

# *Fordham International Law Journal*

---

*Volume 34, Issue 2*

2011

*Article 5*

---

## Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle?

Regina E. Rauxloh\*

\*

Copyright ©2011 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle?

Regina E. Rauxloh

## Abstract

In German criminal trials, the common law instrument of the guilty plea is unknown. Consequently, one cannot speak of plea bargaining in the strict sense. Nevertheless, informal negotiations, which center on the exchange of a confession for a sentence concession, play an increasing role in the German criminal process. It is claimed that in today's Germany "the criminal procedure cannot be imagined without the phenomenon of informal agreements." After years of academic debate and developing case law on informal agreements, the German Federal Parliament (Deutscher Bundestag) has now passed new legislation that regulates agreements and makes them part of the procedure. As a civil-law country, Germany's criminal justice system is based on the notion that the prime task of a criminal trial is to find the material truth.<sup>5</sup> Rather than deciding which of the contesting parties can present the better case, it is the court itself that has to unveil the facts of the case. Section 244(2) of the German Code of Criminal Procedure reads: "In order to establish the truth, the court shall, proprio motu, extend the taking of evidence to all facts and means of proof relevant to the decision." Finding the truth is an objective goal and not subject to the interests of the defense or prosecution. Hence, an admission of guilt is not sufficient to convict the defendant. A confession is rather just one among many forms of evidence and has no procedural function as such. In particular, it is not sufficient to end or even avoid a trial. Nevertheless, one can find some kind of negotiation at all stages of the criminal process, which is comparable to Anglo-American plea bargaining. This Article outlines the development and current practice of informal procedures in Germany and discusses the new procedure introduced in 2009. Part I shows how informal agreements in Germany—comparable to plea bargaining in common-law systems—have started to be used on a wider scale. Part II explains the main reasons for the use of informal settlements in Germany. Part III discusses the procedural framework, looking at the context in which negotiations occur and the possible content of such agreements, and analyzes the main problems of such agreements. Part IV demonstrates how the German Supreme Court's failure to restrict the informal practice finally led to federal legislation—discussed in Part V—to regulate the practice. Part VI discusses the problem that the development of an informal system, which neither the higher courts nor the legislature can prevent or control, leads to the question of the relationship between law in practice and theoretical due process principles. The final part concludes that informal settlements in Germany, as well as plea bargaining in common-law countries, are a sign of a growing chasm between theory and practice, which the new German law fails to bridge.

---

---

FORMALIZATION OF PLEA BARGAINING IN  
GERMANY: WILL THE NEW LEGISLATION BE  
ABLE TO SQUARE THE CIRCLE?

*Regina E. Rauxloh* \*

INTRODUCTION

In German criminal trials, the common law instrument of the guilty plea is unknown. Consequently, one cannot speak of plea bargaining in the strict sense. Nevertheless, informal negotiations, which center on the exchange of a confession for a sentence concession, play an increasing role in the German criminal process.<sup>1</sup> It is claimed that in today's Germany "the criminal procedure cannot be imagined without the phenomenon of informal agreements."<sup>2</sup> After years of academic debate and developing case law on informal agreements, the German Federal Parliament (*Deutscher Bundestag*) has now passed new legislation that regulates agreements and makes them part of the procedure.<sup>3</sup>

As a civil-law country, Germany's criminal justice system<sup>4</sup> is based on the notion that the prime task of a criminal trial is to find the material truth.<sup>5</sup> Rather than deciding which of the

---

\* School of Law, University of Surrey. The author would like to thank Adrienne Wilson for her valuable comments on an earlier draft. All translations are the author's.

1. See THOMAS RÖNNAU, *DIE ABSPRACHE IM STRAFPROZEB—EINE RECHTSSYSTEMATISCHE UNTERSUCHUNG DER ZULÄSSIGKEIT VON ABSPRACHEN NACH DEM GELTENDEN STRAFPROZESSRECHT* [THE INFORMAL AGREEMENT IN CRIMINAL PROCEDURE—A LEGAL-SYSTEMATIC EXAMINATION OF THE ADMISSIBILITY OF THE AGREEMENTS IN CURRENT CRIMINAL PROCEDURE LAW] 249 (1990).

2. Lutz Meyer-Großner, *Gesetzliche Regelung der „Absprachen im Strafverfahren?“* [Legal Regulation of "Agreements in Criminal Proceedings?"], 2004 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 187, 187.

3. See Gesetz zur Regelung der Verständigung im Strafverfahren [Act for the Regulation of Agreements in Criminal Proceedings], July 29, 2009, BUNDESGESETZBLATT, Teil I, [BGBl. I] at 2353.

4. For an introduction to the German criminal procedure and its main legal principles, see NIGEL FOSTER, *GERMAN LEGAL SYSTEM AND LAWS* 212–28 (2d ed. 1996).

5. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 26, 1981, 57 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 250 (275), 1981.

contesting parties can present the better case, it is the court itself that has to unveil the facts of the case. Section 244(2) of the German Code of Criminal Procedure reads: “In order to establish the truth, the court shall, *proprio motu*, extend the taking of evidence to all facts and means of proof relevant to the decision.”<sup>6</sup> Finding the truth is an objective goal and not subject to the interests of the defense or prosecution. Hence, an admission of guilt is not sufficient to convict the defendant. A confession is rather just one among many forms of evidence and has no procedural function as such. In particular, it is not sufficient to end or even avoid a trial. Nevertheless, one can find some kind of negotiation at all stages of the criminal process, which is comparable to Anglo-American plea bargaining.

This Article outlines the development and current practice of informal procedures in Germany and discusses the new procedure introduced in 2009. Part I shows how informal agreements in Germany—comparable to plea bargaining in common-law systems—have started to be used on a wider scale. Part II explains the main reasons for the use of informal settlements in Germany. Part III discusses the procedural framework, looking at the context in which negotiations occur and the possible content of such agreements, and analyzes the main problems of such agreements. Part IV demonstrates how the German Supreme Court’s failure to restrict the informal practice finally led to federal legislation—discussed in Part V—to regulate the practice. Part VI discusses the problem that the development of an informal system, which neither the higher courts nor the legislature can prevent or control, leads to the question of the relationship between law in practice and theoretical due process principles. The final part concludes that informal settlements in Germany, as well as plea bargaining in common-law countries, are a sign of a growing chasm between theory and practice, which the new German law fails to bridge.

---

6. STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT, TEIL I [BGBl. I] 1074, as amended, § 244(2).

I. *THE BEGINNINGS OF INFORMAL AGREEMENTS IN GERMANY*

As in England and Wales, so in Germany, informal negotiations initially spread without being noticed. At the time when the American scholar John Langbein claimed Germany to be the “land without plea bargaining,”<sup>7</sup> informal settlements were already being used regularly. Although it is very likely that in some form there have always been informal agreements,<sup>8</sup> it is assumed that regular engagement in such negotiations was established in large-scale proceedings, such as financial crime,<sup>9</sup> tax evasion, environmental crime, and drug related crime<sup>10</sup> around the mid-1970s.<sup>11</sup> One explanation for the rapid spread of informal settlements in these areas is that both courts and prosecution offices became increasingly overworked.<sup>12</sup> During the last four decades, these areas have experienced considerable growth in the number of criminal cases. Financial crime has been prosecuted more intensively, and the number of drug offenses has grown immensely. However, as Rieß has shown, the number of legal staff has increased accordingly; therefore the rising number of cases alone does not sufficiently explain the development of informal agreements.<sup>13</sup> Rather than the growing number of cases, it was the multiplying duration of the individual

---

7. John H. Langbein, *Land without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 204 (1979).

8. See Hans-Peter Marsch, *Grundregeln bei Absprachen im Strafverfahren* [Ground Rules for Agreements in Criminal Proceedings], 2007 ZRP 220, 220.

9. *Wirtschaftskriminalität* consists of more crimes than just white-collar crime or commercial fraud; it also includes, for example, pollution. See LEONARD H. LEIGH & LUCIA ZEDNER, THE ROYAL COMMISSION ON CRIMINAL JUSTICE: A REPORT ON THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE PRE-TRIAL PHASE IN FRANCE AND GERMANY 40 (1992).

10. See Herbert Landau & Ralf Eschelbach, *Absprachen zur Strafrechtlichen Hauptverhandlung* [Agreements about Criminal Trials], 1999 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 321, 321.

11. See Symposium, *Deutscher Juristentag: Die Beschlüsse* [German Jurists Convention: The Resolutions], 1990 NJW 2991, 2992.

12. See Raimund Hassemer & Gabriele Hippler, *Informelle Absprachen in der Praxis des Deutschen Strafverfahrens* [Informal Agreements in the Application of the German Criminal Procedure], 1986 STRAFVERTEIDIGER [STV] 360; Georg Küpper & Karl-Christian Bode, *Absprachen im Strafverfahren—Bilanz einer Zehnjährigen Diskussion* [Agreements in Criminal Proceedings—Record of a Ten-Year Discussion], 1999 JURA 351, 354.

13. Peter Rieß, *Zur Entwicklung der Geschäftsbelastung in der Ordentlichen Gerichtsbarkeit* [About the Development of the Workload of Ordinary Courts], 1982 DEUTSCHE RICHTERZEITUNG [DRIZ] 201, 201, 464.

proceedings that led practitioners to look for new means of coping with the caseload.

