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Germany: National Report on The Protection of Fundamental Human Rights in Criminal Process

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1. INTRODUCTION

Germany claims to be a state based on the rule of law (*Rechtsstaat*), and to a large extent that claim holds true even in the face of a perceived threat of organised crime, terrorism and other modern forms of criminality challenging the traditional ways of applying criminal justice. Germany still adheres to the inquisitorial principle, which places on agencies of the state (public prosecutor and judiciary) the obligation to investigate and adjudicate crime. But that principle does not turn the defendant into a mere object of a state-run process. On the contrary, the defendant is afforded a broad array of active and passive rights in the process, including the right to remain silent and the right to demand the court to hear additional evidence.

Fundamental rights are listed in the German constitution, and the legislature, the executive and the courts are bound to respect them. The Federal Constitutional Court was created after the Second World War to watch over the integrity of the constitution, and that court has taken its mandate very seriously. Although recent legislation has expanded state authority, especially in the area of secret investigations, one can say that Germany has not fallen into the trap of giving up human rights standards when faced with new forms of criminality.

2. BASIC LEGAL BACKGROUND

The German constitution, the Basic Law of May 23, 1949, guarantees a substantial number of fundamental human rights. Art. 1 (3) Basic Law provides that these fundamental rights are directly binding upon the legislature, the executive power and the courts. The courts are thus obliged to apply fundamental rights *ex officio*; no judgment may violate fundamental rights. Anyone who feels that his fundamental rights have been violated by the executive or

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the judiciary can bring a complaint to the Federal Constitutional Court after having exhausted other available legal remedies.

The Basic Law provides for several rights specifically applicable in the context of criminal process. These include the rights to life, physical integrity and freedom of movement (Art. 2 (2) Basic Law), the inviolability of the secrecy of the mail and of telecommunication (Art. 10 (1) Basic Law), the inviolability of the home (Art. 13 (1) Basic Law), the right of German citizens not to be extradited to a foreign country (Art. 16 (2) Basic Law), the prohibition of instituting *ad hoc* courts and the right of any defendant to be adjudicated by a judge previously determined by law (Art. 101 (1) Basic Law), the right to be heard in court (Art. 103 (1) Basic Law), the principle of legality including the prohibition of *ex post facto* criminal laws (Art. 103 (2) Basic Law), the principle *ne bis in idem* (Art. 103 (3) Basic Law) and the prohibition of detaining a person without judicial warrant for longer than the end of the day following arrest (Art. 104 (3) Basic Law). It should be noted that several recognized procedural rights, e.g., the presumption of innocence, the right to a fair trial and the privilege against self-incrimination, are not specifically mentioned in the German constitution. The Federal Constitutional Court has however found these principles to be inherent in the guarantee of a state based on the rule of law (*Rechtsstaatlichkeit*; cf. Art. 20 (3), 28 (1) Basic Law). These principles are thus constitutionally guaranteed.

To some extent, German procedural law has been influenced by international legal instruments. Germany adopted and ratified the European Convention on Human Rights and Fundamental Freedoms[2] with Protocols No. 1, 4, 6[3], 9[4], 11 and 13. Germany recognizes the right under Art. 34 ECHR to file an individual complaint with the European Court of Human Rights, claiming that an agent of the state has violated a right guaranteed by the ECHR. Domestic remedies must first have been exhausted, however (Art 35 (1) ECHR).

In 1973, Germany also ratified the International Covenant on Civil and Political Rights with Facultative Protocols No. 1 and 2, the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (ratified in 1990) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ratified in 1989).

[2] Germany made a reservation as to Art. 7 (2) ECHR (principle of legality).
[3] Germany declared that in its opinion it had already fulfilled the obligation to abolish the death penalty in its criminal law by introducing Art. 102 Basic Law.
[4] With three interpretative declarations.

These treaties have been transformed by statute into (Federal) national law. They do not have constitutional rank, but courts are to apply the transformed treaties with the principle in mind that Germany's legal order is "international law friendly", i.e., that violations of international obligations are to be avoided.[5]

Criminal process in Germany is regulated by statute. The main legal instrument governing the criminal process is the Code of Criminal Procedure (*Strafprozessordnung – StPO*) which originates from 1877 but has since been amended numerous times. Some aspects of the criminal process are covered by the Court Organisation Act (*Gerichtsverfassungsgesetz – GVG*), also from 1877.

3. PARTICIPANTS IN CRIMINAL PROCESS

A. Judiciary

Professional judges must have studied law in a recognized law school for at least eight semesters and then have undergone a practical internship of two years. At the end of their law studies and again at the end of the internship, young lawyers must pass comprehensive written and oral exams that cover many areas of the law. After the second exam, a young lawyer can immediately be hired by the State to work as a judge, usually in a chamber together with other more experienced judges, thus learning "on the job", but with full formal judicial authority from the first day. In the course of their judicial career, judges can be promoted to the position of presiding judge and/or to serving on a higher court. All appointments and advancements are decided by the Minster of Justice, in some States, on advice of a judicial council elected by the judges of the State.[6]

According to Art. 97 Basic Law, judges are independent and serve only the law. No one (not even the Minister of Justice) is allowed to interfere with any judge's decision-making. A judge obtains life tenure after a 2 or 3 year probationary period. A judge with life tenure cannot be removed from office, involuntarily retired or moved to a different court except on the basis of disciplinary proceedings for violation of his duties (Art. 97 (2) Basic Law). The president of the court can only monitor whether judges adhere to the formal requirements of performing their functions and whether they deal with matters at adequate speed (§ 26 (2)

[5] See *Entscheidungen des Bundesverfassungerichts* (BVerfGE) 111, 307, 329 (2004).
[6] Germany is a Federal state, comprised of 16 separate states (*Länder*).

German Judges' Law (*Deutsches Richtergesetz* - DRiG). For most judges, disciplinary sanctions and proceedings are regulated by State laws.[7] Typically, disciplinary law for judges mirrors the respective norms for civil servants. In the State of Northrhine-Westphalia, for example, judges can be sanctioned by warning, reprimand, fines, reduction of salary, demotion to a lesser-paid judicial function, dismissal from office, reduction of pension, and loss of pension (§ 48 Judges' Law North Rhine-Westphalia). German judges are reasonably well paid.

In order to protect the neutrality of the judiciary, a judge is excluded by law from dealing with a criminal case if he has been a victim of the offence or is married or related to a victim, if he is married or related to the defendant, if he has dealt with the case as a prosecutor, police officer, defence lawyer or lawyer of a victim, or if he has testified in the case as a witness or expert witness (§ 22 StPO). An appeals judge must also recuse himself if he has participated in making the decision under appeal. A judge will further be excluded from adjudicating a case if there are grounds that justify doubts as to his impartiality (§ 24 (2) StPO). In the latter case, recusal requires an application by a party or by the judge himself and a decision of the court (§§ 24 (3), 30 StPO). Acting as a judge during pre-trial proceedings is not, as such, a grounds for recusal as a trial judge. Only if the judge has acted in a way which raises doubts as to his impartiality will he be recused.

