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Introduction

SCOPE OF THE BOOK

In my previous book, *Principles of German Criminal Law*, I said:

This book is ... not a traditional textbook of German criminal law in the way that German academics would understand it. My German colleagues will probably say that I left out too much, emphasized the wrong things and indulged in oversimplification, not to mention the mistakes I may have made. While I do not feel that I should immediately plead guilty to that charge in its entirety, a plea of *nolo contendere* to the first three may be unavoidable, but I will leave that to the judgment of the reader.¹

This is similarly, if not to an even greater degree, true of the present sequel on the procedural aspects of German criminal justice. The field of criminal procedure is, if anything, much wider than that of substantive law because practical issues come into play much more, which makes the task of selecting the right ingredients within the limited space of the present manuscript more difficult. For example, the entire field of international and European cooperation in criminal matters, an area of huge practical importance for German prosecutors, judges and defence counsel these days, has been left out. Issues such as, for example, the role of private prosecutors have been touched upon only in the context of certain other systemic questions, because they are not necessary to understand the general set up. This book is thus on the one hand about the 'German' in 'German Criminal Procedure', and on the other hand it does not presume to cover every concept or institution which in itself may without a doubt be worthy of closer attention.

Above all, it is meant to show how the procedure works in practice, rather than to engage in discussing substrata of legal theory, policy or philosophy; it has a definite 'nuts-and-bolts' character, because I feel from experience that the comparative discussion among many common and international criminal lawyers about 'the' Continental systems often suffers from a lack of precise knowledge about the actual and sometimes major differences between the many Continental systems. The animal which normally gets the lion's share of attention from

¹ M Bohlander, *Principles of German Criminal Law* (Oxford, Hart Publishing, 2009) 1.

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common law procedural commentators, the French *juge d'instruction*, for example, has been a non-entity in German law for a long time and is now under threat in France too.² It makes little sense, either, to talk about the threshold for preferring an indictment in different jurisdictions as long as one does not know what its exact function and role are in each system, and more to the point, what an indictment actually looks like. The differences between German and English law, for example, could not be more striking, as may be seen from Annex 1. Similar things may be said about judgment drafting, where the education of law³ students at university and in practical training after having obtained a first university degree, as well as the fact that German law does not know separate or dissenting opinions below the level of the Federal Constitutional Court (*Bundesverfassungsgericht*—BVerfG), have a marked influence on diction and style; compare, in this regard, Annexes 2 and 3.

For a common lawyer, the code-based structure of German criminal procedure and the interpretation through the case law of the courts, mainly the BVerfG, *Bundesgerichtshof* (BGH) and the *Oberlandesgericht* (OLG), as well as the academic commentary, will unavoidably appear to take on a rather technical character at times, as evidenced, for example, in chapter three of this book, which discusses the rather dry topic of jurisdiction and internal case allocation at some length. Where English courts may be more quickly prepared to rely openly on what they call common sense in order to do justice to the individual case, German courts will tend to enforce the application of the rules across the board based on a more doctrinal understanding of the policy of equal treatment, while not losing sight of the old Latin maxim '*summum ius, summa iniuria*'. This tension is, I hope, explained in the appropriate places in the substantive chapters below.

The main laws relating to the procedural aspects are the *Strafprozessordnung* (StPO), the *Gerichtsverfassungsgesetz* (GVG) and the *Strafgesetzbuch* (StGB), yet for decades now their interpretation has been influenced by the jurisprudence of the European Court of Human Rights (ECtHR); however, for Germany, the extension of parliamentary legislation by the judicial application in practice of higher-order principles of law is not that new. Since the implementation of the *Grundgesetz* (GG) and its catalogue of fundamental rights and liberties, the

² See, eg, the September 2009 Report on the abolition of the *juge d'instruction* by the Léger Commission at <www.elysee.fr/download/?mode=press&filename=Rapport_Leger.pdf>.

³ In stark contrast to the English system, for example, it is impossible for someone to become a lawyer, prosecutor or judge without having passed the two State examinations in law (or their equivalent in some of the *Länder*). The university degree in law is the first half of the professional training, which is mirrored by the fact that the university curriculum naturally encompasses courses in basic civil, criminal, administrative and constitutional procedure, something unheard of in many UK universities these days and—questionably—frowned upon by many academics in the UK as not being scholarly enough to warrant inclusion in the academic teaching provision or their research portfolio. See on this topic, eg, S Bartie, 'The lingering core of legal scholarship' (2010) 30 *Legal Studies* 345.