The reasons for significantly lengthier trials lie in important changes in substantive criminal law in these areas. Since the end of the 1970s, the law on environmental crimes, drug-related crimes, and financial crimes such as tax or accounting fraud, have all been developed, amended, and most of all, expanded.<sup>14</sup> Arguably, the most important development is the change in *actus reus* and causation. In many new offenses, especially in environmental and financial crime, rather than one single identifiable action causing harm, the causation of danger itself has become the *actus reus* of the offense. The traditional concepts of conduct or result crimes have been replaced by “causation of danger crimes.” This makes it extremely difficult to prove the offense.<sup>15</sup> At what point does a legitimate risk become an illegal danger? What is the scope of causation for that risk? To what extent did the defendant need to appreciate the risk? In order to eliminate the problems of evidence, criminal liability has moved forward on the scale of actions, so that the *actus reus* is assumed much earlier in the chain of events.<sup>16</sup>

The distinction between legal and criminal behavior then becomes increasingly dependent on the defendant’s state of mind. For example, an action is deemed dangerous if the defendant perceived or could have perceived the risk. Without a confession, proving *mens rea* requires much indirect evidence. Investigation in these kinds of crimes calls for the screening of hundreds of documents and the testimony of dozens of witnesses (who sometimes have to be brought from abroad as, for example, when dealing with multinational trade). Consequently, the length of investigation, as well as of trials where the evidence needs to be presented and evaluated, has multiplied. The complex German criminal procedure, with its manifold procedural safeguards, is not equipped to deal with these new

---

14. See Joachim Herrmann, *Absprachen im Deutschen Strafverfahren* [Agreements in German Criminal Proceedings], 31–32 ARCHIVUM IURIDICUM CRACOVENSE 55, 56 (2000) (Pol.).

15. See RÖNNAU, *supra* note 1, at 45.

16. See KAI-D. BUSSMANN, DIE ENTDECKUNG DER INFORMALITÄT: ÜBER AUSHANDLUNGEN IN STRAFVERFAHREN UND IHRE JURISTISCHE KONSTRUKTION [THE DISCOVERY OF INFORMALITY: NEGOTIATIONS IN CRIMINAL PROCEEDINGS AND THEIR LEGAL CONSTRUCTION] 23 (1991).

requirements of substantive law. Even if the increase in judicial personnel initially offset the increasing number of cases,<sup>17</sup> their swelling length and intensity has inevitably led to an enormous overload for the prosecution offices and the courts. Thus, large-scale financial crimes are considered the pacesetter, as well as the principal domain,<sup>18</sup> for informal settlements.<sup>19</sup>

In 1982, a criminal defense lawyer under the pseudonym Detlef Deal published an article in Germany describing in detail the common practice of informal negotiations in large-scale criminal cases.<sup>20</sup> He made it very clear that this practice was both widespread and hidden: “[N]early everybody knows it; nearly everybody does it, only nobody speaks it out loud.”<sup>21</sup> In his view, the formal trial has degenerated to “a theatre” where the participants pretend to contribute to the finding of a sentence, which in reality has already been agreed on by all the parties. Despite strong criticism from all sides, legal professionals have not been deterred from engaging in informal settlements. Most practicing lawyers today agree that courts responsible for trying financial crimes would not be able to cope with the flood of large-scale cases if it were not for informal agreements.<sup>22</sup> For example, in the state of Lower Saxony, over eighty percent of judgments in the area of organized crime are based on informal agreements.<sup>23</sup> Interestingly, informal proceedings have also spread to less serious crimes,<sup>24</sup> but they can even be found today

---

17. See Hassemer & Hippler, *supra* note 12.

18. See BUSSMANN, *supra* note 16, at 19 (whose research has shown that in financial criminal cases the inquisitorial process is a rare exception).

19. Another area is drug-related crime. The growing consumption of drugs since the end of the 1960s, the increased prosecution since the 1970s, and the increased criminalization, especially by the 1982 Narcotics Law (*Betäubungsmittelgesetz*), resulted in the number of cases and the length of the procedures growing immensely. *Id.* at 30.

20. Detlef Deal, *Aus der Praxis: Der Strafprozessuale Vergleich* [*In Practice: Settlements in Criminal Proceedings*], 1982 StV 545 (dealing with drug offenses in line with the author’s field of work).

21. *Id.* at 545.

22. See Gunter Widmaier, *Der Strafprozessuale Vergleich* [*Settlements in Criminal Proceedings*], 1986 StV 357.

23. Elisabeth Heister-Neumann, *Absprachen im Strafprozess—der Vorschlag Niedersachsens zu einer Gesetzlichen Regelung* [*Agreements in Criminal Proceedings—Lower Saxony’s Proposal for Statutory Regulation*], 2006 ZRP 137, 137.

24. See Werner Schmidt-Hieber, *Verständigungen im Strafverfahren* [*Agreements in the Criminal Trial*], in *ABSPRACHEN IM STRAFPROZESS—EIN HANDEL MIT DER GERECHTIGKEIT?* [*AGREEMENTS IN THE CRIMINAL PROCEEDINGS—A BARGAIN WITH JUSTICE?*] 52 (1987).

in serious violent crimes such as rape, aggravated robbery, and murder,<sup>25</sup> although this is still exceptional.<sup>26</sup>

## II. MAIN REASONS FOR INFORMAL SETTLEMENTS

The numerous reasons for the development and spread of informal negotiations into all areas of criminal law in Germany can only be summarized here. As in the Anglo-American discourse, German commentators usually mention the increasing overwork of courts and prosecution offices as the main reason for the spread of informal negotiations. Legal experts have no doubt that criminal procedure would break down without informal handling of cases.<sup>27</sup> Thus it is claimed that informal negotiations help to sustain and stabilize the current criminal justice system.<sup>28</sup> Another major reason is the nature of modern legislation. The growing complexity of some criminal law areas means that courts are not just overworked, but actually out of their depth.<sup>29</sup> Further, the change from conduct or result crimes to “causation of danger crimes” means that the outcome of cases is much less predictable.<sup>30</sup> It is this unpredictability that makes pre-trial agreements compelling for both defense and prosecution. For all courtroom actors, informal agreements mean easier and faster completion of the case.

An additional reason for the rise of informal procedures is the shift in theories of punishment. The traditional idea that the primary function of punishment is retribution has now been complemented by the idea of general and specific deterrence.<sup>31</sup>

---

25. See Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 28, 1997, 43 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 195 (197), 1997; BGH May 13, 1997, 11 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NSTZ] 561, 1997; BGH Oct. 19, 1993, 4 NSTZ 196, 1994.

26. See Joachim Herrmann, *Bargaining Justice—A Bargain for German Criminal Justice?*, 53 U. PITT. L. REV. 755, 756 (1992).

27. See RÖNNAU, *supra* note 1, at 20.

28. See Christian Lüdemann & Kai-D. Bussmann, *Diversionschancen der Mächtigen? Eine Empirische Studie über Absprachen im Strafprozeß [Opportunities for Diversion for the Powerful? An Empirical Study of Agreements in the Criminal Process]*, 1989 KRIMINOLOGISCHES JOURNAL [KRIMJ] 54, 69.

29. See BUSSMANN, *supra* note 16, at 29.

30. See *id.* at 25.

31. See Bernd Schünemann, *Die Verständigung im Strafprozeß—Wunderwaffe oder Bankrotterklärung der Verteidigung? [Agreement in the Criminal Process—A Silver Bullet or Bankruptcy of the Defense?]*, 1989 NJW 1895, 1898.

The purpose of deterrence legitimizes time- and cost-saving procedures as goals of the criminal justice system, as opposed to the absolute theory of retribution, which is guided by the considerations of justice only.<sup>32</sup> Herrmann points out that the function of the criminal process is no longer only to enforce the Penal Code but also to help to find solutions for social problems.<sup>33</sup> According to him, more justice is achieved when all participants agree on the outcome, and rehabilitation is more likely to succeed when the defendant accepts the sentence.<sup>34</sup> But agreeing to the mildest sanction possible does not necessarily mean accepting the judgment; rather it might merely mean choosing the lesser evil.

Related to the change of sentencing purposes is the argument that the development of informal proceedings mirrors the development of a new relationship between state and citizen.<sup>35</sup> The hierarchic interrelation in criminal law between the powerful state and its subordinate citizens is being replaced by a co-relation between more equal partners. This different relationship has long been recognized in administrative law where the state is in discussion with citizens to find a solution to the problem rather than exposing them to sanctions as in criminal law. In criminal law the decisive change again started in white collar and environmental crime where the newly extended legislation disregards the principle of *ultima ratio*.<sup>36</sup> Areas previously dealt with by administrative law, which is open to negotiations between state and citizen,<sup>37</sup> are now subjected to the inflexible criminal procedural law with its principle of compulsory prosecution.<sup>38</sup>

With the increasing complexity of life and society, legislation expands the scope of the Penal Code to embrace more and more behaviors, such as forbidden waste disposal, that do not

---

32. See RÖNNAU, *supra* note 1, at 61.

33. Herrmann, *supra* note 26, at 775.

34. *Id.* at 775–76.

35. See *id.* at 775.

36. See RÖNNAU, *supra* note 1, at 45.

37. See Werner Schmidt-Hieber, *Absprachen im Strafprozeß—Privileg des Wohlstandskriminellen?* [*Agreements in the Criminal Process—Privilege for the White Collar Criminal*], 1990 NJW 1884, 1884.

38. BUSSMANN, *supra* note 16, at 25. Compulsory prosecution is a principle to protect from arbitrary choice of investigation and means that all crimes should be prosecuted.

ordinarily belong to the classical notion of crime.<sup>39</sup> Whereas criminal law traditionally used to deal with deviant behavior committed by individuals outside or at least at the margins of society, criminal law now encompasses crimes committed by individuals in all sectors of society.<sup>40</sup> In relation to this, Bussmann states that the courts tend to be lenient in large-scale proceedings not only because they are overtaxed with the complexity of the complicated legal provisions, but also because of class-distinguishing tendencies;<sup>41</sup> defendants of fiscal offenses, tax evasion, or environmental crime are often some of the most respected members of society from similar backgrounds as prosecutors and judges. Both of these aspects had an effect on the criminal process. Whereas criminal procedure traditionally reflected the subordination of the citizen to the state, a new form of interaction emerged in which the parties try to solve conflicts by cooperating and consenting.<sup>42</sup> As a result, the defendant's autonomy in criminal procedures has increased.<sup>43</sup> Informal agreements reflect this development by replacing formal accusation and judgment with informal discussion and negotiations.

