Constitution and, more particularly, by civil rights such as the inviolability of the home, the guarantee of personal freedom, and the right to life and to physical integrity. In this regard, interference with

---

3. See GG art. 95, Abs. 1 (F.R.G.), which provides: "Für die Gebiete der ordentlichen, der Verwaltungs-, der Finanz-, der Arbeits- und der Sozialgerichtsbarkeit errichtet der Bund als oberste Gerichtshöfe [Federal Supreme Courts], den Bundesgerichtshof [Federal Supreme Court of Justice], das Bundesverwaltungs-gericht, den Bundesfinanzhof [Federal Supreme Court for Tax Law], das Bundesarbeitsgericht und das Bundessozialgericht."

4. See GG art. 2, Abs. 1 (F.R.G.), which provides: "Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht ge-
constitutionally guaranteed civil rights requires an explicit statutory authorization, which is characteristic of German Constitutional Law. In other words, the constitutional rights of individuals must not be restricted without statutory authorization.

This principle has already been developed by Montesquieu (the 18th Century theorist). Nowadays, it is based on the constitutional principles of separation of powers, certainty of law, and last, but not least, on the principle of democracy. Only Parliament shall have the power to allow interference with constitutional rights.

Example: The electronic surveillance concerning private homes ("bugging operation") as an instrument of [criminal] prosecution was not regulated in our [German] Criminal Procedure Code until 1998. Therefore, judges were not competent to authorize such investigative measures. And, self-evidently, the police and the public prosecutor were thus not allowed to implement them. Our [German] criminal prosecution authorities have obeyed this.

Furthermore, the constitutional principle of proportionality is of central importance for German criminal proceedings. It states that first, interference with constitutional civil rights always has to be necessary (i.e., a more indulgent means of equal effectiveness must not be available). Secondly, the damage prospectively brought about by the intrusion must not be disproportionate compared to its anticipated [purpose].

Example: The extraction of liquid from the brain or the spinal cord in order to clarify the question of whether the defendant suffers from a disease of the central nervous system, which would ex-
clude or significantly diminish his responsibility, is permitted by the wording of the Criminal Procedure Code.\textsuperscript{8} This considerable physical intervention is disproportionate, though, and thus unconstitutional, if the criminal act in question is [not a] serious crime (like murder or rape).\textsuperscript{9}

2. The Trend-Setting Influence of Federal Constitutional Court Case Law on the Rule of Law in Criminal Proceedings

The significance of the German Federal Constitution for criminal proceedings is ultimately based on the massive interventions into the law of criminal procedure by our [German] Federal Constitutional Court during the almost fifty years of its existence. Therefore, it can be stated that this court substantially shapes the elements of the rule of law in [German] criminal trial[s]; [thus, this rule of law] parallels U.S. law.

3. The Federal Constitutional Court as the de facto “Super Appellate Court” and the Function of the Constitutional Complaint

Like the U.S. Supreme Court, Germany’s Federal Constitutional Court has the power to declare void federal and state law, as well as to overrule court decisions and measures of the executive branch, if these acts are inconsistent with the Federal Constitution. This is also true for judgments of the Federal Supreme Court of Justice in criminal cases - the Federal Constitutional Court has quashed decisions of the Federal Supreme Court due to violations of the Constitution on several occasions.

Most of the Federal Constitutional Court’s decisions result from constitutional complaints filed by citizens. According to German law, everybody has the legal opportunity to challenge final judgments of the state courts and the Federal Supreme Court of Justice before the Federal Constitutional Court by asserting a breach of the Constitution.\textsuperscript{10} Almost 5,000 of these constitutional complaints were filed before the Federal Constitutional Court.