The tribunal in the most serious criminal cases[8] consists of three professional judges and two lay judges. In cases of average seriousness, one professional judge sits together with two laymen. Petty cases are adjudicated by one professional judge sitting alone. Professional and lay judges decide together on the defendant's guilt as well as on the sentence.

Lay judges are selected in a complicated procedure. The city or community council sets up, by vote, a list of persons fit to serve, often based on volunteering or personal acquaintance of council members. From that list, lay judges are elected for 5 years by a special commission headed by a judge of the local court. Allocation of individual lay judges to court panels is then done by lot.

[7] Only the judges of the highest courts are Federal judges.

[8] Certain cases involving the security of the state, including trials for belonging to terrorist organisations, belong to the first-instance jurisdiction of the Court of Appeal. The State Court of Appeal adjudicates first instance criminal matters relating to the security of the state; this includes the offence of forming or being a member of a terrorist organisation (§ 120 (1) GVG). The Court of Appeal sits with three professional judges, in especially complicated matters with five professional judges (§ 122 (2) GVG).

B. Prosecution

Both the judiciary and the prosecutor are part of the administration of justice, which is formally headed by the Minister of Justice. He is politically responsible for decisions of prosecutors and can be called to account for them in parliament. Since Germany is a Federal state, the 16 States (*Länder*) are responsible for most aspects of the administration of justice. It is hence the State Minister of Justice who oversees prosecutorial policy. There is also a Federal prosecutor general (*Generalbundesanwalt*), who is subject to supervision by the Federal Minister of Justice.

The prosecution service is hierarchically organized. Below the Minister of Justice, there is the office of Attorney General (*Generalstaatsanwalt*), one at the seat of each Court of Appeal. The Attorney General represents the prosecution at the level of the Court of Appeal, mostly in appeals cases, and he also supervises the activities of his district's public prosecutor's offices. There is one public prosecutor's office at each district court (*Landgericht*). Each public prosecutor's office is headed by a senior prosecutor (*Leitender Oberstaatsanwalt*).

Prosecutors have the same professional qualification as judges. In some States, most state legal officers in the course of their career work for some time as prosecutors and for some time as judges. In other States, prosecutors start out at the prosecutor's office and never work as a judge.

Regulations for the Criminal Process (*Richtlinien für das Strafverfahren und das Bußgeldverfahren*) give prosecutors legal, practical and ethical guidance as to how to conduct the pre-trial investigation and prosecution. These regulations are based on an agreement among all State Ministers of Justice. The Regulations are not externally binding law; their violation can only lead to disciplinary measures against prosecutors.

There is a register of prosecutorial decisions, which contains each opened investigation and the disposition it has been given (§ 492 StPO). This register is for the internal use of courts and prosecutor's offices only. There is no systematic external monitoring of prosecutorial decision-making.

C. Police

The police are organisationally independent of the prosecutor's office. They are accountable to the Ministry of the Interior of the relevant State or, in the case of the Federal Police (*Bundespolizei*), to the Federal Ministry of the Interior. In criminal procedural matters, however, the public prosecutor can request the assistance of the police in any investigation (§ 161 (2) StPO). Many police officers have the special function of "investigative staff" (*Ermittlungspersonen*) of the prosecutor, which gives them special authority to order certain invasive measures in exigent situations, e.g., to order a search on the spot (§ 105 (1) StPO). The police also have authority to lead the "first attack" when a crime has been reported or discovered; they are required to take all measures immediately necessary to prevent loss of, or tampering with, evidence (§ 163 (1) StPO). After this first phase of securing evidence, the law expects the police to turn the matter over to the prosecutor and to await his further instructions (§ 163 (2) StPO). In practice, however, the police investigate routine cases on their own and inform the prosecutor only when they deem the case "cleared" or see no basis for further investigation. It is then for the prosecutor to decide – if necessary, after having sent the case back to the police for further investigation – whether a formal accusation will be filed. The police can neither dismiss a case nor file an accusation with the court.

Tax offices have special investigators authorized to investigate cases of possible tax fraud. These investigators also are "investigative staff" of the public prosecutor.

D. Defence

Every suspect and defendant has the right to avail himself of the services of counsel at any time, even before the beginning of a formal investigation (§ 137 (1) StPO).

Defence lawyers have the same formal qualification as judges or prosecutors. Any lawyer admitted to the bar as well as any law professor at a university can act as a defence lawyer (§ 138 StPO). There is no distinction between lawyers who have a right of audience and other lawyers. Some lawyers specialize in criminal defence work, and there are formal specialization courses that lead to a formal designation as a criminal lawyer (*Fachanwalt für Strafrecht*).

All lawyers admitted to practice must be members of the lawyers' association (*Anwaltskammer*). There is no special association for criminal lawyers. There is a Code of

Conduct for all lawyers[9] but no special Code for defence lawyers. Sanctions for misconduct are a caution, a reprimand, a fine with a maximum of € 25,000, suspension from acting as a lawyer in certain areas of the law for 1 to 5 years, and exclusion from the bar (§ 114 Federal Lawyers' Statute – *Bundesrechtsanwaltsordnung*).

The defence lawyer is both an organ of justice (*Organ der Rechtspflege*) and a partisan advocate of his client. His main loyalty is with his client but he must not actively interfere with the course of justice. In criminal matters, the lawyer is not the representative of his client in court but his advocate. His main role is to be the guardian of the presumption of innocence. Unless the client wishes to confess and cooperate with the prosecution, the lawyer's task is to maintain or create doubt about the client's criminal responsibility and to make sure that all rules of fair trial are observed. In today's system of "plea bargaining", the lawyer must strenuously represent the client's interest and try to obtain the lowest possible sentence for him.

The defence lawyer has certain rights of his own at the trial, but critical decisions have to be made by the defendant. Since it is the court's responsibility to gather all necessary evidence, the defence lawyer does not have a procedural duty to collect and introduce evidence at the trial. But since the lawyer owes his client zealous advocacy and an active representation of his interest throughout the process he may be obliged to actively search for exonerating evidence.

Germany does not have a public defender's office. If the case is difficult or the defendant is clearly unable to conduct his own defence the presiding judge appoints a private attorney for him. There is no legal aid system in Germany, but if the defendant is indigent the state will pay his appointed lawyer's fee. Although the presiding judge usually appoints a lawyer only after a formal accusation has been filed, the suspect has a right to be represented by a lawyer even before trial.

4. RULES OF CRIMINAL PROCESS

A. Criminal Investigation and Prosecution

[9] *Berufsordnung der Rechtsanwälte* (2003).