### III. *PROCEDURAL FRAMEWORK*

It is important to examine how a practice similar to plea bargaining could be introduced into the German criminal procedure, which does not recognize the guilty plea. Although some negotiations are initiated in the context of the main hearing, many informal agreements are linked to those procedures that provide the prosecution with some discretion because they are exceptions to the principle of compulsory prosecution according to which all crimes must be prosecuted.

---

39. See Küpper & Bode, *supra* note 12, at 355.

40. See GÖTZ GERLACH, *ABSPRACHEN IM STRAFVERFAHREN: EIN BEITRAG ZU DEN RECHTSFOLGEN FEHLGESCHLAGENER ABSPRACHEN IM STRAFVERFAHREN* [AGREEMENTS IN CRIMINAL PROCEEDINGS: A CONTRIBUTION TO THE LEGAL CONSEQUENCES OF FAILED AGREEMENTS IN CRIMINAL PROCEEDINGS] 23 (1992).

41. BUSSMANN, *supra* note 16, at 29.

42. See Herrmann, *supra* note 14, at 78.

43. See Schünemann, *supra* note 31, at 1898.

One of the core procedures used to open the way for informal negotiations is the penal order (*Strafbefehl*).<sup>44</sup> Section 407 of the Code of Criminal Procedure gives the prosecutor, in a case of a misdemeanor, the power to request an order imposing punishment from the judge if there is sufficient suspicion.<sup>45</sup> If the accused does not appeal, the penal order replaces any further proceeding and the offender is immediately punished with a fine or a sentence on probation. Thus it avoids a full trial and comes very close to the guilty plea in common law systems. Hence it is not surprising that the penal order is a welcome starting point for informal negotiations. The defense counsel and prosecutor might agree that the prosecution will not bring further charges and request only a penal order if the accused is willing to accept the punishment suggested by the order.<sup>46</sup> Typically, the defense lawyer and the prosecutor negotiate the amount of the sanction, with the judge usually agreeing to the order suggested by the prosecution.<sup>47</sup> Today, some thirty-five percent of all cases are handled through a penal order, and it is realistic to assume that many of those are based on informal settlements.<sup>48</sup>

The other major starting point for informal agreements is dismissal. According to section 153 of the Code of Criminal Procedure, a misdemeanor can be dismissed on the ground of insignificance by the prosecution with the agreement of the court if there is only minor culpability and no public interest in prosecution.<sup>49</sup> Once the trial has commenced, the court too can dismiss the case with the agreement of both the prosecutor and the defendant. This provision is also an exception to the principle of compulsory prosecution.

Initially, section 153 could be used only under very restricted circumstances, and practitioners asked to widen its remit. At the insistence of the legal community, in 1974 section 153a was introduced in order to fight mass petty crime. This

---

44. See Werner Schmidt-Hieber, *Vereinbarungen im Strafverfahren* [*Informal Arrangements in Criminal Proceedings*], 1985 NJW 1017, 1017.

45. StPO, Apr. 7, 1987, BGBL. I 1074, as amended, § 407.

46. See Herrmann, *supra* note 14, at 56.

47. See *id.* at 66.

48. BERND SCHÜNEMANN, ABSPRACHEN IM STRAFVERFAHREN?—GRUNDLAGEN, GEGENSTÄNDE UND GRENZEN [AGREEMENTS IN CRIMINAL PROCEEDINGS?—FOUNDATIONS, OBJECTS AND LIMITS] B153 n.461 (1990). There are German states where more cases are handled with the order than by trial. See Herrmann, *supra* note 14, at 65.

49. StPO, Apr. 7, 1987, BGBL. I 1074, as amended, § 153.

provision enables the prosecutor to refrain from pressing some or all charges, even when there is an interest in prosecuting, if this interest can be overridden by the defendant fulfilling certain conditions, usually by paying a sum to charity.<sup>50</sup> Section 153a was at first criticized harshly as an “introduction of the American plea bargaining,” “shady horse trading,” “whispering procedure,” and “buying-off procedure.”<sup>51</sup> However, this rule was not a new creation. The legislature in fact followed an existing informal practice to assume that the public interest in prosecution can be met as soon as the accused obeys the prosecution’s directive. It is an example of how courtroom actors extended a legal provision to such an extent that the legislature saw itself compelled to adjust the law to the lawyers rather than the other way round. This turned out to become the common pattern for the development of informal agreements in Germany.

Although the legislature followed the demands of practitioners and formalized negotiations to some extent, courtroom actors kept operating beyond the new legal framework. Section 153a is restricted to misdemeanor offences and cases with low culpability and strong evidence. Nevertheless, this provision is excessively used in large-scale proceedings, which are neither mass nor petty crime,<sup>52</sup> and the restrictions are usually bypassed.<sup>53</sup> In 1993, the provision extended the restriction of minor guilt by stating that “the seriousness of the guilt does not require the contrary.”<sup>54</sup> Once again, legislation followed the common practice of extending the criteria beyond the law.<sup>55</sup> Section 153a is today frequently used as a basis for informal settlements. Especially during the preliminary investigation, it is common for the courtroom actors

---

50. According to section 153a(2), if there is already an indictment, the court can take the same decision with the consent of the defendant and the prosecutor. *Id.* § 153a.

51. See Schmidt-Hieber, *supra* note 24, at 50.

52. See BUSSMANN, *supra* note 16, at 28.

53. See Herrmann, *supra* note 26, at 775.

54. StPO, Apr. 7, 1987, BGBl. I 1074, as amended, § 153a. Interestingly, the legislation did not take this opportunity to address informal settlements one or way or the other.

55. See Schünemann, *supra* note 31, at 1896. The same is true for sections 154 and 154a, which are sometimes applied if the court wants to reward a confession or withdrawal from motion for admission of evidence, even if the requirements are not strictly fulfilled. See RÖNNAU, *supra* note 1, at 32.

to agree that the investigation will cease if the accused pays a fine.<sup>56</sup>

In practice, section 153a can be extended to favor or to disadvantage defendants. It is to their disadvantage that the application of section 153a violates the rights of the accused in cases where there is insufficient suspicion of a criminal act,<sup>57</sup> and the presumption of innocence should mean that there is no prosecution at all. As in England and Wales, the common practice of exchanging a dismissal for a confession or waiver of appeal can result in the prosecutor charging a more serious offense simply to have more substance with which to bargain.<sup>58</sup> More often, however, section 153a is extended in favor of the accused, particularly for economic crimes when section 153a is applied even when there is more than just minor culpability.<sup>59</sup> In order to do this the case is often redefined to fit the requirements of section 153a; perjury, for example, might be reframed as the less serious offense of false unsworn statement.<sup>60</sup>

#### A. *The Context of Informal Negotiations*

Informal settlements in Germany occur most often when the case involves complicated questions of evidence or law. The more a court is overworked, the more willing it is to avoid complicated cases.<sup>61</sup> Schünemann found in his research that 77% of judges, 72% of prosecutors, and 51% of defense lawyers favor informal settlement if the case has difficult legal issues.<sup>62</sup> If there are problems of evidence, 91% of the judges, 90% of the prosecutors, and 53% of defense lawyers in the study preferred an informal agreement.<sup>63</sup> This is especially true for large-scale proceedings where countless documents and witness statements have to be analyzed. Frequently, cases are so technical that the court is

---

56. See Herrmann, *supra* note 14, at 56.

57. See SCHÜNEMANN, *supra* note 48, at B19.

58. See *id.* at B109.

59. See RÖNNAU, *supra* note 1, at 37.

60. See Hans Dahs, §153a StPO—ein „Allheilmittel“ der Strafrechtspflege [*§153a Criminal Procedure Code—A “Panacea” for the Criminal Justice System*], 1996 NJW 1192, 1192.

61. See Deal, *supra* note 20, at 550.

62. See STEFAN BRAUN, DIE ABSPRACHE IM DEUTSCHEN STRAFVERFAHREN [THE AGREEMENT IN GERMAN CRIMINAL PROCEEDINGS] 11 (1998) (summarizing Schünemann’s research).

63. See *id.*

dependent on expensive experts' statements. All these factors mean great expense and delay for the trial and increase the interest in informal procedures.

Further, the relationship between the participants is a crucial factor in pursuing informal negotiations.<sup>64</sup> Like plea bargaining in England and Wales, informal agreements in Germany are based on personal relationships of trust. The better the participants know each other and the more positive their previous experiences with each other have been, the more straightforward the negotiations will be. The older the relationship between the prosecution and defense lawyer, the more emphasis they will put on cooperation rather than contest. Sometimes the negotiations even embrace different cases with different defendants and concessions in one case are rewarded in another case. This basic element of trust between professionals is the reason agreements are seldom breached although legally they are not binding. If, however, the agreement falls apart, the other parties to the settlement will feel their trust violated and future negotiations will be threatened.<sup>65</sup> Since some private defense lawyers are dependent on the court to get them appointed as defense counsels, they are taking a personal risk that the defendants will keep their promises.<sup>66</sup> It is said that some courts even have "blacklists" of lawyers who did not keep their agreement. Because of this concern, defense lawyers often do not let their clients know the details of the deal, so that the defendants cannot obstruct the negotiations.<sup>67</sup> This also prevents the defendant from complaining if the sentence is higher than that which was agreed upon by the parties.<sup>68</sup>

The characteristics of the defendant are likewise decisive. According to Schünemann's report, 76% of practitioners stated that juvenile defendants showed an increased willingness to agree to informal settlements compared with adult defendants, 89% confirmed a higher willingness of elderly defendants, and 91% stated that defendants with no previous conviction are more

---

64. *See id.* at 13.

65. *See* BUSSMANN, *supra* note 16, at 72.