German materials uses

BVerfG has kept a close watch over the manner in which the ordinary courts employ the sub-constitutional law. In recent times it has done so by de facto raising the case law of the ECtHR to a quasi-constitutional level through the principle that the GG has to be interpreted in a Convention-friendly manner unless by doing so the domestic safeguards would be reduced. In other words, German courts do not need to rely as directly and openly on the European Convention on Human Rights (ECHR) as UK courts, for example, often do via the Human Rights Act 1998, because the domestic German law is interpreted in the light of ECtHR jurisprudence, yet never with the aim of finding the lowest common denominator. Notably the strike-down power the BVerfG has even vis-à-vis acts of legislation has meant that the civil liberties of the GG quickly acquired the necessary bite in the face of attempted encroachments from the executive, the legislature and even the lower judiciary. The book therefore does not refer as much to the ECHR directly as a UK treatise on the topic might do. However, sometimes even the BVerfG is taken to task by the ECtHR, as happened recently over the law in the StGB on incapacitation orders (*Sicherungsverwahrung*), which had passed muster with the former but was partially declared to be in violation of the ECHR by the latter in a string of cases in 2009 and 2010. In an unprecedented landmark decision of 4 May 2011, the BVerfG—apparently in an attempt not to be outdone by its European sister court—jumped at the opportunity presented by a number of constitutional complaints and declared *the entire law* on incapacitation orders unconstitutional, giving the Federation and the *Länder* two years to pass new and compliant legislation, something that the complainants had not even asked for.

GERMAN MATERIALS USED

As with the book on substantive law and for the same reasons expressed therein, I have with a few exceptions restricted the use of literature sources to a few major and well-known commentaries and manuals. The case law of the BVerfG, BGH, the OLGs and other courts has again been heavily relied upon because, in procedure even more clearly than in substantive law, the law is what the courts say it is. That is not to say that the courts are always agreed about what the law is; in the absence of a rule of *stare decisis*, the smallest *Amtsgericht* (AG) may deviate from the consistent jurisprudence of the BGH. In fact, if the OLG under whose jurisdiction the AG sits has a different view from the BGH, it would almost be unwise for the AG to adopt the views of the BGH if its own final appellate court is likely to overturn judgments based on such a view as a matter of routine.

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HISTORICAL DEVELOPMENT

This book does not trace the development of criminal justice in Germany in general. In a few places and where necessary, historical comments have been made to explain the shape a certain rule has these days and why. For those interested in an up-to-date and modern account of the history of German criminal law in the European context from the nineteenth century onwards, I recommend the excellent work by Thomas Vormbaum, *Einführung in die moderne Strafrechtsgeschichte*, 2nd edition.⁴

MODE OF CITATION

I repeat what was said in the previous book on the Criminal Code, with a slight variation:

I have kept to the German way of citation of laws. To keep the text as short and uncluttered as possible I have used the German symbol for ‘section’, which is ‘§’. After that, the subdivisions are ‘subsection’ (‘(1)’, or ‘(2) to (7)’), ‘sentence’ (‘1st sentence’), ‘number’ (‘No 1’, or ‘Nos 2 to 5’) and letters (‘(a)’, ‘alternatives’, etc. This is not necessarily an exclusive hierarchical sequence as, depending on the length of individual provisions, numbers could have several sentences, etc.

Thus, for example, the following citation

‘§ 211(2) 3rd alt’

would read:

‘Section 211, subsection (2), third alternative’.

The double ‘§§’ means ‘sections’. Unless another law is mentioned directly in the citation, all sections cited are those of the StPO.

CHAPTER OVERVIEW

Chapter two will set out a number of the fundamental constitutional and systemic principles that underpin the German concept of a fair trial and due process. It will, it is hoped, dispel a few of the myths about the ‘inquisitorial’ nature of the Continental legal systems. Chapter three presents the main players in the criminal justice arena and highlight their roles in relation to each other; it also explains the German criminal court hierarchy. Chapter four takes the reader

⁴ T Vormbaum, *Einführung in die moderne Strafrechtsgeschichte*, 2nd edn (Berlin, Springer, 2011).

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through the stages of the pre-trial investigation and explains the roles of the prosecution, the court and the defence, as well as the rules on collecting evidence. Chapter five follows on from that and describes the issues connected with the process, from the prosecution's decision to prosecute or discontinue until the judgment at trial. Chapter six is dedicated entirely to an overview of the law of evidence. Chapter seven serves as an introduction into the law and practice of sentencing; it is the longest chapter of the book, but the reader should nonetheless be aware that it does nothing but scratch the surface of a topic that would merit a book on its own. Lastly, chapter eight looks at the appeals process and post-conviction review.

Annexes 1 to 3 are translations of a specimen indictment and two judgments, one at trial level and one at BGH appellate level.

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