The public prosecutor has sole responsibility for pre-trial investigation.[10] An investigation can be initiated when the prosecutor or the police have "sufficient factual grounds" to think that an offence has been committed (§ 152 (2) StPO). Proactive criminal investigations without a suspicion are not permissible. But the threshold of "suspicion" is fairly low. There need not be a grave or individualized suspicion. It is sufficient that the prosecutor or police think that an offence has been attempted. With respect to serious offences (*Verbrechen*, which carry a minimum penalty of one year imprisonment), according to § 30 Penal Code (*Strafgesetzbuch – StGB*) even a conspiracy to commit the crime is a criminal offence and would permit initiation of an investigation. There are also criminal provisions concerning criminal and terrorist groups (§§ 129, 129a StGB), where mere membership of such group is a criminal offence. Such broad criminal provisions make it possible to open an investigation even before another offence has been committed. It should also be noted that the police have special powers, under State police laws, to take measures to *prevent* crime. These powers often go hand in hand with the authority to investigate past crime, and police officers can, in practice, combine both powers to deal with situations where a crime may be imminent or already on its way. In practice, the great majority of criminal investigations are started on the basis of a complaint by a victim or witness.

The police may generally interfere with citizens' rights only on the basis of express authorization by law. For measures that do not seriously involve fundamental rights (e.g., a short-term observation of a citizen in public), § 163 (1) 2nd sentence StPO provides a general authorization; according to that provision, the police can in the course of a criminal investigation take measures of any kind to the extent that there is no special regulation of the matter. There has been some debate as to whether police officers can rely on the "normal" rights of self-defence and defence of others. The better view is that a police officer, when attacked, can defend himself like any other citizen, but that he can only rely on special police law when coming to the aid of a citizen who is being attacked.

If the prosecutor wishes to use invasive methods for investigation (arrest, searches, seizures, wiretapping etc.) he has to apply to a judge of the local court, who then decides on the prosecutor's application. Only if exigent circumstances exist can the prosecutor perform invasive acts of investigation without judicial authorization; in that case, the suspect or

[10] Germany abolished the office of investigative judge in 1975.

another person affected can subsequently ask the judge for a determination of the lawfulness of the measure. The prosecutor can also request the judge of the local court to conduct interrogations (§ 162 StPO).

The prosecutor is responsible for gathering both incriminating and exonerating evidence (§ 160 StPO). If he determines, after the investigation has been concluded, that there is sufficient evidence for conviction, he is obliged to file a formal accusation with the trial court (§ 170 (1) StPO). The trial court (sitting without lay judges) decides whether there is sufficient cause to bind the defendant over for trial. "Sufficient cause" exists when it is probable that, based on the evidence available to the prosecutor, the suspect will be convicted at trial.

The Code of Criminal Procedure provides for several exceptions to the so-called procedural principle of legality obliging the prosecutor to file an accusation whenever there is sufficient evidence. For example, in less serious cases (*Vergehen*, offences with a minimum penalty of less than one year imprisonment), the prosecutor can dismiss the case whenever the suspect's guilt is regarded as minor and there is no public interest in prosecution (§ 153 StPO). The prosecutor can likewise dismiss a case when the offence was committed abroad (§ 153c StPO). If there is some public interest in prosecution but no grave guilt on the part of the suspect, the prosecutor can agree to dismiss the case in exchange for a payment or some public service provided by the suspect (§ 153a StPO). In that case, the presumption of innocence remains intact and the suspect need not formally confess to the offence. The amount of the payment or other service is subject to negotiation between the prosecutor and the suspect or his attorney. The "settlement" needs the consent of the trial court except in petty cases.

If the victim of a crime has filed a complaint and the prosecutor dismisses the case for lack of sufficient suspicion (§ 170 (2) StPO), the victim can appeal that decision to the Attorney General.[11] If the Attorney General confirms the lower prosecutor's decision the victim can then file an application to the Court of Appeal, requesting the Court to order the prosecutor to file a formal accusation. Victim' petitions to the Court rarely succeed.

With respect to some minor offences (e.g., simple assault, trespass, destruction of property), the private victim can file a criminal complaint with the local court and act as a prosecutor

[11] The victim has no right to appeal when the prosecutor has dismissed a case on discretionary grounds according to §§ 153 *et seq.* StPO.

(§ 374 StPO). The public prosecutor can however take over such cases at any time (§ 377 (2) StPO). Private prosecution has become very rare in Germany. Victims of certain crimes against the person (e.g., attempted murder, sexual offences, assault) can join the prosecution when a formal accusation has been filed. They have far-reaching independent rights at the trial and can also independently appeal against an acquittal (§§ 395, 397, 400 StPO).

B. Interrogation and Right to Silence

A suspect must be interrogated at least once before a formal accusation (*Anklage*) is filed (§ 163a (1) StPO). Before his first interrogation, the suspect is to be informed of what act he is suspected of having committed and what criminal laws that act has violated (§ 136 (1) StPO). A suspect must also be informed of his right to remain silent and of his right to consult with a lawyer before questioning. This right applies regardless of the person who conducts that interrogation (police, prosecutor or judge). If the suspect had not been informed of his rights and made a statement, that statement is inadmissible if the defendant's lawyer objects to its introduction at the trial.

A suspect has the right to remain silent except for the giving of his name, date of birth and address. The right to silence extends to nonverbal activities, such as giving a handwriting sample or even a breath sample.

It is not permissible to draw adverse inferences from the defendant's refusal to make a statement, or from the timing of any statement he chooses to make. For example, the fact that the defendant raises a point in his favour only at the trial cannot be used to question the credibility of that statement.

C. Trial and the Role of the Court

At least in theory, the *locus* of fact-finding is the trial. The trial court can base the judgment only on facts and evidence presented and discussed at the trial, and the results of pre-trial proceedings cannot, as a rule, be introduced at the trial by simply reading a transcript of pre-trial proceedings. There are several exceptions to this rule, however, and, in practice, the pre-trial process is of great significance for the fact-finding at the trial. The main link is

the prosecutor's dossier of the pre-trial investigation. This dossier, which contains all evidence taken before trial, is sent to the court before trial and read by at least some of the trial judges (usually, the presiding judge and one other professional judge, but not by lay judges). Its contents, though inadmissible as such, thus informs the court's preconception of the issues at trial.

It is the court's duty to determine the truth to the extent that it is relevant for the case, and the presiding judge has full responsibility for gathering all – incriminating as well as exonerating – evidence (§ 244 (2) StPO). The judges thus play an active role during the trial. It is the presiding judge who introduces and examines evidence at the trial, based on information he has taken from the prosecutor's dossier. The defendant (if he wishes to make a statement), witnesses and experts are first interrogated by the presiding judge, subsequently other judges and the parties can ask additional questions of witnesses (§§ 238 (1), 240 StPO).

The presiding judge is at the same time responsible for keeping order in the courtroom and for conducting proceedings in accordance with the applicable law.

The defence can, at any time, petition the court to hear additional witnesses, and the court can refuse to follow such a request only if the evidence would be clearly irrelevant or redundant (§ 244 (3) StPO).