66. In some cases, the defendant changed her defense counsel and appealed against the sentence, thus breaching the initial promise not to appeal.

67. BGH July 4, 1990, NJW 3030, 1990.

68. *See* BUSSMANN, *supra* note 16, at 72.

ready to reach agreements.<sup>69</sup> Only 36% of the practitioners thought that defendants in a weak financial situation would be willing to reach settlements, and 29% considered that those with little education would be interested to come to an informal agreement.<sup>70</sup> According to Deal, upper- or middle-class defendants are more likely to favor reaching settlements with the court and prosecutors, and judges are more likely to reach an agreement with the defense lawyer if the defendant appears sympathetic to the judges.<sup>71</sup> Because of courts' interest in compensation, white-collar criminals are more likely to be offered the opportunity to negotiate because they can offer higher sums.<sup>72</sup> Whether the gender of defendant, defense counsel, judge, or prosecutor plays any role is not addressed in any empirical research. Another aspect considered by judges and prosecutors is, as in England and Wales, the victim's interest, especially in sexual crimes. Courts also favor informal settlements that lead to confessions and waivers of evidence production—and thus protect the victim from having to appear in court and give evidence.<sup>73</sup>

Defense lawyers favor settlements especially in cases in which there is a high probability of conviction (96% of the lawyers in Schünemann's survey mentioned this reason).<sup>74</sup> Particularly in this situation, the defense lawyer can gain some reduction of the sentence in a case that would otherwise be hopeless. An informal negotiation does not just demonstrate how much influence the lawyer has in court, but also how the settlement can be sold to the client as a successful outcome. Other examples of situations in which defense lawyers favor informal settlements are when they want to protect their client from public exposure (83%) and in cases where a high sentence is expected (83%).<sup>75</sup>

If not all parties favor an agreement, courtroom actors might employ a number of different strategies in order to impose

---

69. See BRAUN, *supra* note 62, at 10–11. However, this is only indirect data, as the defendants themselves were not asked. This author believes that a public figure is very much interested in being spared a public trial.

70. *Id.* at 10.

71. Deal, *supra* note 20, at 549.

72. See BUSSMANN, *supra* note 16, at 28.

73. See SCHÜNEMANN, *supra* note 48, at B23.

74. See BRAUN, *supra* note 62, at 11 (crediting Schünemann's research).

75. See *id.*

pressure on the others to settle. To increase its negotiating power, the prosecution might “over-charge” the defendant in order to later be able to offer to withdraw offences from the accusation.<sup>76</sup> Another strategy to put pressure on the defense is to take advantage of the fact that only the prosecution can request a dismissal or a penal order. Accordingly, the prosecutor can combine an offer of dismissal under section 153a with a warning that this is the last chance for settling.<sup>77</sup> Moreover, the prosecutor can indicate that a refusal to accept an agreement could lead to a higher sentence recommendation. Obviously, it is not right to punish the defendant with a more severe sentence for objecting to a negotiation. However, since the exact final sentence is nearly impossible to anticipate, it is very difficult to evaluate whether the final sentence is more severe because of the earlier rejection to settle. An increased sentence might even be an unintended consequence.<sup>78</sup>

Defense lawyers, on the other hand, use the defendant’s extensive procedural safeguards to threaten the courts with an enormous number of interim appeal motions and evidentiary hearings that are expensive and time consuming to initiate an informal settlement of the case.<sup>79</sup> They bombard the court with motions of different kinds, which the court cannot reject without risking an appeal. Thus the trial is artificially prolonged, just to induce settlement in order to shorten the procedure.<sup>80</sup> The same tactic can be used with motions to disqualify the judge.<sup>81</sup> Compared to England and Wales, the defense counsel in Germany is in an advantageous position because it has access to the prosecution’s dossiers, which are not restricted by disclosure rules.<sup>82</sup>

---

76. See Andrew Ashworth & Meredith Blake, *Some Ethical Issues in Prosecuting and Defending Criminal Cases*, 1998 CRIM. L. REV. 16, 28; Christian Lüdemann, *Land without Plea Bargaining? How the Germans Do It. Results of an Empirical Study*, 17 EUROCRIMINOLOGY 119, 122 (1998).

77. See Herrmann, *supra* note 14, at 63.

78. See *id.* at 67.

79. See LEIGH & ZEDNER, *supra* note 9, at 41. Wassermann speaks of a boycott and even a sabotage of the criminal procedure. Rudolf Wasserman, *Von der Schwierigkeit, Strafverfahren in angemessener Zeit durch Urteil abzuschliessen [The Difficulty of Concluding the Criminal Procedure through Judgment without Undue Delay]*, 1994 NJW 1106.

80. See GERLACH, *supra* note 40, at 24.

81. See STPO, Apr. 7, 1987, BGBL. I 1074, as amended, §§ 24, 26.

82. In fact, at trial the defense lawyer has the same dossier as the prosecution and the court.

There are many examples of abuses on both sides, and there are even known cases in which defendants were put under grave pressure to confess to crimes that they denied having committed.<sup>83</sup> In one case, the lawyer forced the prosecution into a settlement declaring that he knew that there was a serious basis for appeal, without revealing the court's mistake. The prosecutor had a choice between risking the judgment being reversed by the appeal court or engaging in negotiations with the defense.<sup>84</sup> Unfortunately, the literature has to rely on anecdotal evidence as there is no systematic empirical research on the extent of severe abuses.

### B. *Content of Agreements*

The defendant (usually through his counsel) can offer to confess to all or parts of the accusations, to testify against a co-defendant,<sup>85</sup> to waive a motion for the admission of evidence, or to waive the right to file an appeal.<sup>86</sup> In addition, the defendant might promise to undertake to pay court costs or indemnification payments<sup>87</sup> or to waive his own requests for any compensation.<sup>88</sup> As in England and Wales, the center of informal negotiations in Germany is the confession. However, as in the English discourse on plea bargaining, an essential question is what effect a confession should have on the sentence.

It is generally accepted that a remorseful confession should generate a sentence reduction. In the case of an informal agreement, however, it is more likely that the cause for the confession is the expected sentence reduction rather than true remorse. Schmidt-Hieber argues that the possibility of remorse is at least not ruled out and that one should account for the principle of *in dubio pro reo*.<sup>89</sup> Schünemann counters that the

---

83. See Herrmann, *supra* note 14, at 77.

84. See Deal, *supra* note 20, at 548.

85. See BRAUN, *supra* note 62, at 6.

86. For the question of the extent to which such a waiver is binding, see *infra* p. 318.

87. See BRAUN, *supra* note 62, at 6.

88. See Christoph Rückel, *Verteidigertaktik bei Verständigungen und Vereinbarungen im Strafverfahren—Mit Checkliste [Defender Tactics in Negotiations and Agreements in Criminal Proceedings—With Checklist]*, 1987 NSTZ 297, 303.

89. Werner Schmidt-Hieber, *Der strafprozessuale „Vergleich“—eine Illegale Kungelei? [Criminal Procedure “Settlement”—Illegal Wheeling and Dealing?]*, 1986 StV 355, 356 [hereinafter Schmidt-Hieber, *Vergleich*]. Otherwise, so he claims, there would be acting

confession in this case *depends* on the offer of an advantage and therefore cannot indicate *unconditional* remorse.<sup>90</sup> On the other hand, Schmidt-Hieber stresses that even without remorse the confession's value for establishing the facts is sufficient for mitigating the sentence.<sup>91</sup> Moreover, the Federal High Court of Justice (*Bundesgerichtshof*) has held that a confession is a mitigating factor, even if it is given primarily for tactical reasons.<sup>92</sup> Additionally, according to Widmaier, the ethical effort of admitting to the offence in front of the court, the public, and to oneself should be rewarded.<sup>93</sup> On the other hand, especially in the areas of financial, environmental, and similar crimes, defendants cannot be absolutely convinced of their blameworthiness because the question often does not depend on the facts (as in traditional crime) but rather on definitions and interpretation of the elements of the offence by the courts.<sup>94</sup> To express deep remorse is difficult under these circumstances.

Even more pressing is the relationship between confession and truth. As was shown earlier, the principle of substantive truth dictates that the judge examine every confession as to its truthfulness and consider additional evidence if needed. However, research reveals that informal agreements drastically undermine this principle. When Schünemann asked judges whether they would accept a confession even in a situation where the trial had not brought up enough evidence for a conviction, seventy-two percent showed themselves ready to accept the confession and to take it as the only basis for conviction.<sup>95</sup> The principle of substantive truth is considerably undermined further if an informal agreement consists of a so-called "slim confession," which means that the defendant only confirms the already known evidence rather than revealing any new facts.<sup>96</sup> This kind of

---

skills at play in trials. Werner Schmidt-Hieber, *Absprachen im Strafprozeß—Rechtsbeugung und Klassenjustiz?* [*Informal Agreements in the Criminal Process—Perversion of Justice and Class Justice?*], 1990 DRIZ 321, 321 [hereinafter Schmidt-Hieber, *Absprachen im Strafprozeß*].

90. SCHÜNEMANN, *supra* note 48, at B112.

91. Schmidt-Hieber, *Vergleich*, *supra* note 89, at 356.

92. See BGH Aug. 8, 1997, 28 JURISTISCHE RUNDSCHAU [JR] 245 (248), 1998.

93. Widmaier, *supra* note 22, at 358.

94. See BUSSMANN, *supra* note 16, at 76.

95. SCHÜNEMANN, *supra* note 48, at B23; see also Oberlandesgericht [OLG] [Higher Regional Court] Jan. 24, 1989, BREMEN [StV] 145, 1989 (presiding judge admitted not having read the file before initiating negotiations with the defendant).