\textsuperscript{8} See § 81(a) Abs. 1 StPO (F.R.G.).
\textsuperscript{9} See BVerfGE 16, 194, (198) (F.R.G.). For analysis, see CRIMINAL PROCEDURE LAW, PART II, supra note 7, at 45-46 (sidenotes 118-112); see also GERD PFEIFFER, KARLSRUHER KOMMENTAR ZUR STRAFPROZEßBÖRDUNGN 363 (sidenote 7) (1999).
\textsuperscript{10} GG art. 93, Abs. 1, Nr. 4(a) (F.R.G.), which provides: “Das BVerfG entscheidet über Verfassungsbeschwerden, die von jedermann mit der Behauptung erhoben werden können, durch die öffentliche Gewalt in einem seiner Grundrechte ... verletzt zu sein. Ergänzend [supplementary] §§ 90-95 Bundesverfassungsgerichtsgesetz [implementing law
complaints are addressed to the Federal Constitutional Court every year,\(^{11}\) which means a lot of work for the sixteen justices and their approximately fifty assistant judges. More than ninety percent of all constitutional complaints are dismissed in summary proceedings without explanation. Just about two percent of all constitutional complaints are finally successful.\(^{12}\) A number of decisions allowing constitutional complaints have significantly shaped the law of criminal procedure.

Example: Mr. Robinson is held in pre-trial custody. He is charged with armed robbery. Custody has already lasted for nine months because the competent court is completely overtaxed with criminal cases on a long-term basis. The competent court of appeals has to decide about the permissibility of further custody after a period of six months in pre-trial custody.\(^{13}\) If necessary, after another period of three months, the court orders the continuation of pre-trial custody because of the trial court's above-mentioned overtaxing. The defendant files a constitutional complaint thereagainst. In such cases, the Federal Constitutional Court has often set aside the decision of the court of appeals resulting in the defendant's release from custody. The Court has stated that the overtaxing of a trial court for a longer period of time comes within the State's area of responsibility; the State has to equip its administration of justice with judges in such a way as to

---

12. See MAUNZ ET AL., BUNDESVERFASSUNGSGERICHTSGESETZ, KOMMENTAR 16-16(a) n.78(a) (sidenote 8(b)) (1998).
13. See § 121 Abs. 1 StPO (F.R.G.), which provides: "Solange kein Urteil ergangen ist, das auf Freiheitsstrafe ... erkennt, darf der Vollzug der Untersuchungshaft wegen derselben Tat über 6 Monate hinaus nur aufrechterhalten werden, wenn die besondere Schwierigkeit oder der besondere Umfang der Ermittlungen oder ein anderer wichtiger Grund das Urteil noch nicht zulassen und die Fortdauer der Haft rechtfertigen." Zur Klarstellung: Selbstverständlich müssen die gesetzlichen Voraussetzungen für die Anordnung der Untersuchungshaft gemäß § 112 StPO (dringender Tatverdacht und ein Haftgrund wie Fluchtverdacht) weiterhin vorliegen. § 122 Abs. 1 StPO: "In den Fällen des § 121 legt das zuständige Gericht die Akten durch Vermittlung der Staatsanwaltschaft dem Oberlandesgericht [OLG] [Court of Appeals] zur Entscheidung vor, wenn es die Fortdauer der Untersuchungshaft für erforderlich hält oder die Staatsanwaltschaft es beantragt."
allow the courts to function. Therefore, the principle of proportionality forbids [the State from holding] defendants in pre-trial custody [in excess of] a six-month period, on grounds of overtaxing the trial court.\textsuperscript{14}

Thanks to [the] constitutional complaint, the Federal Constitutional Court has become a \emph{de facto} "super court of appeals," even on a higher level than the Federal Supreme Court, and \textit{substantially invading} the jurisdiction [over] criminal law and the law of criminal procedure. Many lawyers in Germany regard this as a wrong development, as do I.\textsuperscript{15}

\section*{III. ORGANS OF THE ADMINISTRATION OF CRIMINAL JUSTICE: THE POLICE, THE PUBLIC PROSECUTION AUTHORITIES, AND THE CRIMINAL COURTS}

\subsection*{A. The Police and Public Prosecution Authorities}

With regard to the relationship between the public prosecution and the police, various important differences exist between Germany and the continental legal tradition on the one hand, [and] the United States on the other hand.