D. Evidence

The general principle guiding German evidence law is the goal of finding "the truth" about the case before the court. There are therefore only a few general rules restricting the ability of the court to take evidence. One such rule is the limitation of possible evidence to four sources, namely witnesses, experts, documents, and real objects. There are a few rules excluding certain evidence, for example statements obtained through physical force, deceit, or threats (§ 136a (3) StPO), but courts have not recognized a general rule that illegally obtained evidence be inadmissible.[12]

Witnesses must normally give their name and address when testifying in court. If by identifying, the witness would put his or someone else's life, health or freedom at risk, the court can permit him to withhold his name and address (§ 68 (3) StPO). When a witness

[12] See 4 E. infra.

feels threatened in his health or well-being by the presence of the defendant during his testimony, the court can make the defendant wait outside the courtroom while the witness testifies (§ 247 StPO). Threatened or vulnerable witnesses can be interrogated by a delegated judge of the court at a place outside the courthouse (§ 223 StPO). They can also be interrogated by video conference while situated at a location that can remain secret (§ 247a StPO). According to one view, they can also change their appearance and use a device that changes their voice.

Hearsay testimony is generally allowed, subject to the court's general duty to seek the truth. If the chief of an administrative agency has decided that making a person's name known would jeopardize important state interests (see (3) (d) (bb) supra), a hearsay witness will often report information stemming from that anonymous witness. The court can admit such evidence if the administrator plausibly explains the reasons for his decision not to make the name known. Anonymous hearsay testimony must not be the sole basis for the defendant's conviction.

The court only hears legally admissible evidence. If it later turns out that a piece of evidence that the court has heard or seen is inadmissible, the court will disregard that piece of evidence in arriving at the judgment. Evidence obtained abroad is admissible if the circumstances under which it was obtained are in keeping with the principles of German law.

E. Appeals

German law distinguishes between appeals for trial *de novo* (*Berufung*, §§ 312 et seq. StPO) and appeals because of misapplication of the law (*Revision*, §§ 333 et seq. StPO). *Berufung* lies against first-instance judgments of the local court (*Amtsgericht*). All other judgments can be appealed only by *Revision*. On *Berufung*, the second-instance court (*Landgericht*) holds a new trial and hears witnesses again, if necessary. On *Revision*, the second-instance court does not hear evidence but only examines the protocol of the first-instance trial and the judgment of the first-instance court for possible violations of substantive or procedural law. If such violations are found, the higher court will usually reverse the judgment and order a new trial.

Both the prosecution and the defence can file *Berufung* against a first-instance judgment of the *Amtsgericht*, and ask for a trial *de novo*. The defence can however not file *Berufung* when the defendant has been acquitted.

The prosecution, as well as the defence, can apply for *Revision*. If the prosecution applies for *Revision* against an acquittal, the court of appeals can overturn the acquittal and order a new trial. The prosecutor can also apply for *Revision* in favour of the defendant (§ 296 (2) StPO). If *Revision* has been filed only in favour of the defendant, the court of appeals, and any court to which the case has been referred for a new trial, is precluded from increasing the sentence imposed by the former trial court (prohibition of *reformatio in peius*, § 358 (2) StPO).

When a judgment has become final because no appeal was filed within the required time period, the defence can demand retrial if a basic prerequisite of a fair trial, as enumerated in the Code, had been missing (e.g., the judge had been bribed or a witness had committed perjury – see § 359 no. 1-3 StPO)[13] or if new evidence has been discovered which is likely to lead to an acquittal or to the application of a norm providing for more lenient punishment (§ 359 no. 5 StPO).

Any person who feels that his constitutional rights have been violated by a court can, after exhausting regular appeals, bring a constitutional complaint to the Federal Constitutional Court (Art. 93 (1) no. 4a Basic Law). If the Constitutional Court finds the complaint to be well-founded, it overturns the court's judgment as unconstitutional and refers the case back to that court.

5. HUMAN RIGHTS IN CRIMINAL PROCESS

A. General rights

The German Basic Law of 1949 guarantees a number of fundamental human rights relevant to criminal justice. The constitution abolished the **death penalty** (Art. 102 Basic Law), and there is no movement toward re-introducing it. According to the majority position, it would indeed be impossible to re-introduce the death penalty because it violates human dignity,

[13] Under these conditions, the prosecution can also demand retrial of a defendant who has been acquitted. The same is possible if the defendant, after the first trial, has publicly and credibly confessed to the crime (§ 362 StPO).

and even an amendment to the Basic Law cannot abrogate the protection of human dignity (Art 79 (3) in connection with Art. 1 Basic Law).

The **right to life** is protected by Art. 2 (2) Basic Law. According to the majority position, recognition of the right to life imposes a positive obligation upon the state to protect citizens' lives, including unborn lives. The Federal Constitutional Court has ruled that the state therefore cannot totally decriminalize abortion, even during the first trimester of pregnancy.[14] Under State police law, the police are obliged to protect human life from imminent harm.

There is no constitutional provision explicitly prohibiting **torture** and cruel treatment. But torture is regarded as a violation of human dignity; its prohibition is thus covered by the general rule that human dignity is inviolable and must be respected and protected by all branches of government (Art. 1 (1) Basic Law). Exceptions have been discussed only for extreme cases (such as the "ticking bomb" scenario with thousands of potential victims). The Federal Constitutional Court has held that human dignity even precludes state agents from shooting down a passenger airplane abducted by terrorists and aimed at innocent persons on the ground.[15]

There are no special rules concerning a positive duty to start criminal proceedings for torture or cruel treatment. In most cases, persons using torture will be criminally liable for assault (§ 223 StGB), coercion (§ 240 StGB) and/or extortion of a statement (§ 343 StGB), and the public prosecutor will be obliged to initiate a prosecution under the "legality principle" of §§ 152 (2), 170 (1) StPO.[16]

The police and prosecution staff are specifically prohibited from interfering with an interrogated person's freedom of will by, *inter alia*, physical abuse, fatigue, torment, or coercion not authorized by law (§ 136a (1) StPO). Statements obtained after such prohibited means have been employed are inadmissible as evidence, even if the interrogated person consents to their use. Suspects must be informed, at the beginning of any interrogation, of the offence they are suspected of and of their right to remain silent (§ 136 (1) StPO).

[14] See *Entscheidungen des Bundesverfassungerichts* (BVerfGE) 39, 1 (1975).
[15] BVerfGE 115, 118 (2006).
[16] It is difficult to imagine a case in which there would be no "public interest" in prosecuting torture cases.

Suspects who do not speak sufficient German have a right to an **interpreter** to the extent that an interpreter is necessary to enable them to make use of their procedural rights (§ 187 (1) GVG). This includes conversations between a suspect and his defence lawyer. The interpreter must be provided free of charge.

A suspect can avail himself of the services of a **defence lawyer** at any time (§ 137 (1) StPO). This includes the situation of an interrogation by police, a prosecutor or a judge. At the beginning of any interrogation, a suspect must be informed of his right to consult with a lawyer (§ 136 (1) StPO). According to the majority position, the defence lawyer has a right to be present at an interrogation only if the suspect is interrogated by a prosecutor or a judge (§§ 168c (1), 163a (3) StPO), not during a police interrogation.

