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Negotiated Agreements and Open Communication in Criminal Trials: The Viewpoint of the Defense

By Stefan König & Stefan Harrendorf***

A. Introduction

Negotiated agreements in criminal trials—often, somewhat deprecatingly, called "deals" in Germany—are a curious phenomenon. Such agreements informalize criminal proceedings, yet—according to the legislature—they are also restrained by the formal structure of German procedural law, through the principle of judicial investigation. The restraining of deals via procedural law seems like a futile attempt to achieve the impossible: In an inquisitorial system, the court is obliged to find the "real," material truth by extending the taking of evidence to all facts and means of proof relevant to the decision.[1] Neither ascertainment of guilt nor sentencing can be based merely on hypothetical facts of the case. A recent judgment of the Federal Constitutional Court on negotiated agreements has stressed that it is unconstitutional to base a conviction on facts that have been mutually agreed upon, if it is not certain that the facts are actually real.[2] This decision hints at the problems deals pose for criminal proceedings in Germany. Despite these problems, such agreements have been very common in the last years and decades. There are many reasons for this. We are going to discuss the most important ones here.

In Section 257c StPO,[3] enacted 4 August 2009,[4] the legislature finally set some rules for negotiated agreements.[5] These rules are the result of different, and sometimes

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[1] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBL. I] 1074, as amended, § 244, para. 2.

[2] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2628/1066, 66 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1058, 1063, 1068 (Mar. 19, 2013).

[3] Section 257c StPO has the following wording (in English translation):

> (1) In suitable cases the court may, in accordance with the following subsections, reach an agreement with the participants on the further course and outcome of the proceedings. Section 244 subsection (2) shall remain unaffected.

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contradictory, developments in modern criminal justice that the legislature tried to balance against each other. The resulting compromise, however, is far from satisfactory. Whether it helps to solve the problems of modern criminal procedure is questionable.

In the abovementioned judgment of 19 March 2013, the Federal Constitutional Court decided that Section 257c StPO is constitutional, but that it needs to be interpreted restrictively. The Constitutional Court also stated that the way negotiated agreements are practiced in criminal proceedings disregards the requirements of criminal law. The

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> (2) The subject matter of this agreement may only comprise the legal consequences that could be the content of the judgment and of the associated rulings, other procedural measures relating to the course of the underlying adjudication proceedings, and the conduct of the participants during the trial. A confession shall be an integral part of any negotiated agreement. The verdict of guilt, as well as measures of reform and prevention, may not be the subject of a negotiated agreement.
>
> (3) The court shall announce what content the negotiated agreement could have. It may, on free evaluation of all the circumstances of the case as well as general sentencing considerations, also indicate an upper and lower sentence limit. The participants shall be given the opportunity to make submissions. The negotiated agreement shall come into existence if the defendant and the public prosecution office agree to the court's proposal.
>
> (4) The court shall cease to be bound by a negotiated agreement if legal or factually significant circumstances have been overlooked or have arisen and the court therefore becomes convinced that the prospective sentencing range is no longer appropriate to the gravity of the offence or the degree of guilt. The same shall apply if the further conduct of the defendant at the trial does not correspond to that upon which the court's prediction was based. The defendant's confession may not be used in such cases. The court shall notify any deviation without delay.
>
> (5) The defendant shall be instructed as to the prerequisites for and consequences of a deviation by the court from the prospective outcome pursuant to subsection (4).

STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBL. I] 1074, as amended, § 257c (translation taken from http://www.gesetze-im-internet.de/englisch_stpo/).

[4] Introduced by the Gesetz zur Regelung der Verständigung im Strafverfahren [Act on the Regulation of Negotiated Agreements in Criminal Proceedings], July 29, 2009, BUNDESGESETZBLATT [BGBL. I] at 2353.

[5] Such agreements were, however, already widely in use before, but they were merely based on a kind of case law by the *Bundesgerichtshof* (Federal Court of Justice). *See* Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 4 StR 240/97, 43 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 195 (Aug. 28, 1997); Bundesgerichtshof [BGH – Federal Court of Justice], Case No. GSSt 1/04, 50 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 40 (Mar. 3, 2005).

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Constitutional Court even deemed it necessary to admonish the judiciary that "under the rule of law the law determines practice, but practice does not determine the law."[6] We will analyze the consequences of this judgment and suggest implementing open communication in criminal proceedings to replace negotiated agreements to some degree.