\subsection*{1. The Prosecutor as the Legal Ruler of the Preliminary Investigation}

The right of the public prosecutor to give instructions to the police is a characteristic feature of our [Germany's] criminal procedure law.\textsuperscript{16} The police [are] sometimes sensitive toward orders of the public prosecutor instructing them to undertake certain investigative acts (i.e., the examination of witnesses) or to implement compulsory measures (i.e., searches and seizures). However,

\begin{itemize}
\item \textsuperscript{14} See BVerfGE 36, 264, (269);\textit{Criminal Procedure Law, Part I, supra note 7}, at 40-41 (sidenotes 92–95); \textit{Criminal Procedure Law, Part II, supra note 7}, at 120-125 (sidenotes 320–333).
\item \textsuperscript{15} See Volker Krey, \textit{Das Bundesverfassungsgericht in Karlsruhe – ein Gericht läuft aus dem Ruder}, 6\textit{Juristische Rundschau} 221, 221–228 (1995).
\item \textsuperscript{16} § 161 StPO (F.R.G.) which provides: "Zu dem ... Zweck (Strafverfolgung) kann die Staatsanwaltschaft von allen öffentlichen Behörden Auskunft verlangen und Ermittelungen jeder Art entweder selbst vornehmen oder durch die Behörden und Beamten des Polizeidienstes vornehmen lassen. Die Behörden und Beamten des Polizeidienstes sind verpflichtet, dem Ersuchen oder Auftrag der Staatsanwaltschaft zu genügen." \textit{See also} § 152 Abs. 1 Gerichtsverfassungsgesetz [GVG] (F.R.G.), which provides: "Die Hilfsbeamten der Staatsanwaltschaft [police officers] sind ... verpflichtet, den Anordnungen der Staatsanwaltschaft ... Folge zu leisten."
\end{itemize}
this sensitivity does not seem comprehensible to me. According to the French example, the public prosecution was instituted explicitly as a “guardian of the law” [for] the police in the 19th Century. From my point of view, the police, with its two areas of responsibility, which are averting dangers [and prosecuting] crimes, would be too powerful and too dangerous to the constitutional rights of citizens [if not for] the prosecutor’s function as the “guardian of the law.” This function requires the district attorney’s right to issue directives in matters of criminal prosecution. Besides, in reality, the police regularly conduct the investigations relating to mass crime independently and the public prosecutor’s office will then only decide whether or not to [press] charge[s].

The legal function of the public prosecutor as “ruler over the criminal investigations” generally corresponds to serious crimes (i.e., terrorism, espionage, capital crimes, white-collar crime, etc.). Incidentally, the public prosecutor’s authority to issue directives to the police can help detectives in cases of political resistance against certain criminal investigations within the police department. [The detectives] can take direct orders from the district attorney’s office to conduct these investigations; thus, the police supervisors are “left out.”

2. The Principle of Legality for the Police and the Public Prosecution Authorities. Exceptions (i.e., the Principle of Discretionary Prosecution) Exist Only for the Public Prosecution Authorities

German criminal procedure law is ruled by the so-called principle of legality, which sets out that the police and the district or federal attorney must prosecute crimes. There are no exceptions

17. See CRIMINAL PROCEDURE LAW, PART I, supra note 7, at 197, 199–200 (side-notes 492 & 496).
18. See id. at 198–199 (sidenotes 493–495).
19. For the police, see § 163 Abs. 1 StPO (F.R.G.), which provides: “Die Behörden und Beamten des Polizeidienstes haben Straftaten zu erforschen und alle keinen Aufschub gestattenden Anordnungen zu treffen, um die Verdunklung der Sache zu verhüten.” For the public prosecution, see § 152 Abs. 1 StPO (F.R.G.), which provides: “Zu Erhebung der öffentlichen Klage ist die Staatsanwaltschaft berufen;” and § 152 Abs. 2 StPO (F.R.G.), which provides: “Sie ist, soweit nicht gesetzlich ein anderes bestimmt ist, verpflichtet, wegen aller verfolgbaren Straftaten einzuschreiten, sofern zureichende tatsächliche Anhaltspunkte vorliegen.” “Bieten die Ermittlungen genügenden Anlaß zur Erhebung der öffentlichen Klage, so erhebt die Staatsanwaltschaft sie durch Einreichung einer Anklageschrift bei dem zuständigen Gericht.” § 170 Abs. 1 StPO (F.R.G.). See also § 153
to this rule in cases of felonies. Only in the case of less serious misdemeanors does there exist the legal possibility [of] drop[ping] the charge (the principle of discretionary prosecution). Only the public prosecutor’s office may make use of [such] exceptions. By the way, in some cases of discretionary prosecution, the Criminal Procedure Code requires a joint decision by the public prosecutor’s office and the court. In most cases, [however] the district or federal attorney may decide independently.