Audio or video **taping of interrogations** is not obligatory and is indeed not practiced in routine cases.

B. Arrest and pre-trial detention

The police can arrest a suspect and hold him until the end of the day following the arrest (§ 128 (1) StPO). The maximum time thus depends on the hour at which the arrest was made. The maximum is 48 hours and 59 minutes. Within that time period, the police decide whether and when to release the suspect. An arrest is permissible at the same level of suspicion as pre-trial detention, i.e., an urgent suspicion that the suspect committed an offence (§ 127 (2) StPO).

When the police decide not to release the suspect they must bring him before a judge to determine whether pre-trial detention is necessary. At the hearing before the judge, the suspect must be informed of the facts that tend to incriminate him. He must also be informed of his right to remain silent, and he must be given an opportunity to point out facts that speak in his favour (§ 115 (3) StPO). He must further be informed of his right to file an appeal. Foreign suspects can demand an interpreter.

Pre-trial detention of a suspect is permissible under the following conditions. First, there must be a strong suspicion of criminal wrongdoing; second, the suspect must have absconded, there must be a risk of flight, or there must be a risk that he would illegally destroy or tamper with evidence (including witnesses) if left at large (§ 112 (2) StPO). Pre-trial detention of a suspect is also permissible if he is suspected of a particularly serious

crime listed in the statute, e.g., murder or aggravated arson (§ 112 (3) StPO), or if detention is necessary to prevent the suspect from committing further offences of the same kind as those of which he is suspected (§ 112a StPO).[17] Pre-trial detention must in any event be authorized by a judge (§ 114 (1) StPO). The judge must inform a relative of the suspect, and the suspect may himself inform a person (§ 114b StPO). During pre-trial detention, the suspect may be subjected only to such restrictions as are necessary to fulfil the purpose of detention, i.e., to prevent him from interfering with the criminal process and to maintain order in the place of detention (§ 119 (3) StPO). The suspect is not to be detained together with other persons unless he so requests (§ 119 (2) StPO). Regulations as to the censorship of mail and visiting rights can only be imposed by a judge. Most places of detention have general judge-made rules on this. The suspect's right to counsel is not affected by the fact that he is in detention (§ 148 (1) StPO). His lawyer must be granted access at any reasonable time, and neither conversation nor correspondence between the suspect and his counsel must be monitored. Special rules apply to persons suspected of belonging to a terrorist group (§ 129a StGB). Although these detainees still have a right to converse with their lawyers without supervision, objects can be passed between lawyer and client only after inspection (§ 148 (2) StPO).

Pre-trial detention ordered by a judge can last for six months. It can be extended beyond that period if the case is especially difficult or extensive, or if another important reason precludes holding a trial. An extension beyond six months can only be ordered by the Court of Appeal (§§ 121, 122 StPO). The judge must terminate the pre-trial detention order when its prerequisites no longer apply, especially when there is no longer an urgent suspicion against the detainee, or when detention has become disproportionate with the gravity of the charges. At any time before trial, the public prosecutor can demand the release of the suspect, and the judge must then order his release (§ 120 (3) StPO).

There is no bail system as such, but pre-trial detention can be suspended if less onerous conditions are sufficient to guarantee the suspect's presence at trial. Among these conditions, the Code lists an adequate financial surety offered by the suspect or a third person (§ 116 (1) no. 4 StPO).

[17] These grounds for pre-trial detention only apply to certain offences listed in the statute, e.g., sexual offences, aggravated larceny, robbery, and drug offences.

The detainee can appeal (by *Beschwerde*) the judge's detention order to the district court. He can also at any time apply for a review of the detention order to the judge who had issued it (*Haftprüfung*, § 117 StPO). He has a right to an oral hearing before the judge, but only every two months after a decision upholding pre-trial detention (§ 118 (3) StPO). After six months of pre-trial detention, the issue must be submitted to the Court of Appeal for a determination of the exceptional need to extend pre-trial determination.

A detainee can complain to the judge about the conditions of detention. If the judge does not grant relief he has a right to appeal (*Beschwerde*) to the district court (§ 304 StPO).

Breaches of pre-trial detention law can be raised at trial but will rarely have an impact on the judgment. But if a suspect was wrongfully detained and made a statement during detention this statement will be inadmissible as evidence.

C. Fair Trial

a. Trial practice in general

When the pre-trial investigation has been completed and the prosecutor does not dismiss the case, he files a formal accusation with the competent court. The defendant receives a copy of that accusation (§ 201 StPO). The formal accusation contains the following information: the criminal act including the time and location, the legal elements of the applicable criminal norm, the proposed evidence and the main results of the pre-trial investigation (§ 200 StPO). The accusation becomes definite when it has been accepted by the trial court; the prosecutor can not then withdraw the accusation (§ 156 StPO). The court is, however, not bound by the legal qualification of the facts presented by the prosecutor (§ 206 StPO). Even during the trial, the court can determine that norms other than those listed in the formal accusation may be applicable. The court must inform the parties thereof and give them an opportunity to be heard on this issue (§ 265 StPO).

When a formal accusation has been filed with the competent court, the court decides whether there is sufficient cause to hold a trial. The defendant can (but in practice rarely does) offer evidence to the court at that stage, and the court usually decides in a written proceeding without an oral hearing. The defendant cannot appeal the court's decision to

open a trial. If the court finds that there is not sufficient cause to hold a trial and dismisses the case, only the prosecutor has a right to appeal (§ 210 (2) StPO).

If the court admits the case for trial, it summons the defendant not later than one week before the trial starts (§ 217 (1) StPO). At the same time, the defendant will receive a copy of the formal accusation. If the matter is simple and evidence is clear, the prosecutor can request an accelerated trial; in that case, the defendant can be summoned as shortly as 24 hours before the beginning of the trial (§§ 417, 418 StPO).

The defendant cannot formally waive his right to a trial. There is no plea of guilty or not guilty. A "cooperative" defendant can make a confession to the accusation in open court, and this will, in practice, often make it unnecessary for the court to hear further evidence. If the defendant's confession was coerced or obtained by deceit (e.g., the court promised him a lenient sentence and in fact imposed a more severe one), he can file a regular appeal against the trial court's judgment based on the claim that the court violated the rules of fair proceeding and/or that his confession was not admissible evidence.

There is, at present, no legal provision that specifically addresses out-of-court settlements. As has been mentioned above, the prosecutor can agree to dismiss prosecution of a less serious offence in exchange for a payment or some public service provided by the suspect (§ 153a StPO). Since conditional dismissal requires the consent of the suspect, negotiations often occur between the prosecution and the defence as to what amount of money the suspect would be willing to pay to have the prosecution dismissed.