96. See SCHÜNEMANN, *supra* note 48, at B83.

confession is usually formulated by the defense counsel<sup>97</sup> and then is just confirmed by the defendant. Defendants favor slim confessions because they avoid having to release details, that might bring about a harsher sentence or be used in a civil action by the victim.<sup>98</sup> The court too might favor a less elaborate statement of the facts because more details of the crime could lead to suspicion among the public who might not understand the mild sentence or probationary custody.<sup>99</sup> In this respect, the argument that a confession deserves a sentence reduction because it facilitates fact-finding is no longer applicable.

The second form of offer by the defendant is to waive or withdraw a motion for the admission of evidence in order to shorten the proceeding.<sup>100</sup> The defense might also agree not to challenge the admission of certain evidence by the prosecution or the court.<sup>101</sup> In this way, defendants renounce a considerable part of their procedural rights. Sometimes the defense offers additional remedies, such as a promise to improve the environmental protection at its factory or to waive administrative procedures.

Most informal settlements also include the waiver of the right to file an appeal.<sup>102</sup> Although any promise to waive the right to appeal made by the defendant before the final conviction is not legally binding,<sup>103</sup> it is only rarely broken. Even though there are legal remedies against a sentence based on an informal settlement, defendants rarely use these. There are three possible reasons why defendants do not challenge the conviction. First, they may be satisfied with the outcome to which they have agreed. Second, they might be reluctant to spend more time, money, and effort on another process. The third and most serious reason is that the defense counsel might not have informed the client about the legal remedies against the

---

97. The defense counsel chooses the formulations carefully in order to avoid any civil action.

98. See SCHÜNEMANN, *supra* note 48, at B83.

99. See *id.* at B26.

100. See BRAUN, *supra* note 62, at 6.

101. See Schmidt-Hieber, *supra* note 44, at 1017.

102. See Küpper & Bode, *supra* note 12, at 353.

103. See Herrmann, *supra* note 14, at 75.

settlement, or even about the existence of the agreement itself, which counsel negotiated on its own.<sup>104</sup>

Besides a dismissal or a penal order, the prime offer the prosecution can make to the defendant is to recommend a lower sentence to the court.<sup>105</sup> As in England and Wales, the result of a settlement can also be downgrading the charge, e.g., from attempted manslaughter to serious injury<sup>106</sup> or from perpetrator to abettor.<sup>107</sup> However, the court is not bound “by the offense’s evaluation which formed the basis of the order opening the main proceedings.”<sup>108</sup> This means that if the evidence during the hearing shows that an act has to be evaluated as the higher charge the court has to convict accordingly. If, however, the court accepts a slim confession without further investigation it will not have any indication that a higher charge might be more appropriate.

In addition to a sentence reduction, the accused might be offered release from custody<sup>109</sup> or other coercive measures.<sup>110</sup> Also, the exclusion of the public from the hearing can be offered in order to maintain the defendant’s privacy and professional reputation. Especially in white-collar crimes, the publicity of a criminal procedure can cause serious financial losses owing to the damaged reputation of the defendant or his business. Since the public can only be excluded from the court hearing if the requirements of section 169ff of the Courts Constitution Act<sup>111</sup> are met, informal strategies, such as the scheduling of the trial for late afternoon, or not passing information to the judicial press service, are used to avoid an audience in the court room.<sup>112</sup>

---

104. See Schünemann, *supra* note 31, at 1900.

105. See Herrmann, *supra* note 14, at 68. On the duty of the prosecutor to recommend a sentence to the judge, see JULIA ALISON FIONDA, PUBLIC PROSECUTORS AND DISCRETION: A COMPARATIVE STUDY 148 (1995).

106. See Herrmann, *supra* note 14, at 63.

107. See Hassemer & Hippler, *supra* note 12, at 360.

108. See STPO, Apr. 7, 1987, BGBl. I 1074, as amended, § 264.

109. See Schmidt-Hieber, *supra* note 44, at 1017.

110. See BRAUN, *supra* note 62, at 6.

111. Gerichtsverfassungsgesetz [GVG][Courts Constitution Act], Sept. 12, 1950, BGBl. I at 1077.

112. See BUSSMANN, *supra* note 16, at 18.

C. *Criticisms*

The main criticism regarding plea bargaining is not that the accused is unduly pressured, as is claimed in England and Wales.<sup>113</sup> Although such cases might occur, there is no evidence that this happens more than just exceptionally. Until last year, the largest part of the academic discourse instead dealt with the question of whether informal agreements are reconcilable with the German Constitution, the general principles of criminal procedure, and certain provisions of the Criminal Procedure Code and the Penal Code.<sup>114</sup> Principles that were claimed to have been infringed are: the presumption of innocence, the right to a fair trial, the right to a lawful judge, the right to judicial hearing, the principle of public trial, the principle of substantive truth and court investigation, the principles of immediacy and orality, the privilege against self-incrimination, the principle of compulsory prosecution, the duty of presence of the accused, and the prohibition of undue pressure.<sup>115</sup>

Whereas most academics held informal settlements to be an illegal practice, most practitioners were convinced of their compatibility with the German legal system.<sup>116</sup> Even though in the early 1980s the topic of informal case dispositions was considered explosive and disreputable,<sup>117</sup> many authors ascribed legality to this practice long before the introduction of the new legislation in 2009. The main points can only be summarized here, but it is evident that the discourse very much resembled the plea bargaining debate in Anglo-American criminal justice systems. The main arguments supporting the legality of informal agreements were that the Criminal Procedure Code did not forbid them expressly, that there were other provisions which allowed negotiations, that a decision based on consensus helped

---

113. MICHAEL MCCONVILLE ET AL., *STANDING ACCUSED: THE ORGANISATION AND PRACTICES OF CRIMINAL DEFENCE LAWYERS IN BRITAIN* 63–64 (1994).

114. See Thomas Swenson, *The German "Plea Bargaining" Debate*, *PACE INT'L L. REV.* 373, 383, 393, 400–01 (1995).

115. It is also discussed that courtroom actors engaging in informal agreements might commit offenses themselves. It is argued that participating professionals might violate section 336 (perversion of justice), sections 258 and 258a (preventing prosecution of a guilty person), or section 240 (duress) of the Penal Code. Likewise the betrayal of the client's interests (section 356) and breach of the duty to observe secrecy (section 203) are discussed in the literature. See *id.* at 425.

116. See Herrmann, *supra* note 26, at 775.

117. See BUSSMANN, *supra* note 16, at 48.

to achieve a fair and accepted outcome, and that the practice had been so well established that it was not reversible anyway.<sup>118</sup>

The major arguments against informal procedures were that, as long as the Criminal Procedure Code did not allow them explicitly, they were illegal, that they violated most major principles of the criminal process, that they compromised the role of the trial, and that they led to arbitrary results with a class bias.<sup>119</sup> Although informal negotiations played a vital role in Germany's criminal justice system for at least forty years, the literature shows that the legality of informal agreements was highly contested in relation to numerous principles and provisions. It is interesting to observe how many arguments some authors have advanced to show that informal procedures are legal,<sup>120</sup> while before 1982 no one doubted their illegality. Only after it was no longer possible to deny that informal negotiations were more than rare exceptions were justifications sought.<sup>121</sup> Otherwise, one would have had to recognize and admit that judges made wide-scale use of illegal means.<sup>122</sup>

Unfortunately, the discussion of legality failed to address broader questions, such as the actual balance of judicial and legislative power in Germany, the relation between work quotas and law obedience, the role of legal principles and values, and the relationship between substantive and procedural criminal law. Rather, the debate concentrated exclusively on the question of legality and the need for regulation. This gap in the discussion is regrettable because, as is argued below, it seems very questionable whether legislation can heal the rift between the traditional theoretical principles of the formal German criminal procedure and the new informal practice that is created to shortcut this procedure.

---

118. See generally RALF TSCHERWINKA, *ABSPRACHEN IM STRAFPROZESS* [AGREEMENTS IN CRIMINAL PROCEEDINGS] (1995) (discussing the arguments supporting the legality of informal agreements).

119. See Swenson, *supra* note 114, at 400.

120. See TSCHERWINKA, *supra* note 118.

121. See BUSSMANN, *supra* note 16, at 90 ("The knowledge of the existence and the significance of an informal practice changed its legal interpretation.").

122. See *id.* at 126–27. This is even supported in many other areas of law, such as civil law or administrative law, where agreements are legal.

IV. *ATTEMPTED RESTRICTIONS BY COURT RULINGS*

In financial crimes, informal settlements have been carried out for years despite of the fact that all participants were aware that the Federal High Court of Justice would not accept this practice.<sup>123</sup> Since a crucial part of the agreement is usually the waiver of the right of appeal, only a handful of higher court rulings dealt with informal settlements. But because of an increasing number of failed agreements (usually claiming a violation of the principle of freedom from coercion under section 136a)<sup>124</sup> the Federal High Court of Justice and even the Federal Constitutional Court (*Bundesverfassungsgericht*) (“Court”) were eventually forced to provide some rulings on this practice.<sup>125</sup>

The first landmark decision was delivered by the Federal Constitutional Court in 1987 when the appellant claimed that his constitutional rights were violated.<sup>126</sup> In the preliminary procedure, the Court denied having jurisdiction over the present case about an informal agreement as it could not identify any drastic violation of constitutional rights.<sup>127</sup> The Court held that negotiations outside the court in which the negotiating parties discuss the prognosis of the case were not generally forbidden as long as the law was respected.<sup>128</sup> In this case there was no violation of any procedural law because the presentation of evidence at trial was nearly completed and the final sentence was commensurate with the offender’s guilt.<sup>129</sup> In addition, the Court stated that the free choice of the defendant had not been unlawfully violated.<sup>130</sup> However, like the UK Court of Appeal in *Turner*,<sup>131</sup> the Federal Constitutional Court established a set of

---

123. *See id.* at 128.

124. Section 136a of the Code of Criminal Procedure states:

The accused’s freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. Coercion may be used only as far as this is permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited.

STPO, Apr. 7, 1987, RGBL. 1074, as amended, § 136a.