Differently from the prosecutor’s office, the police must always investigate these crimes.20 [This legal obligation to prosecute crimes] has criminal consequences. [For instance], a police detective who attains knowledge of a crime while on duty, but, contrary to his professional obligation, does not prosecute [and/or investigate] it, commits the misdemeanor of “compounding crime by omission.”21

In my opinion, constitutional principles like equality, certainty of the law, and separation of powers, speak for the principle of legality. Parliament, within its administrative discretion, and not the police, should decide what [acts are] punishable. The public prosecutor’s function as “guardian of the law” is the reason why the exceptions to the principle of legality, regulated by the German Criminal Procedure Code, can only be [utilized] by the public prosecutor’s office, [and] not by the police.

The principle of legality would not be practicable without exceptions for mass crime. Furthermore, modern penal law must concede the possibility of refraining from unnecessary punishment of first offenders who have committed less serious offenses (diversion).

From my point of view, the rule [of] no exceptions to the principle of legality for the police is in need of reform. According to the Dutch example, it should be legal for the police, themselves, [to] discontinue the investigation in cases of petty offenses; however; [the police still must act] within guidelines set by the public prosecutor’s office.

StPO (F.R.G.) (refrain from prosecution because of the trifling nature of the offense); § 153(a) StPO (F.R.G.) (discharge from prosecution after performance of a condition like payment to the public treasury).

20. See CRIMINAL PROCEDURE LAW, PART II, supra note 7, at 94-95, (sidenotes 238-240).
21. §§ 258, 258(a) StGB (F.R.G.).
3. Police Officials and Public Prosecutors as Appointed Civil Servants

There are no superior police officials and attorneys for the prosecution in Germany who are elected public officers. Moreover, police officials and prosecuting attorneys are appointed civil servants [with lifetime tenure]. Public officials elected by the people are, of course, “democratically anointed.” [Because] civil servants are appointed for [their] lifetime, [they] are more independent. Incidentally, in the latter case, there is no explosive problem [regarding] who funds a district attorney’s campaign.

B. The Absence of a Jury System and the Use of Professional and Lay Judges

A distinctive difference between German and U.S. law of criminal procedure exist regarding the kind and extent of the participation of non-professional judges.

1. German Criminal Procedure Law Has No Jury System

The institute of a jury comprised [of] twelve jurors, which has jurisdiction over capital crimes like murder or manslaughter, was abolished in Germany in 1924 because of its inefficiency. Since then, there is no jury system in our country [Germany], in criminal or civil cases; [nor is] there a grand jury [system].

2. Professional and Lay Judges’ Cooperation in the Trial Courts

The abolition of the former jury system does not signify that only professional judges decide criminal cases. On the contrary, [Germany] has a differentiating system [for] the [lay judges’] participation in trial courts. In the most important trial courts, lay judges are involved in the main trial (trial of indictment). They

22. Amtsgericht [minor district court]: Einzelrichter und Schöffengericht; §§ 24, 25, 28, 29 GVG (F.R.G.). Landgericht [LG] [trial court]: Große Strafkammer und Spezialstrafkammern, z.B. Schwurgericht; §§ 74-77 GVG (F.R.G.). Oberlandesgericht [OLG] [trial court for selected criminal matters and court of appeals]; §§ 120-122 GVG (F.R.G.) (Die Oberlandesgerichte sind nur in folgenden Sachen Gerichte der ersten Instanz: Terrorismus und Landesverrat [the court of appeals only have the function of courts of first instance in cases of terrorism and treason]).

23. Additional remarks to the lay judges: The towns prepare a roll of proposals for lay judges with a two-thirds majority of their councils. Subsequently, the lay judges are elected for a period of four years by an election committee (consisting of one presiding judge, ten citizens, one civil servant). See generally §§ 36-45 GVG (F.R.G.). The order in
have the same rights as professional judges regarding the question of guilt as well as the sentence.