Beyond this, a wide-spread practice of "sentence-bargaining" has developed. Especially in white-collar and drug cases, the court and the defence[18] frequently enter into negotiations concerning a confession to be made by the defendant in exchange for a lenient sentence offered and eventually imposed by the court. Such negotiations can occur before or during the trial. The case-law of the Federal Court of Appeal has approved of such bargains if certain conditions are met. Legislative proposals on the matter are pending.[19]

b. Specific trial rights

German law does not have specific rules on **speedy trials**, but the defendant's right to be tried without undue delay has been recognized. There is, however, no fixed term defining

[18] Negotiations of any sort are not usually conducted with the suspect or defendant personally but only with his lawyer.
[19] In 2009, the Federal cabinet presented a draft amendment to the StPO that would introduce certain ground rules for sentence-bargaining.

"undue delay". What is reasonable depends on the extent and difficulty of the case. According to case-law, undue delay leads to a sentence discount if the defendant gets convicted.

Trials of adults are in principle open to the **public** and the media, trials of juveniles (14 to 17 years) are non-public. Sound and video recording of trials is prohibited (§ 169 GVG).

The public can be excluded to the extent that public testimony or discussion would create a risk to the security of the state, to public morals, to the life or health of a witness or another person, or to a business or private secret, or when a witness younger than 16 years is being heard (§ 172 GVG). The public can also be excluded when facts concerning the private life of a party, victim or witness are being discussed (§ 171b GVG), unless there is a prevailing public interest in having the public present. Any party can request the exclusion of the public and the court can also exclude *proprio motu*. In the case of § 171b GVG, an affected witness can also request exclusion of the public. It is always for the court to decide on the exclusion of the public; in the case of § 171b GVG, the court's decision cannot be appealed.

c. Presumption of innocence and burden of proof

The presumption of innocence has not been explicitly stated in domestic German law, but it applies through Art. 6 (2) European Convention of Human Rights and has been accorded constitutional status by the Federal Constitutional Court. According to the majority opinion, the presumption of innocence applies only within the criminal process and does not bind the media. There is hence no procedural sanction against third parties who make premature statements of guilt. They may be liable in tort, however, for violating the personality right of the person affected, and they may be criminally liable for a libel offence if the truth of the incriminating statement cannot be proved in court (§ 186 StGB).

There is no formal burden of proof on either party in the criminal process[20], but the court must be convinced of the defendant's guilt to convict him. The defendant need not formally raise any defence, but the court must follow up on any lead that might exonerate the defendant. There are no circumstances that would make it formally necessary for the defence to present proof.

[20] German doctrine does not view the prosecutor and the defendant as "parties" in the criminal process since it is the court that conducts a neutral investigation, and the public prosecutor is likewise cast in a neutral position.

d. Right to defend oneself

Right to a defence lawyer[21]

The defendant has several procedural rights of his own; he can avail himself of these rights regardless of his lawyer's action or inaction. The defendant personally can, for example, question witnesses and expert witnesses (§ 240 (2) StPO), request the court to take additional evidence, make statements evaluating the evidence (§ 257 (1) StPO), and file an appeal (§§ 296, 297 StPO[22]). Any defendant can thus, in principle speak for himself in court. If, however, the defendant is charged with a serious crime, if the case is complicated, or if the defendant is reduced in his personal capacity to defend himself in court, a trial can be held only if the defendant is represented by counsel (§ 140 StPO). If in that case the client has not chosen counsel the presiding judge will appoint a lawyer for him (§ 141 StPO). The defendant cannot simply dismiss appointed counsel, even if he disagrees with the way counsel conducts the trial, but he can only petition the presiding judge to replace the appointed lawyer by another. Courts are reluctant to grant such requests, however, and will replace a lawyer only if there are objective grounds to believe that it is impossible to re-establish a relationship of trust between the defendant and the lawyer originally appointed. If the participation of a defence lawyer is not necessary by law, the defendant can at any time dismiss the lawyer he had hired, and the lawyer can retreat from the case.

There is no legal aid system. Whenever the participation of a lawyer for the defence is necessary according to § 140 StPO, the presiding judge appoints a lawyer for the defendant if the latter is financially unable or unwilling to hire a lawyer. In that case, the defendant does not have to pay the lawyer's fee unless he can do so without endangering his and his family's sustenance (§ 52 (2) Law on the Remuneration of Lawyers – *Rechtsanwaltsvergütungsgesetz*). If the client is indigent the lawyer receives his fee from the state.

Every lawyer registered with the lawyers' chamber is by law obliged to accept an appointment for defence. But in fact there is a large supply of (mostly young) lawyers eager to work as an appointed defence lawyer, so judges have a sufficient pool of volunteers to choose from. An appointed lawyer in a local court case with a one-day trial will receive €

[21] See also 3 D. supra.

[22] According to § 297 StPO, the defence lawyer can file an appeal on behalf on his client, but not against the client's express wish.

560. The fee is higher when the trial is held in district court and/or takes longer than one day.

Rights of the defence lawyer

Counsel has **unrestricted access** to his client even when the defendant is detained. Restrictions can be based on institutional concerns of the jail. Counsel has to register in advance and show that he has been hired or appointed to represent the detainee, and night time visits can be denied.

Communication between the defendant and his lawyer is absolutely **confidential**. The lawyer must not disclose anything his client told him, and he has a testimonial privilege enabling him to refuse to answer questions even when called as a witness (§ 53 (1) no. 2 StPO). Organs of the state are prohibited from monitoring conversations between the defendant and his lawyer; this extends to live conversation as well as to telephone calls (§ 100c (6) StPO). If by chance a conversation between counsel and client had been taped in the course of a legitimate wiretap the result cannot be used as evidence. Written communication between client and counsel must not be seized (§ 97 (1) no. 1 StPO). There is a single exception from the protection of confidentiality: objects (including written communication) that are passed between a lawyer and a detainee suspected of belonging to a terrorist group are subject to inspection (§ 148 (2) StPO).

Defence lawyers have a **right to be present** when a prosecutor or judge interrogates the defendant, or when a judge interrogates a witness before trial (§ 168c (1), (2) StPO). They have no right to attend police interrogations, but the suspect has a right to consult with a lawyer before he talks with the police (or decides to remain silent). A lawyer can be present during a search, but he will not be alerted in advance when a search is imminent.

In principle, the defence lawyer can **inspect the prosecution** file at any time (§ 147 (1) StPO). The prosecutor can, however, deny inspection if it would endanger the purpose of the investigation, i.e., the finding of the truth (§ 147 (2) StPO). Such risk exists when the defendant abuses information from the file in order to illicitly influence witnesses or to otherwise tamper with evidence. (Although only the defence lawyer has the right to inspect the file he can – and may even have to – pass on information from the file to his client.)[23]

[23] In practice, defence lawyers often give a copy of the file to the client.

Prosecutors often summarily deny inspection as long as the defendant has not made a confession. The defence lawyer has an absolute right to inspect the file when the investigation has been closed, that is, shortly before the formal accusation is filed. The prosecutor's file contains everything that must be presented to the court to enable it to prepare for trial, i.e., any incriminating or exonerating information from the pre-trial investigation. When the defence claims that relevant parts were removed from the file, the State court of appeals must decide any dispute between the prosecution and the defence.