125. For a summary see Swenson, *supra* note 114, at 419.

126. BGH Jan. 27, 1987, NSTZ 419, 1987.

127. 9 NSTZ 419 (419).

128. *Id.*

129. *Id.*

130. *Id.*

131. *R. v. Turner*, [1970] 2 Q.B. 321 at 326–27 (Eng.).

rules under which informal settlements could be accepted.<sup>132</sup> All participants have to be involved, and any negotiations, including their contents, have to be set out in the main trial hearing.<sup>133</sup> The settlement must not include any *ultra vires* promises and the agreed outcome must be lawful and justifiable.<sup>134</sup> Further, although the agreement is not binding, there must be no divergence without reason.<sup>135</sup> Finally, following the principle of substantive truth, the defendant's confession has to be examined by the court to determine if it is genuine.<sup>136</sup> In setting out these limitations, the court seemed to acknowledge the general validity of informal settlements.<sup>137</sup> However, opponents have pointed out that only in these very restricted circumstances would negotiations be allowed; the majority of informal settlements would fall outside these limits and are therefore illegal.

The Federal High Court of Justice passed a number of confusing rulings regarding specific aspects of informal agreements without, however, addressing whether the practice in general was permissible. In 1989, the court held that the trial judge was allowed to contact the parties outside the courtroom, but it did not deal with the question of whether this contact could amount to any negotiations with the parties.<sup>138</sup> The court made clear that if the trial court raised certain sentence expectations, the defendant could rely on them, but it was not clear whether the trial court was allowed to raise such expectations in the first place.<sup>139</sup> In a 1990 tax evasion case the court held that the prosecution's offer to drop some charges if the defendant accepted a penal order would not preclude proceedings against the withdrawn charges later but would be considered mitigating circumstances.<sup>140</sup> In another case decided the same year,<sup>141</sup> the court again avoided dealing explicitly with the legality of informal settlements in general, but held that in the present case the judges had been biased because they

---

132. BRAUN, *supra* note 62, at 128.

133. *See id.*

134. *See id.*

135. *See* Swenson, *supra* note 114, at 399.

136. *See id.*

137. *See id.* at 419.

138. *See* BGH June 7, 1989, NJW 2270 (2271), 1989.

139. *Id.*

140. BGH June 7, 1989, NJW 1924, 1990.

141. BGH July 4, 1990, NJW 3030 (3031), 1990.

negotiated with the two co-defendants but not with the appellant, who was not informed about the settlement. One year later, the court declared that informal agreements contradict the rule of law,<sup>142</sup> and in another decision that year, it clarified that the agreement does not bind the trial court, as this could render judges biased.<sup>143</sup> Further, it criticized the practice of informal negotiations in the strongest terms.<sup>144</sup> Any informal contact should be limited to “feeling out” the parties, without dealing with questions of sentencing or probation.<sup>145</sup> However, only a couple of months later a different Senate<sup>146</sup> of the same court disallowed an informal settlement for specific reasons, rather than reasoning that they were generally impermissible.<sup>147</sup> In 1993 it was confirmed that extra-trial settlements would not necessarily prejudice the court’s judgment.<sup>148</sup>

The decisions of the Federal High Court of Justice on the practice of informal negotiations have been ambiguous and the interpretations have been consequently debated.<sup>149</sup> The court seemed to oscillate between criminal procedural principles on the one hand and the pragmatic necessity of informal agreements on the other. In an *obiter dictum* the court stated the incompatibility of informal settlements with the legal system,<sup>150</sup> but made a contrary ruling soon after.<sup>151</sup> It explained that the solution lay in a linguistic distinction between illegal “accordance” (*Absprache*) and legal “understanding” (*Verständigungen*), but the court did not provide any criteria to distinguish between the two forms in practice.<sup>152</sup>

In a landmark decision in 1997, the Fourth Senate of the Federal High Court of Justice declared that informal settlements were “not prohibited” if they were within certain limits.<sup>153</sup> The

---

142. BGH Sept. 24, 1990, NSTZ 348, 1991.

143. See BGH Jan. 23, 1991, NJW 1692 (1693), 1991.

144. See *id.* at 1694.

145. See *id.*

146. The Federal High Court of Justice is divided into five chambers called Senates.

147. BGH Oct. 30, 1991, 8 NJW 519, 1992.

148. BGH Oct. 19, 1993, 19 NJW 1293, 1994.

149. See Küpper & Bode, *supra* note 12, at 395.

150. BGH Oct. 30, 1991, 37 BGHST 298, 1991.

151. BGH Oct. 19, 1993, 4 NSTZ 153 (196), 1994.

152. *Id.*

153. BGH Aug. 28, 1997, NJW 86, 1998 (where the defendant was charged with a hundred counts of sexual abuse and rape).

negotiation has to take place after the trial has started, although discussions in the course of preparation are allowed if the result is revealed during the main trial;<sup>154</sup> all participants (including co-defendants) have to be informed; and the trial court is not relieved of its obligation to find the objective truth and thus has to investigate the credibility of the confession. As a consequence, the determination of guilt of any offense must not be part of the negotiation. Further, a confession made as part of the informal negotiation has a mitigating effect, but the court is not allowed to indicate the exact sentence. However, it is permissible to indicate the maximum penalty that could be expected. Threats or undue promises are forbidden. The same is true for a waiver of the right to appeal by the defense.<sup>155</sup> As will be shown later, it is especially the last rule that is generally disregarded in practice.<sup>156</sup>

Since this decision, the Federal High Court of Justice repeatedly emphasized that although the practice of informal negotiations was developed *praetor legem*, it is now a necessary part of the German criminal justice system and thus permissible within the restrictions of the 1997 decision.<sup>157</sup> However, these guidelines were met with incomprehension by the legal community, which felt that the guidelines would not address their concerns. The restrictive limits of the ruling did not reflect the practice of informal negotiations and practitioners felt that the Federal High Court of Justice was too remote from the day-to-day work of trial courts to understand the practical necessities.

The 1997 decision did not prove to be the final clarifying decision for which many had been waiting. Seven years later, there were still discrepancies between the five criminal Senates of the Federal High Court of Justice regarding informal agreements.<sup>158</sup> In 2004, the Federal High Court of Justice

---

154. *Id.*

155. Joachim Herrmann, *Rechtliche Strukturen für Absprachen in der Hauptverhandlung. Die Richtlinienentscheidung des Bundesgerichtshofs—BGHSt 43, 195* [Legal Structures for Agreements in the Criminal Trial. The Policy Decision of the Federal Court—43, 195], 12 JURISTISCHE SCHULUNG [JUS] 1162 (1999). For a critique of this decision, see Thomas Weigend, *Eine Prozeßordnung für abgesprochene Urteile* [A Code of Procedure for Negotiated Judgments], 2 NSTZ 57 (1999).

156. Helmut Satzger & Kai Höltkemeier, *Zur Unwirksamkeit eines abgesprochenen Rechtsmittelverzichts* [The Ineffectiveness of a Negotiated Waiver of Appeal], 2004 NJW 2487.

157. BGH Oct. 29, 2003, 18 NJW 1273 (1335), 2004.

158. See, e.g., BGH Feb. 19, 2004, 50 BGHSt 84, 2005; BGH Mar. 13, 2003, 50 BGHSt 161, 2004.

examined the validity of waivers of appeal as part of the agreement.<sup>159</sup> The Joint Senate confirmed once again the general permissibility of informal agreements within the guidelines of the 1997 decision,<sup>160</sup> but limited the waiver of appeal.<sup>161</sup> The court made clear that if the judgment is based on an informal agreement, any waiver of appeal by the defendant was not binding unless the defendant has been informed by the court that he or she was not bound by any promises to waive the right to appeal made previously as part of the agreement (the so-called “qualified information”).<sup>162</sup> Moreover, the court declared that “the limits of judicial lawmaking” had been reached, and called for action by the legislature.<sup>163</sup>

#### V. *THE NEW LEGISLATION*

On May 28, 2009, the German Federal Parliament followed the call of the Federal High Court of Justice by passing the Bill for the Regulation of Agreements in the Criminal Procedure, which formalizes agreements during the criminal trial.<sup>164</sup> Except for some minor changes, the legislation largely follows the guidelines set out by the Federal High Court of Justice. A new section, 257c,<sup>165</sup> was added to the German Criminal Procedure Code, to allow for and regulates agreements without—so it is claimed<sup>166</sup>—infringing on the principles of the German criminal procedure.<sup>167</sup>

The new provision regulates the agreement between the court, the prosecution, and the defense.<sup>168</sup> An agreement becomes valid when the court announces the possible content of the agreement and both the prosecution and defense consent.<sup>169</sup> The legal status of agreements that have been made before or outside of trial is unclear. Section 160b allows for

---

159. BGH June 15, 2004, NJW 2536, 2004.

160. BGH Mar. 3, 2005, 50 BGHSt 40 (47), 2005.

161. *Id.*

162. In German, *qualifizierte Belehrung*.

163. 50 BGHSt 40 (64).

164. DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 16/12310

165. This is the focus of the new regulation. Other provisions that were changed or added are: sections 35a, 44, 160b, 202a, 212, 243, 257b, 267, 273, 302. *Id.*

166. BT 16/13095.

167. *Id.* at 1–3.

168. StPO, Apr. 7, 1987, BGBl. I at 1074, as amended, § 257c.

169. *Id.* § 257c(3).

communications between prosecution and defense before trial (“if they appear to be suitable to further the proceedings”) which need to be read into the record,<sup>170</sup> but it is unclear whether binding agreements between the prosecution and defense without the involvement of the court are prohibited, or simply not part of the new regulation.