[There are two trial courts] in which lay judges are involved. First, in the minor district courts, that deal with more than ninety percent of all criminal cases, a [professional] judge sitting alone, i.e., without lay judges, decides on less serious misdemeanors (i.e., shoplifting, minor physical injury, drunk driving). In contrast, a bench of three judges (a mixed court), consisting of one professional judge and two lay judges takes care of more serious misdemeanors and minor felonies (i.e., burglary and attempted robbery). Second, in the higher district courts, which have jurisdiction over serious offenses, a bench of five judges, consisting of three professional and two lay judges, rules on capital crimes (i.e., murder, willful homicide, and robbery with negligent fatal result); a bench of four judges (two professional [and] two lay judges) [rules on] all other crimes that are charged in the higher district courts (i.e., rape and drug-dealing). Because a [criminal] conviction requires a two-thirds majority within a given bench of judges, the lay judges can always force an acquittal.

We thus have a system of “mixed courts” in German trial courts that prescribes a mixed bench of judges for all more significant criminal cases in the minor district courts, as well as for all criminal cases without exception, in the higher district courts. This cooperation of professional and non-professional judges in the main trial is appropriate in my opinion and well established in practice. This mixed system avoids the disadvantages of the jury system, which are well known to [the United States], [and] offers the following advantages: [first,] the involvement of lay judges is specifically a “democratic” idea. At the same time, it implies a certain control of the people over professional judges. It reinforces the [citizens’] understanding of the criminal courts, and it reduces the danger of an administration of criminal justice from a one-sided judicial perspective that is out of touch with real life.

which each of the lay judges has to act in a special court session is decided by lot. See id.

26. However, three, instead of only two, professional judges are involved when this court decides on very serious cases; see § 76 Abs. 2 GVG (F.R.G.).
27. See § 263 Abs. 1 StPO (F.R.G.) (“Zu jeder dem Angeklagten nachteiligen Entscheidung über die Schuldfrage und die Rechtsfolgen der Tat ist eine Mehrheit von zwei Dritteln der Stimmen erforderlich.”).
[Second,] there are, *inter alia*, the following reasons why the judgment is not completely left up to non-professional judges, but requires cooperation with professional judges in Germany. On the one hand, lay judges lack legal knowledge. On the other hand, they are less immune to irrelevant consideration and influence than professional judges, who are capable of a higher degree of objectivity due to their professional training.

3. Consequences of this System of Mixed Courts

The public prosecutor’s office has the right to appeal acquittals by the trial courts; the same is valid for convictions if they are [deemed] too lenient by the prosecutor.28

In all criminal cases decided by the lower district court, the appeal of “re-trial on appellate level” (appeal of fact and law), whether filed by the convict, or by the prosecutor, is admissible. The latter can appeal to the disadvantage of the convict[ed], but [can] also [appeal] to his favor, (i.e., with the intention of an acquittal or a more lenient sentence, which occurs occasionally.) A higher district court, more exactly, a bench of three judges (one professional and two lay judges), decides on the appeal of “re-trial on appellate level.” This means that even if a convict was sentenced by a professional judge sitting alone without lay judges, he can reach the involvement of lay judges by appealing to the court of second instance.29

4. Professional Judges as Appointed (Non-Elected) Judges

In Germany, professional judges are never elected; they are appointed for a lifetime. This establishes greater economic independence and exempts them from the necessity [of] campaign[ing].

IV. CHARACTERISTIC FEATURES OF THE MAIN TRIAL (THE TRIAL OF INDICTMENT)

A. Admission of the Indictment by the Trial Court

In Germany, it is not a grand jury or a magistrate judge that

28. § 296 Abs. 1 StPO (F.R.G.) (“Die zulässigen Rechtsmittel gegen gerichtliche Entscheidungen stehen sowohl der Staatsanwaltschaft als dem Beschuldigten zu;” § 296 Abs. 2 StPO (F.R.G.) (“Die Staatsanwaltschaft kann von ihnen auch zugunsten des Beschuldigten Gebrauch machen.”).

29. See §§ 296, 312 StPO (F.R.G.); see also § 76 Abs. 1 GVG (F.R.G.).
decides the admission of a charge, [rather] the trial court (court of first instance) [makes the decision, but] always without the involvement of lay judges.