B. Three Lines of Development

We will now try to describe the most important lines of development that, from our point of view, help to understand the phenomenon of negotiated agreements and the way they are practiced in Germany.

Negotiated agreements are controversial among criminal defense lawyers. There are both strict opponents of deals and proponents of fully separate consensual proceedings. The penal law commission of the *Bundesrechtsanwaltskammer* (German Federal Bar) even published a draft law for such a fully separate consensual procedure, governed by special rules and principles differing from those governing regular criminal procedural law.[7]

The authors of the draft promised (or simply hoped) that *"Konsens schafft Frieden"* (consensus creates peace),[8] while their opponents called this argument "*Kitschrhetorik*."[9] It can be reasoned, however, that the procedure of negotiated agreements, as it is now set down in our Code of Criminal Procedure, gives great power to the defense: Lawyers have managed to negotiate legally binding promises of the court for their clients. These promises are usually narrowed-down sentencing ranges or maximum penalties in exchange for giving up certain legal options of defense, such as the abandonment of (further) applications to take evidence or a confession in which the defendant admits all or part of the accusations. The agreement is fixed before the stipulated acts are carried out or—where an omission was promised—eventually left undone. Hence, the defendant knows beforehand what he will have to expect in a worst-case scenario.

[6] BVERFG, Case No. 2 BvR 2628/1066 at 1070 (as translated by the authors).

[7] Strafrechtsausschuss der Bundesrechtsanwaltskammer [Penal Law Commission of the German Federal Bar], *Vorschlag einer gesetzlichen Regelung der Urteilsabsprache im Strafverfahren*, 25 BRAK-STELLUNGNAHME 2005 (Sept. 2005), *available at* http://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2005/september/stellungnahme-der-brak-2005-25.pdf.

[8] *Id.* at 4.

[9] Strafrechtsausschuss des deutschen Anwaltvereins [Penal Law Commission of the German Bar Association], *Soll der Gesetzgeber Informelles formalisieren?,* STRAFVERTEIDIGER FORUM 89, 90 (2006).

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I. Lack of Communication

A lack of communication in German criminal proceedings, especially in the trial phase, is one of the most important forces driving deals. There is no *Schuldinterlokut* (separate decisions on verdict and sentencing) and there are no intermediate stages during which the court would be obliged to inform the defendant and the prosecutor about the preliminary assessment of the evidence received.[10]

This is not to say that there is no communication at all in court, but there are no institutionalized means of bidirectional communication between the court and the other parties involved in the trial: Clearly, the defendant and the defense can bring forward their positions vis-á-vis the accusations raised. They can interrogate witnesses and experts—per Section 240(2) StPO—and can comment on each piece of evidence that is taken—per Section 257 StPO. The prosecutor and the *Nebenkläger* (private co-prosecutor) have the same rights. But the position of the court is typically unknown to the other parties. According to the structure of our Code of Criminal Procedure, the court does not need to explain its assumptions and standpoints before the actual conviction.[11] This can have dire consequences: Take the example of a defendant who fights for an acquittal while the court, perhaps very early in trial, is convinced of his guilt. The defendant, unaware of this fact, does not bring forward any evidence that might help in reducing the punishment.

It is not at all uncommon that there are extensive discussions of issues that, in the end, are totally irrelevant to the court's decision, while the issues that the court holds crucial to its decision are unknown to the defense and are, therefore, not properly addressed. There are a few complex ways a defendant can try and find out the preliminary position of the court.[12] For example, a defendant can formally apply for the taking of specific evidence on certain facts. The reaction of the court to such applications can shed light on which facts the court deems irrelevant, already proven, or still necessary to be investigated.[13] But there are also means by which the court may conceal its position, even if confronted with such an application. This leads to games of hide-and-seek in the courtroom, which is not only

[10] Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 5 StR 237/97, 17 STRAFVERTEIDIGER [STV] 561 (Sept. 3, 1997). This decision was reviewed critically in a case note by Stefan König, 18 STV 113 (1998) and affirmatively in a case note by Gerhard Herdegen, 53 JURISTENZEITUNG 54 (1998).

[11] *See* BGH, Case No. 5 StR 237/97.