The new provision is aimed at preserving the principle of substantive truth. Only if the court is convinced that the offense has been fully investigated and there are grounds for believing that the admission of guilt is genuine can the judgment follow. This confirms the Federal High Court of Justice ruling that a mere “formal admission” (in which the defendant only admits guilt but does not make any statement about the facts) does not suffice for a judgment.<sup>171</sup> It follows that the settlement must not include an agreement about a determination of guilt.<sup>172</sup> This provision also excludes any negotiations that in the common-law system would be called charge bargaining. However, charge bargaining between prosecution and defense very likely occurs before the trial. It has been shown that negotiations about different charges are invaluable to both defense and prosecution, and it is very questionable whether section 257c(2) will be able to end these kinds of negotiations.<sup>173</sup>

All negotiations before and during trial have to be announced during the main trial hearing and read into the record.<sup>174</sup> The recording of all negotiations and agreements promotes transparency and ensures that all arrangements can be revised by an appellate court. According to the new section 273(1a), even the absence of any agreement needs to be recorded.<sup>175</sup> This is an important step to move “plea bargaining” out of the shadows of informality and into the field of regulated, transparent, and controllable formal procedure.

To ensure the principle of fair trial and protect the defendant, section 257c(4) mandates that unless new facts emerge (be they related to the crime itself or the behavior of the defendant after the agreement), the trial court is bound by its

---

170. *See id.*

171. *See* BGH Jan. 26, 2006, 3 STRASSENAT [STR] 415/02, 2006.

172. *See* StPO, Apr. 7, 1987, BGBl. I at 1074, as amended, § 257c.

173. *See supra* discussion in Part II.

174. *See* StPO, Apr. 7, 1987, BGBl. I at 1074, as amended, § 273.

175. *See id.*

initial prognosis of punishment.<sup>176</sup> This stipulation protects defendant expectations but ensures that the final sentence reflects the known facts and not merely the agreement. If the trial court feels that it cannot sentence according to its initial sentence prognosis the admission of guilt cannot be used as evidence. This rule attempts to restore the status quo, particularly the presumption of innocence, that existed before the agreement. However, it will be very difficult for the trial court<sup>177</sup> to disregard a confession after it has previously accepted it, which it can only do if it was convinced, according to the concept of substantive truth, that it was genuine. One can easily imagine a situation where the defendant submits a credible confession that concurs with other evidence but later new aggravating facts arise and the trial court cannot justify its initial indication of maximum sentence. In this case the agreement falls apart, the court is not bound by its promise, and the defendant's confession is presumed not to have been made. It is not realistic to expect the court to disregard a confession which it was convinced was true simply because additional aggravating facts have arisen. Even if the court is able to disregard completely the earlier credible admission of guilt, if the defendant is convicted it will be hard for him as well as the public to believe that the court was not prejudiced by the previous confession.

The second central aspect of the new law concerns the waiver of appeal. Following the guidelines of the Federal High Court of Justice, according to sections 35a and 302(1), a waiver of appeal must not be part of any agreement.<sup>178</sup> Further, whenever a judgment involves an agreement, any waiver of appeal (even if it was not part of the agreement) is only valid if the defendant has received the qualified information explained above.<sup>179</sup> This means if a case involves an agreement and the defendant waives his right to appeal, the court has to explain to the defendant that if this waiver was part of the deal, the court is no longer bound by it.<sup>180</sup> Only if the defendant adheres to the waiver after being thus informed by the court does it become valid. The aim of this strict

---

176. *See id.* at § 257c.

177. There is no jury in the German trial.

178. *See* STPO, Apr. 7, 1987, BGBl. I at 1074, as amended, §§ 35a, 302.

179. *See id.*

180. *See id.* §§ 257c, 302.

rule is to ensure that agreements are open to revision by the appellate courts. The hope is that this judiciary control will guarantee that all agreements are within the legal boundaries and thus establish legitimacy for this practice.

However, like the Federal High Court of Justice before it, the legislature has overlooked the flaw of this reasoning. The waiver of an appeal by the defendant has potentially two invaluable benefits for the trial judge. First, without the prospect of an appeal, the judgment does not need to be formulated with the same care as if it were open to review by a higher court. Second, every appeal is a challenge to the rightfulness and quality of the judge's decision. The fewer cases of an individual judge that are reviewed by a higher court, the fewer decisions are overruled, which is important for the judge's career appraisals. The defense lawyer, too, is unlikely to pursue an appeal that will damage the trust-based working relationship with the court and the prosecutor, and might threaten future negotiations. Thus a judicial review of cases based on informal agreements is not in the interest of the practitioners, and it does not come as a surprise that this rule was regularly disregarded. It is more than questionable whether the new legislation will be able to change this.

Another problem related to the waiver of appeal is the time limit for the defendant. If the defendant declares a waiver of appeal without receiving the qualified information and then decides to appeal after all, he can do so only within the ordinary time limits for appeals, which is one week after pronouncement of the judgment.<sup>181</sup> The Federal High Court of Justice explicitly ruled that the time limit cannot be extended for defendants who have entered an agreement because this would put them in a better position than defendants who have not participated in a settlement.<sup>182</sup> In practice this means that defendants who are not informed by the court that they are not bound by their initial waiver of appeal can only file an appeal if they find out that their initial waiver is invalid within one week after the judgment. If the court and defense counsel agree to a settlement which illegally includes a waiver of appeal, it is doubtful that they will later inform the defendant that this part of the deal is not binding. As

---

181. *See id.* at § 341.

182. *See* BGH June 25, 2008, STR 246, 2008.

was argued before, an appeal is not in the interest of any of the courtroom actors. The future will show if courts will take advantage of this loophole. Marsch guesses that the waiver of appeal will not end, but rather will only be made invisible.<sup>183</sup>

Considering what little impact the rulings of the Federal High Court of Justice had on the practice of informal negotiations, the main question is whether the new legislation (which adds little substance to the existing practice) will be followed by the courtroom actors. Since the debate over informal agreements started in Germany, calls for legislative regulation of the practice have been voiced. It was argued that the legislature needed to regulate the practice and make it more formal so that courtroom actors would no longer need to act outside the Criminal Procedure Code. However, Nestler-Tremel pointed out that legality was only a theoretical problem, for in practice the defendant usually waived the right to appeal and thus withdrew the negotiations from any formal control.<sup>184</sup> Besides, informal settlements were carried out long before practitioners even dared to admit it. Even if proponents later argued that informal agreements would fit into the German criminal law system, initially the participants did not believe them to be legal but used them on a regular basis nevertheless.<sup>185</sup> If the judiciary developed its own system believing the procedure to be illegal, it is doubtful they would now accept regulations and restrictions.<sup>186</sup> Meyer-Goßner even declared that informal agreements “are going to shape the legal everyday life with or without legislation.”<sup>187</sup> Schünemann, on the other hand, disapproved of this viewpoint and called it an unrealistic insult to the German judiciary.<sup>188</sup> However, the development of relevant legislation supports Meyer-Goßner’s view. The dismissal was repeatedly extended by the legislature to follow the *praetor legem* development of the informal practice by the judiciary.<sup>189</sup> Bussmann’s research

---

183. Marsch, *supra* note 8.

184. Cornelius Nestler-Tremel, *Der „Deal“ aus der Perspektive des Beschuldigten* [*The “Deal” from the Perspective of the Accused*], 1989 KRITISCHE JUSTIZ [KJ] 448.

185. See Herrmann, *supra* note 14, at 57.

186. See Wolfgang Siolek, *Neues Zum Thema Verständigung im Strafverfahren* [*New Comments on the Subject of Agreements in Criminal Proceedings*], 1993 DRIZ 427, 428.

187. Meyer-Großner, *supra* note 2.

188. SCHÜNEMANN, *supra* note 48, at B159.

189. See *supra* Part I.

confirmed that the question of legality did not play a notable role for legal professionals.<sup>190</sup> The practitioners were led by quotidian requirements rather than by the formal law, and consequently they were not particularly concerned about whether the question of law should be changed.<sup>191</sup> It was not so much that the practitioners suppressed the praxis-law conflict, but rather that the formal law played an inferior role in the daily practice. When considering whether to initiate an informal negotiation, participants calculate its benefits and drawbacks, rather than its compatibility with the law.<sup>192</sup> Thus formal law is replaced by an informal but established code of conduct.<sup>193</sup> Widmaier made the reality of the practice very clear: “Settlements in criminal procedure do exist. They do not need to be first legalised, nor can they be prohibited.”<sup>194</sup>

Drawing conclusions from this experience, it is very questionable whether the courtroom actors will adapt their practice-driven customs to the limits of section 257c. Meyer-Gößner points out that judges and prosecutors are less likely to ignore legislation than judge-made law because they could commit the criminal offense of perversion of justice according to section 339 German Penal Code.<sup>195</sup> However, this threat seems not to have been strong enough to prevent the judiciary and prosecutors from developing extensive informal practices outside the law of dismissal and penal order in the first place.<sup>196</sup> Since the appeals courts have developed the rules which have now become written law, it must be expected that appeals courts will support the new legislation, but of course they will only have the opportunity to do so if the trial courts use agreements openly.

The future will reveal whether the new legislation will succeed in lifting the agreements out of informality into the realm of formal procedure. This author has serious doubts about whether the formalization of a practice which derives its attraction from its informality can be realized.

---

190. BUSSMAN, *supra* note 16, at 219.

191. *Id.*

192. See Nestler-Tremel, *supra* note 184, at 448.

193. See BUSSMANN, *supra* note 16, at 141.

194. Widmaier, *supra* note 22, at 357.

195. Meyer-Gößner, *supra* note 2, at 190.

196. See *supra* Part III.

VI. *THE CHASM BETWEEN THEORETICAL VALUES AND PRACTICAL NECESSITIES*

As in England and Wales, the merits of informal negotiations for the German criminal process are highly contested. Whereas most practitioners praise the usefulness and even the necessity of informal procedures, many academics point out that this practice is not compatible with the basic values of the German criminal justice system. But there is a third essential theme which is missing in the debate. This Article argues that the development of informal procedures in Germany, as with plea bargaining in England and other common-law systems, leads to the development of an informal system which runs parallel to the formal process with neither higher courts nor legislation being able to prevent or control it. This opens questions not only about the power of the judiciary in general, but also about whose role it is to close the chasm between theoretical values and practical necessities in general. The legislature in Germany had the opportunity to engage in a debate about the tension between the two, but unfortunately did not address this question at all.