As long as the investigation continues the prosecutor can excise parts of the file that are deemed sensitive and thus limit the defence lawyer's inspection right. When the investigation has been closed the complete file must be presented to the court, except for parts that have turned out to be irrelevant. However, the chief of an administrative agency can withhold certain information when its disclosure would jeopardize important state interests (§ 96 StPO). This exception is used, e.g., for the protection of undercover police informers.

At the trial, the defence has the right to **question every witness** and expert after the court has interrogated him (§ 240 (2) StPO). The defence can request the court to take **additional evidence** (§ 244 (3) StPO). It can also introduce evidence of its own if it is generally admissible and available in the courtroom (§§ 220, 245 StPO). This extends to witnesses and experts. There is no general right to have expert evidence re-examined in court, but the defence can request the court to hear another expert on the same issue. The court has to grant that request if the first expert's expertise is doubtful, if there are contradictions in his testimony, or if the new expert proposed by the defence has superior research facilities (§ 244 (4) StPO).

Quality of the defence

It is part of the principle of fair trial that there should be equality of arms between the prosecution and the defence. It is not clear, however, whether the defendant can derive from that principle a subjective procedural right to an "adequate" defence. There have not been any successful criminal appeals based on the claim that the service of defence counsel was "inadequate".[24] Nor are there agreed-upon general standards as to what a defence

[24] The defendant could sue his lawyer in contract or tort, provided that he can prove monetary damages.

lawyer must minimally do, beyond the general requirement that counsel act professionally and zealously in favour of his client.

e. Right to an interpreter

Suspects who do not speak sufficient German have an unrestricted right to an interpreter (§ 187 GVG). This right applies from the beginning of an investigation, e.g., for a conversation between a suspect and a lawyer. There are qualified interpreters available for major languages, but finding an interpreter can become a problem when the defendant speaks only a rare language or dialect.

D. The Right to Privacy

Although a right to privacy is not specifically mentioned in the German Basic Law, the Federal Constitutional Court has found such a right to be protected by the principle of human dignity (art. 1 (1) Basic Law) and the right to freely develop one's personality (art. 2 (1) Basic Law). In the criminal process, the individual's right to privacy typically conflicts with the state's interest in collecting information on the case under investigation. German law has increasingly allowed secret invasive measures of investigation and has thus cut back on privacy rights.

Permissible secret investigation methods presently include surveillance of telephone and telecommunications (§ 100a StPO) including tracking a mobile phone (§ 100i StPO), audio surveillance of homes (§ 100c StPO) and other areas (§ 100f (2) StPO), video surveillance outside the home (§ 100f (1) StPO), and comparing sets of personal data with recorded data (§ 98a StPO). Moreover, undercover police agents can be used to investigate crime (§ 110a StPO). In 2008, the possibility of secretly conducting an online search of private computers was added.

There is no special level of suspicion required for using invasive methods. Audio surveillance as well as surveillance of telecommunications must be authorized by a judge (§§ 100b (1), 100f (2), 100i (4) StPO) or, in the case of audio surveillance of homes, by a panel of three judges (§ 100d (1) StPO). The same is true for comparing recorded private data (§ 98b (1) StPO). If there are exigent circumstances, a prosecutor can order these

measures, but his order loses force after three days unless upheld by a judge. The use of undercover police agents needs authorization by a prosecutor; if the agent is to investigate a specific person or to enter a private home, his activities must be authorized by a judge (§ 110b (2) StPO).

Secret telephone and audio surveillance is permissible only for investigating certain offences listed in the Code of Criminal Procedure (there are different lists for different methods of investigation). These measures can be ordered only if resolving the case by other methods of investigation would be impossible or significantly more difficult. The use of undercover police agents is permissible for the investigation of serious offences (*Verbrechen*) and of other offences that involve drugs, weapons or forgery of money, offences against the security of the state, and offences committed habitually or as a member of a gang (§ 110a (1) StPO).

E. The Right to Freedom of Expression and the Role of the Media

Art. 5 Basic Law protects the freedom of opinion and the freedom of the press. Media reporters have a right to be present at criminal trials as part of the public. When the public is excluded, so are reporters. There is no difference between press and TV reporters, but live TV coverage or filming is prohibited except before the trial starts and during recess (§ 169 GVG). The media can freely report on trials from which the public was not excluded. Criminal justice authorities provide services for media staff, depending on local conditions.

There is no general prohibition against reporting on the investigating stage of a criminal case, but the media should not identify suspects by their full name or by showing photographs unless the suspect is a well-known personality. Identifying a suspect before trial without good cause can be seen as a violation of his personality rights and may lead to tort liability. The media must also not print *verbatim* the formal accusation or other official documents on the case before they have been discussed at the trial (§ 353d no. 3 StGB). Journalists who violate this rule are subject to criminal prosecution, but due to the narrow wording of the norm prosecutions are very rare.

There is no general prohibition against judges and prosecutors talking to the media about an ongoing case. But internal guidelines counsel discretion and restraint. Prosecutors and

judges can commit a criminal offence (§ 353b StGB) by disclosing secrets that they have learned in the course of their official duties and thereby violating an important public interest.

Lawyers are allowed to talk to the media about ongoing cases, but they must not disclose what happened in a court session from which the public had been excluded (§ 353d no. 1 StGB).

When a lawyer speaks in court he is not immune from criminal prosecution. He can be prosecuted, e.g., if he knowingly named an innocent person as the offender (§ 164 StGB). A lawyer is also, in principle, subject to criminal laws on libel and slander, but courts recognize a broad area where the lawyer can be justified on the grounds that was defending his client's interest (cf. § 193 StGB).

F. Protection against Double Jeopardy

After a final decision (conviction or acquittal) has been reached in a German court there can not, on principle, be another prosecution of the defendant for the same factual situation (Art. 103 (3) Basic Law).[25] There are only few exceptions to this rule. Such exceptions apply when the judgment was brought about by criminal means (e.g. a witness committed perjury, a document was forged or a judge was bribed), or the acquitted person later made a credible confession to the crime (§ 362 StPO).[26] In these cases, the prosecutor can move for rescinding the original judgment. If the court finds that one of the grounds listed in § 362 StPO applies it orders a new trial. A sentence as such cannot be changed once the judgment has become final.

Foreign judgments do not have a *res judicata* effect in Germany. This is different under the Schengen accord with respect to EU states.

6. CONSEQUENCES OF ABUSE OF POWER OR INFRINGEMENT OF FUNDAMENTAL RIGHTS

[25] The courts permit a separate prosecution for serious offences committed in connection with the activities of a terrorist organisation even after the defendant had already been convicted of membership in that organisation.

[26] If the judgment is to be rescinded because it is based on criminal wrongdoing, an application by the prosecution is admissible only if the perpetrator has been finally convicted of the offence in question or the case has been dismissed for reasons other than lack of sufficient evidence (§ 364 StPO). The emergence of new evidence incriminating the acquitted person is not grounds for rescinding the original judgment.