B. Main Trial

1. The Non-Adversarial German Criminal Trial and the Taking of Evidence by the Court *Ex Officio*\(^{30}\)

   It is characteristic of continental (European) criminal procedure [for] the presiding judge [to] carry out the evidence-taking in the main trial, not the public prosecutor or the defendant. The German criminal trial is shaped by this principle of ascertainment of the truth through judicial inquiry *ex officio*.\(^{31}\) Therefore, there exists no cross-examination in [German] criminal trial practice.\(^{32}\) Nevertheless, the prosecutor and the defense counsel are not condemned to passiveness. They can call for evidence, which can only be refused if the Criminal Procedure Code provides an explicit reason therefor. Examples of such causes for statutory refusal are:\(^{33}\)

   1) Inadmissibility of the evidence-taking (i.e., reading an intimate diary [out loud] when the charge is perjury and not a capital crime (principle of proportionality)).

   2) Unfitness of the means of evidence (i.e., the defense counsel names a witness, who was completely drunk at the time in question, as proof of a complicated course of an accident).

\(^{30}\) See § 244 Abs. 2 StPO (F.R.G.) ("Das Gericht hat zur Erforschung der Wahrheit die Beweisaufnahme von Amts wegen auf alle Tatsachen und Beweismittel zu erstrecken, die für die Entscheidung von Bedeutung sind.").

\(^{31}\) See *id.*

\(^{32}\) See § 239 StPO (F.R.G.), which allows cross-examination; however, this rule has no importance in everyday practice.

\(^{33}\) See § 244 Abs. 3 StPO (F.R.G.), which provides:


*Id.*
3) Unattainability of the evidence (i.e., an undercover agent is concealed by the police).

4) Intention to delay the proceedings (however, the courts of appeal impose on the trial courts very strict requirements for [a] presumption of this intention).\(^{34}\)

Motions to take evidence by defense counsel are common in German criminal proceedings and often result in massive trial protraction. [In addition to] the prosecution, the defense counsel and the defendant may question the witnesses and experts, which occurs very frequently.

From my point of view, the following reasons speak for the court's carrying out of the evidence-taking and against an adversarial trial within criminal proceedings. The attorney for the prosecution lacks the necessary independence for carrying out the taking of evidence; as [a] civil servant, [a] prosecutor [is] subject to directives. Contrary thereto, German judges are independent. In addition, the prosecuting attorney lacks the unbiased neutrality of a judge. Incidentally, in the adversarial process, the defendant depends too much on the quality of his defense counsel [and] not every citizen can afford a good defense counsel. The justified interests of the defendant and his counsel are safeguarded in the trial of indictment through the above-mentioned extensive right of motion to take evidence as well as through [the] rights to question and to declare.

2. An Exemplary Restriction on the Principle of Immediacy for Evidence-Taking: the "Witness from Hearsay"

In the continental (European) context, in Germany, the principle of immediacy is very distinct [in that there is an important difference from the United States' approach to] witness evidence. The German Criminal Procedure Code permits the so-called "witness from hearsay." It is also legal to read [aloud] records of pretrial interrogations during the trial if the witness is dead or otherwise unreachable (documentary evidence). However, the conclusive force of these methods of proof is not very strong.\(^{35}\)

---

\(^{34}\) Lutz Meyer-Gobner, Strafprozeßordnung 44 (sidenotes 67–69) (Theodor Kleinknecht & Karlheinz Meyer eds., 1999) (commentary on § 244 StPO (F.R.G.)).

\(^{35}\) For examples of the in-court utilization of undercover agent testimony by means
Example: Laurie was on trial for murdering her husband, Stanley, when the prosecution called Yxta, a nurse, as a witness. Yxta claimed Stanley told her just before he died, “Laurie poisoned me.” The judge [admitted] the statement as evidence. Laurie was convicted, based, inter alia, on Yxta’s testimony. This “classic” hearsay evidence was legal. However, because of the weak conclusiveness of the “witness from hearsay” the court needs further circumstantial evidence (like motive and no alibi) for a conviction.

From my point of view, the “witness from hearsay” as a means of evidence is no more questionable than proof [offered] by a star prosecution witness (state’s evidence). As far as I am concerned, and after my experience as judge, the above-mentioned exception to the principle of immediacy seems necessary for the protection of witnesses and for the efficiency of criminal prosecution. Additionally, this method does not affect the fair-trial principle because of its weak conclusiveness.

V. CLOSING WORDS

In criminal proceedings, the most important principle is the rule of law. Insofar, [Germany and the United States] are alike. Concerning details, there are a lot of differences between the [two countries]. It was a great pleasure for me to talk about some of these differences to you today. Thank you very much for your attention.