It has been argued above that the core reason for the start of informal settlements in Germany was the change in the nature of the substantive criminal law without adaptation of the procedural law. Both the German Penal Code and the Criminal Procedure Code date from the nineteenth century when crimes were comparatively simple to define and generally corresponded to the understanding of an average person. In modern society, with the increasing introduction of crimes that cause danger (rather than harm), common sense is no longer sufficient to establish the boundary between permissible and criminal conduct.<sup>197</sup> The main question is often not the identity of the offender, but whether an offense was committed in the first place. The conduct of the accused need not be identified, but rather interpreted. For example, the trial court might not need to establish whether the defendant has transferred money, but whether this transaction amounted to money laundering. This means criminal law has been extended to offenses that do not fit under the conventional

---

197. See Rolf-Peter Calliess, *Strafzwecke und Strafrecht—40 Jahre Grundgesetz—Entwicklungstendenzen vom freiheitlichen zum sozial-autoritären Rechtsstaat?* [Sentencing Goals and Criminal Law—40 Years Constitution—Developing Tendencies from Liberal to Social-Authoritarian Constitutional State], 1989 NJW 1338, 1340.

criminal procedure law. Not surprisingly, the courtroom actors have had to adapt their way of handling these cases and court behavior has become less characteristic of criminal law and more typical of administrative law:

Through giving up the punitive, repressive paradigm in favour of an economic paradigm and abandonment of hierarchical, authoritarian forms of interaction in favour of cooperative, consent orientated forms of process, criminal procedures become increasingly similar to administrative law procedures, solving conflicts of interests . . . by negotiation.<sup>198</sup>

Hence, legal practice finds itself in a quandary between, on the one hand, formal procedural law that is still oriented toward the principle of material truth, and on the other hand, substantive criminal law, which blurs the boundaries between allowed behavior and criminal conduct, and thus pushes towards formal truth on which the participants agree. As certain behaviors were transferred to the more repressive criminal law, the criminal trial itself was replaced by informal negotiations where the offender can now negotiate and avoid public stigmatization. The fact that more and more offenses have been transferred from administrative law into criminal law in order to exercise more repressive control on white-collar crime ironically has had the effect that criminal courts increasingly might replace the trial with less repressive, consensus-oriented negotiations. While this is welcome in most cases by the defendant and all courtroom actors, it disregards the interest of the public in proportionate punishment and fair labeling of the crime. “The increasing restructuring of criminal law from a device of citizen protection into a flexible mechanism of state intervention is the wrong answer to the right question of how social risks can be dealt with.”<sup>199</sup>

Rather than formally measuring the new substantive law against the traditional core values of criminal procedure and adapting one to the other, it has been left to the courtroom actors to square this circle. As in England and Wales, Germany’s two law systems, i.e., the formal trial and the informal case

---

198. BUSSMANN, *supra* note 16, at 27.

199. Calliess, *supra* note 197, at 1338.

disposition, started to work alongside each other.<sup>200</sup> This development is easier to accept in common-law systems as judges are allowed and indeed asked to develop law. In civil-law countries, too, the development of customary law is acknowledged to some degree. Herrmann holds that criminal justice is a “living organism” and hence it is possible to develop it against the law.<sup>201</sup> Also, Schünemann regards the increasing use of informal settlements in Germany as a form of development of customary law.<sup>202</sup> However, the development of customary law finds its limits in the fundamental principle of law and the rule of law. And as was shown above, the legality of informal agreements was always highly contested.

But there is a more fundamental problem with informal criminal procedures, i.e., the consequences of the duality of systems. When two systems exist side by side, the crucial question is, who has the power to decide which system is used in which case and which criteria are taken into account in this decision? The main argument of the proponents of plea bargaining in England and Wales and informal agreements in Germany is that the defendant has the choice between safeguards and sanction reduction. However, this argument has two crucial flaws: first, defendants often do not have the necessary information to make this rational decision. They lack insight into the practices and routines of the court, they have no access to the prosecutor’s files, and it is seldom possible for a lay person to evaluate the strength of the prosecutor’s evidence, especially in large-scale procedures. As a consequence, defendant will be dependent on the decisions made by the lawyers, who have their own interests in mind. Second, even if the defendants themselves have a choice, the divergence from a formal trial silences both the public (who are denied an audience at trial and whose interests are no longer represented by the prosecution, who again follow their own interests) and the victim. In both adversarial and inquisitorial criminal justice systems, it is the legal professionals who decide which cases are “worthy” of a full trial and which are to be disposed of informally. However, there are no guidelines on the criteria for this decision, and it seems that this is an area

---

200. See BUSSMANN, *supra* note 16, at 20.

201. Herrmann, *supra* note 26, at 773.

202. SCHÜNEMANN, *supra* note 31, at 1896.

of absolute, uncontrolled discretion.<sup>203</sup> As was shown above, the criteria of selecting cases for plea negotiations are very random and more related to the characteristics of the defendant than the interest of the public.

### VII. *SQUARING THE CIRCLE*

Informal agreements have spread so widely to all types of crime because the work pressure of under-resourced courts and prosecution offices have reprioritized the values of the criminal process. It is now the maxim of efficiency that often assumes first priority in decision making by legal professionals.<sup>204</sup> Since negotiations among professionals have turned out to be much more efficient than contesting the case, traditional values of fair trial and proportionate sentencing have to make way for the new value of “process economy.”<sup>205</sup> The new legislation claims to square the circle of plea bargaining, making it possible to profit from all the advantages of informal agreements while simultaneously upholding the main principles of the formal criminal trial. However, it is doubtful whether the new procedure can combine the benefits of informal agreements while preserving the safeguards of the formal procedure. First, the new legislation focuses on agreements between all parties during the trial whereas in reality many deals are struck before the main hearing and are often without the participation of the court. Thus a great number of negotiations fall outside the scope of the new legislation. Second, as the confession is not sufficient to establish the defendant’s guilt, the court is expected to study the dossier carefully and satisfy itself that there are no legal or factual obstacles to the agreed outcome.<sup>206</sup> The extent to which the validity of the confession will be examined by the courts remains to be seen. As one of the main reasons for the development of informal agreements was the shortening of proceedings, it is open to question whether courtroom actors are now inclined to lengthen them. One could argue that a hearing that examines the validity of the admission of guilt is still shorter than a full

---

203. And an area that is unresearched for that matter.

204. See Lüdemann & Bussmann, *supra* note 28, at 68.

205. In German, *Prozeßökonomie*.

206. *Absprachen im Strafprozess—Wirksamkeit eines Rechtsmittelverzichts* [Agreements in Criminal Procedures—The Effectiveness of the Appeal Waiver], 2005 NJW 1440, 1442.

trial, but experience shows that courtroom actors often do not feel that they can afford the time to check the validity of the confession. Thus, with hindsight, it is not surprising that courtroom actors repeatedly disregarded the Federal High Court of Justice rulings and continued to extend the use of informal negotiations. Legislation that reiterates rules that have proven to be unacceptable to courtroom actors will hardly be able to change a well-established practice.

Last, but by no means least, the question of appeal, which opens the practice to supervision of the higher courts, has not been addressed appropriately by the legislature. There is no disagreement that undue pressure, be it threats or inappropriate promises, are forbidden and render any agreement void. The essential question is how the authenticity of the confession can be tested. It is the informality of the negotiations, in which the courtroom actors can speak freely off the record without the risk of creating grounds for an appeal, that makes informal negotiations so attractive. The informality is the reason that the attempts by the Federal High Court of Justice to render negotiations and agreements more visible were opposed by practitioners, and waivers of appeals are made regularly part of settlements. It is doubtful whether this procedure can combine the benefits of informal agreements while preserving the safeguards of the formal procedure.

It has been shown throughout this Article that informal agreements have been developed as a response to the growing gap between theoretical values of the formal process and the practical demands on courtroom actors. The development of an informal practice that has been developed outside the written law and outside the explicit rulings of both the Federal Constitutional Court and the Federal High Court of Justice proves how wide this gap is. On the one hand, substantive criminal law, which has been used to solve different social problems since the Penal Code was first written in the nineteenth century, has changed its function. On the other hand, the notion of criminal procedure and the role of punishment have shifted. Neither is reflected in the development of the formal criminal trial. The irreconcilability of traditional criminal procedure and modern criminal law seems to be an overlooked side effect of reforms in substantive criminal law. Considering how much

weight is given to the core values and how much pride is placed in the term “rule of law,” a departure from such values has to be consciously considered. Rather than leaving it to the courts to cope with the strains of new procedures, the legislature and civil society have to decide how to reconcile substantive and procedural criminal justice. The solution for this enormous task cannot be found in criminal law and criminal procedural law alone,<sup>207</sup> but by taking a broader look on an inter-disciplinary basis—for example, by considering options such as the reformation of tax law and accounting law, a re-transfer of certain offenses to administrative law, and a reconsideration of the criminalization of certain risk-creating offenses.

The rules that the Federal High Court developed and the legislature reiterated neither discussed these underlying tensions nor succeeded in formulating a procedure that would help courtroom actors serve the demands of both procedural and substantive criminal law. It seems that both the Federal High Court of Justice and the legislature assume the problems are solved as soon as they give the courtroom actors the extra freedom they are demanding. This approach demonstrates a lack of understanding of the underlying conflict between the different demands on the legal practitioners. Although regulation of previously informal negotiations in criminal law is welcome, the legislature unfortunately failed to debate the role of modern criminal law.

---

207. This is what the main German academic discourse regarding informal settlements seeks to do.