Evidence obtained through interrogation methods prohibited by § 136a StPO (e.g. physical abuse, constraint[27], fatigue, torment, deceit, hypnosis, threats) cannot be used as evidence (§ 136a (3) StPO). The same is true for the results of telephone and audio surveillance of a home that have invaded the core private sphere of an individual (§§ 100a (4), 100c (5) StPO). Beyond these situations, statutory law does not contain any rules as to the admissibility of evidence obtained through a violation of human rights. The courts decide such cases on an individual basis, emphasizing that under the inquisitorial principle and in view of the trial court's responsibility to determine the truth, exclusion of evidence is an anomaly and should therefore be used sparingly. Only if the court finds that the gravity of a violation outweighs the interest in finding the truth will it exclude the evidence in question. A violation is regarded as grave especially when it has been committed intentionally and has affected important basic rights such as the right of privacy or bodily integrity. Finding the truth, on the other hand, is given great weight when the suspect stands accused of a serious crime. If there is exclusion it pertains only to the evidence directly obtained through a violation; "fruits of the poisonous tree" are generally admitted by the courts.

In some instances, criminal punishment can be imposed for violations of fundamental rights in the course of the criminal process. Inhuman treatment during an interrogation can be criminally prosecuted as an assault committed in office (§ 340 StGB) or as coercing a statement in a criminal proceeding (§ 343 StGB). Intentionally using a listening device or taping a private conversation without proper authorization is also a criminal offence (§ 201 (1) StGB). If someone detains another person without proper legal authority he is punishable for deprivation of freedom (§ 239 StGB).

In other cases of improper behaviour on the part of judges or law enforcement personnel, the reaction can consist in a reduction of the sentence when the defendant has eventually been convicted. German courts have applied this "sanction", e.g. in cases of undue delay of the process and violations of fair trial. If the court imposes a sentence of imprisonment, the judgment must determine what part of the sentence is deemed to having already been served as a compensation for the procedural violation.

[27] There is case-law to the effect that an illegal detention or an abuse of pre-trial detention for the purpose of making the suspect confess is a case of illegal "constraint" under § 136a StPO and thus leads to the inadmissibility of any incriminating statement made by the suspect while in detention.

German law does not recognize a general concept of "abuse of process". Only in extreme cases of undue delay have courts ordered a prosecution dismissed. In egregious cases of partisan and unfair conduct, an individual prosecutor will be relieved of conducting a case by his superior. There are usually no criminal or disciplinary sanctions imposed on prosecutors in such cases.

Unduly incriminating statements by persons connected with law enforcement do not have an impact on the criminal process. Judges (even lay judges) are assumed to be beyond being influenced by one-sided media reports before trial; only if a judge has himself made a declaration that violated the presumption of innocence will he be recused for fear of bias (§ 24 StPO). The defendant's only remedy in such cases is to sue the state under tort law.

7. STATE OF EMERGENCY AND DEROGATION FROM HUMAN RIGHTS OBLIGATIONS

In situations of war or other state emergency, a Federal statute can extend the permissible duration of detention without judicial authorization to four days if a judge was prevented from becoming active (Art. 115c (2) no. 2 Basic Law). Other infringements on human rights are not permissible even in a state of emergency.

8. RECENT LEGAL CHANGES AFFECTING HUMAN RIGHTS

German criminal procedure law has repeatedly been amended in recent decades. Some of the acts implementing changes carry titles indicating a connection with global concerns, such as organized crime and terrorism. But the amendments have not created any special legal regime or alternative track – all provisions of the law are technically applicable to any crime.[28] The main target of some recent amendments has been serious crime of a trans-national character.

Among recent reforms, there was an expansion of the availability of secret surveillance of telephone conversations (§ 100a StPO) and of other conversations in private homes (§ 100c StPO). Locating suspects by satellite has been authorized (§ 100i StPO). Prosecutors and courts have been authorized to require telecommunication providers to disclose data

[28] See, e.g., *Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität* (Law for combating the illegal drug trade and other forms of organized crime) of July 15, 1992; *Gesetz zur Bekämpfung des internationalen Terrorismus* (Law for combating international terrorism) of January 9, 2002 (authorizing various secret service agencies to collect data from banks and telecommunication providers).

concerning the time and participants of telecommunication when there is suspicion of a significant crime or of an offence committed by means of telecommunication (§ 100g StPO). For that purpose, telecommunication providers must store relevant data for 6 months (§ 113a Telecommunication Law, based on an EU directive). The Federal Constitutional Court has serious doubts as to the constitutionality of this provision; it has issued a partial stay of the application of the law while the matter is pending before the Court.[29]

A law passed at the end of 2008 permits the Federal police agency (*Bundeskriminalamt*) to conduct secret online monitoring of private computers. Due to restrictions on secret online monitoring imposed on constitutional grounds by a recent decision of the Federal Constitutional Court[30], the law provides for secret monitoring only for the purpose of combating dangers to life, health and freedom of a person or an important interest of the public. The new law also contains, for the first time, an authorization for visual surveillance of homes by means of hidden cameras.

With respect to improved international cooperation, the implementation of the EU Framework decision on the European arrest warrant should be mentioned.[31]

Over the last 30 years, the investigative powers of law enforcement personnel have been expanded. This is especially true for secret investigations, such as wiretaps, listening to conversations by means of hidden microphones, use of undercover police agents, and freezing assets of suspects. Co-operation duties have not substantially changed.

The allocation of powers among judges, prosecutors and police has not substantially changed over the last decades. Since the abolition of the office of investigating judge in 1975, it is the prosecutor who officially conducts the pre-trial investigation, the police who actually perform most necessary acts, and the judge who has to authorize infringements of civil rights. Due to the recent case-law of the Federal Constitutional Court, the position of the judge has been strengthened. The Court has reduced the ability of police to conduct searches and seizures without judicial authorization by re-interpreting the concept of "danger in delay" and requiring installation of a round-the-clock judicial emergency service. There has not been a specialisation or centralisation of judicial investigative

[29] Federal Constitutional Court, Provisional Order of March 11, 2008 (1 BvR 256/08).
[30] Federal Constitutional Court, Judgment of Feb. 27, 2008 (1 BvR 370/07, 1 BvR 595/07), reprinted in *Neue Juristische Wochenschrift*, 2008, p. 822.
[31] Law of August 2, 2006.

authorities. The Federal Constitutional Court has also tightened control over the length of pre-trial detention and has sometimes ordered the release of suspects who had been held for a long time when it was the court's or the prosecutor's fault that the process did not properly move toward the trial with due speed.

German law does not provide for special rules in terrorism or other especially serious cases. The fact that Germany has remained largely unaffected by international trends toward abolishing defendants' rights can be explained by a comparatively moderate climate of public opinion in this matter. Another important factor has been the case-law of the Federal Constitutional Court, which has consistently defended fundamental civil rights, especially the right to privacy, against legislative and judicial assault.