[12] *See generally* Rainer Hamm, *Wert und Möglichkeiten der Früherkennung richterlicher Beweiswürdigung durch den Strafverteidiger*, *in* WAHRHEIT UND GERECHTIGKEIT IM STRAFVERFAHREN: FESTGABE FÜR KARL PETERS AUS ANLASS SEINES 80 GEBURTSTAGES 169 (Klaus Wasserburg et al. eds., 1984).

[13] *Id.*; Ulrich Sommer, *§ 244*, *in* ANWALTKOMMENTAR STPO margin nos. 151–52 (Wilhelm Krekeler et al. eds., 2d ed., 2010); Stefan König, *§ 244*, *in* GESAMTES STRAFRECHT: STGB, STPO, NEBENGESETZE – HANDKOMMENTAR margin no. 4 (Dieter Dölling et al. eds., 3d ed., 2013).

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problematic for the defendant, but can also lead to lengthy trials and avoidable conflicts, complicating the work of judges.

Of course, judges are allowed to be more communicative.[14] Hence, there are also ways that the judge can introduce greater transparency. But this depends on the personality and style of the judge and thus brings some arbitrariness, which is unsatisfying.

As a consequence, there have been attempts and proposals to establish open communication in criminal proceedings, especially in the trial phase.[15] The results of such endeavors have been poor. In the end, the only change was the introduction of a new Section 257b StPO, which states: "At the main hearing the court may discuss the status of the proceedings with the participants, insofar as this appears suitable to expedite the proceedings."[16]

Legally, it was (almost)[17] irrelevant to add this to the Code of Criminal Procedure: It has always been possible for the court to openly discuss the status quo and the prospective outcomes with the defense and prosecutor,[18] the problem was—and is—that the court is under no obligation to do so. So why did the legislature put down something this self-evident? The objection of many judges to open communication is the only explanation. This has not changed much since Section 257b StPO came into force.[19] However, the recent decision of the Federal Constitutional Court on negotiated agreements of 19 March 2013[20] has restricted and complicated such agreements and may thus further open communication. We will come back to this later.

The pressure put upon criminal trials and especially upon the defendant for the reasons described above has been channeled into another direction: Deals. Negotiated agreements

[14] Especially, discussing the status of proceedings with the participants does not deliver grounds to challenge a judge because of prejudice, *cf.* Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 4 StR 571/10, 31 NEUE ZEITSCHRIFT FÜR STRAFRECHT (NSTZ) 590, 591 (Apr. 14, 2011).

[15] See the draft law on a reform of criminal procedure of the parliamentary parties of the SPD and *Bündnis 90/Die Grünen* and the Federal Ministry of Justice of February 2004, reprinted in 24 STRAFVERTEIDIGER [STV] 228 (2004) and the opinion of the penal law commission of the German Bar Association on this draft law, Strafrechtsausschuss des Deutschen Anwaltvereins**,** STELLUNGNAHME NR. 43/2004, 30–32.

[16] Translation taken from http://www.gesetze-im-internet.de/englisch_stpo/.

[17] The existence of a legal norm explicitly allowing such discussions at least symbolically increases their importance. Apart from this, Section 257b StPO allows for extensive interpretation, *see infra* Part C.

[18] BGH, Case No. 4 StR 571/10**;** Strafrechtsausschuss des Deutschen Anwaltvereins**,** *supra* note 15, at 31**.**

[19] *See* Gesetz zur Regelung der Verständigung im Strafverfahren [Act on the Regulation of Negotiated Agreements in Criminal Proceedings], July 29, 2009, BUNDESGESETZBLATT [BGBL. I].

[20] BVerfG, Case No. 2 BvR 2628/1066.

at least help give the defendant some security with respect to the concrete punishment that can be expected. This option is, however, typically only available in exchange for a confession.[21]

Here, this line of development crosses with others: First, the last decades brought about the increasing professionalization of criminal defense in Germany, which has led to the rise of a "new type of defense lawyer"[22] and has put courts under pressure to develop countermeasures against new defense strategies. Second, there is the amazing career of the confession as an alleged piece of evidence in criminal procedure during the same time span,[23] a development that transformed proceedings into something new: *postmodern* criminal procedure.

II. A New Type of Defense Lawyer

In 1985 Hanack presented a paper[24] in which he described a new type of defense lawyer that—according to his (correct) impressions—had started to appear in German courtrooms. He described this new type of defense lawyer as a:

> [T]ype of very dedicated and generally reputable, often very skillful defense lawyer; but a defense lawyer who uses the wide and extensive possibilities of our code of procedure not only exceptionally, like the generations before did; who, in his client's interest, even if he deems him guilty, forges ahead into the free spaces of law and who, in doing so, develops defense strategies aiming at the typical weak points of the judiciary.[25]

The judiciary, notoriously drowning in case overload, was forced onto the defensive by these developments and was therefore, as Hanack noticed, "increasingly willing to participate in internal negotiations, arrangements or agreements."[26] It also developed

[21] Pursuant to Section 257c (2), sentence 2 StPO, "a confession shall be an integral part of any negotiated agreement." STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBL. I] 1074, as amended, § 257c (2), sentence 2.

[22] *See* Ernst-Walter Hanack, *Vereinbarungen im Strafprozeß: Ein besseres Mittel zur Bewältigung von Großverfahren?,* 7 STRAFVERTEIDIGER [STV] 500, 501 (1987).

[23] Stefan König, *Das Geständnis im postmodernen, konsensualen Strafprozess*, 65 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1915 (2012).

[24] Hanack, *supra* note 22, at 501.

[25] *Id.* (as translated by the authors).

[26] *Id.* (as translated by the authors).

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countermeasures, like opening the so-called *Sanktionenschere* (literally "sanction scissors").[27] This means that the court tells the defendant, more or less openly, that he will receive a severe punishment if he remains silent or contests the accusations, but in the end is found guilty, but if he confesses, a much milder punishment will be imposed. In extreme cases there has been a substantial difference, in terms of years in prison, between the alternatives—for example seven to eight years without a confession and three and a half years with one.[28] This practice has been criticized by the Federal Court of Justice[29] and the Federal Constitutional Court.[30] Nowadays, the courts will therefore usually restrict themselves to obscure insinuations with regard to the consequences of a failed agreement.

III. The Role of the Confession

In order to understand the development of the role of the confession in modern criminal proceedings, it is necessary to go back to the 19th Century. At that time, the structure of the reformed criminal procedure was modeled as a decided alternative to the old inquisitional procedure, which is not to be mixed up with the inquisitorial system of modern times.[31] In this old system, the roles of prosecutor and judge were not yet separated, but carried out by the same person. Trials were not open to the public. The confession was the most important piece of evidence and in order to obtain it torture was justified. The reformed proceedings, on the other hand, have given the defendant the right to silence and have divided the functions of prosecutor and judge. Since then, the court is obliged to rule on the evidence taken according to its *freie Überzeugung* (literally: free conviction) from the *Inbegriff* of the hearing—i.e. from the hearing as whole, but also only from it.[32] The confession of the accused has been downgraded to one piece of evidence among others, which alone is not sufficient to base a verdict on. Instead, it needs to be verified and supported by other evidence.

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[27] *See* Hans-Joachim Weider, *Der aufgezwungene Deal,* STRAFVERTEIDIGER FORUM 406, 408 (2003).

[28] See the facts of the case Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 3 StR 266/07, 27 STRAFVERTEIDIGER [STV] 619 (Aug. 14, 2007).

[29] Bundesgerichtshof [BGH – Federal Court of Justice] Case No. GSSt 1/04, 50 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 40 (Mar. 3, 2005).

[30] BVerfG, Case No. 2 BvR 2628/1066 at 1071.

[31] On the historical developments described here and in the following, see generally König, *supra* note 23; Stephan Stübinger, *Anmerkung zu BGH, Beschluss v. 6. 11. 2007, 1 StR 370/07,* 63 JZ 800 (2008); FRAUKE DREWS, DIE KÖNIGIN UNTER DEN BEWEISMITTELN? EINE INTERDISZIPLINÄRE UNTERSUCHUNG DES FALSCHEN GESTÄNDNISSES (2013).

[32] *See* STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBL. I] 1074, as amended, § 261.

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Over the years, however, the confession advanced to become a mitigating circumstance,[33] thus putting the full equality of all evidence into question. This shift was a disadvantage for the silent or contesting defendant, but it also gave him a negotiating chip, because he could offer a confession in exchange for mitigated punishment. The courts reacted to such offers by also starting to negotiate themselves, using the sanction scissors or some obscure insinuations about the impending sentence length, sometimes even the ordering of pre-trial detention, as their own bargaining chips to put pressure on the defendant. The confession emerged to become the most important article of trade in criminal proceedings. It became independent from its original function. In the thicket of the deal, the confession took on many variations—from the "truthful" over the "tactical"[34] and the "slim"[35] to the "anorexic"[36] confession.[37] The Federal Constitutional Court has added another version: The "agreement-based" confession.[38] It became less and less important whether a confession was indeed true. In negotiated agreements, the confession was often only compared to the contents of the case files.[39]

C. The Judgment of the Federal Constitutional Court on 19 March 2013

This fact was one of many alarming issues that were found in an empirical study by Altenhain et al.[40] ordered by the Constitutional Court. Another result was that more than

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[33] Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 1 StR 88/51, 1 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 105 (Apr 10, 1951) (still cautious); Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 4 StR 240/97, 43 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 195, 210 (Aug. 28, 2007) (extensive). For a critical overview on the overall development, see Walter Stree & Jörg Kinzig, *§ 46*, *in* STRAFGESETZBUCH: KOMMENTAR (Adolf Schönke & Horst Schröder eds., 28th ed., 2010), margin no. 41a; König, *supra* note 23.

[34] This is a confession that is just motivated by the prospect of mitigation of punishment, especially in connection with a negotiated agreement.

[35] This is a tactical confession that only refers to the alleged facts on which the indictment is based, admits all or some of those facts, and does not go into any detail beyond this admission; also called a "meaningless formal confession." *Cf.* BVerfG, Case No. 2 BvR 2628/1066 at 1063.

[36] This is the slimmest confession possible. It consists of one sentence: "I confess to be guilty as charged," which reportedly has been accepted in practice. *See* Klaus Malek, *Abschied von der Wahrheitssuche*, 31 STRAFVERTEIDIGER [STV] 559, 565 (2011).

[37] König, *supra* note 23, at 1916; Malek, *supra* note 36; Ralf Eschelbach, *§ 257c*, *in* BECK'SCHER ONLINE-KOMMENTAR: STRAFPROZESSORDNUNG margin nos. 20–24 (Jürgen Peter Graf ed., 16th ed., 2013).

[38] BVerfG, Case No. 2 BvR 2628/1066 at 1063.

[39] See the results of an empirical study carried out by Karsten Altenhain et al. for the Federal Constitutional Court: Comparison with the case files was used by 91.9 % of all judges to verify the confessions; often it was used without any further taking of evidence. KARSTEN ALTENHAIN ET. AL, DIE PRAXIS DER ABSPRACHEN IM STRAFVERFAHREN 100 (2013).

[40] *See generally id.*

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fifty-five percent of the interviewed defense lawyers reported to have already experienced that a client made a false confession after the "sanction scissors" were opened for him or her by the court.[41] Yet, in its important judgment on 19 March 2013,[42] the Constitutional Court did not declare Section 257c StPO unconstitutional. It assumed that the problems encountered in practice are not systematically fostered by the law itself, but are based on a disregard of the law and its *ratio legis*.

The Constitutional Court made quite clear that there is no possibility for a more consensual procedure than the one Section 257c StPO already provides: It clearly stressed that neither the guilt of the defendant nor the facts of the case—from which the amount of guilt is derived—may ever be subject to disposition by the participants of a criminal trial leading to verdict and punishment.[43] The constitutional principle *nulla poena sine culpa* (guilt principle) forbids such agreements. Hence, "real" plea-bargaining (as practiced in common law countries) would be unconstitutional according to the German *Grundgesetz* (Basic Law).[44] Agreements can only be made about sentencing and only within the limits the guilt principle sets for a just punishment, e.g. a punishment that is disproportionate to the amount of guilt found cannot be negotiated. It is also impossible to negotiate out of the applicable abstract sentencing range as set down in the Criminal Code. This is even true for sentencing ranges the judge may choose based on his or her discretion, such as those ranges imposed for minor or aggravated cases of an offense.[45] Hence, negotiations are restricted by the guilt principle and can only refer to a narrowed down concrete sentencing range within the limits of the larger, abstract sentencing range.

With the strict character of the guilt principle in mind,[46] the Court stressed the importance of Section 257c (1) sentence 2 StPO, which states that the obligation to find the material

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[41] *Id.* at 134.

[42] BVerfG, Case No. 2 BvR 2628/1066. The decision was, *inter alia*, reviewed by Stefan König & Stefan Harrendorf, *"Deal": Ein Freispruch auf Bewährung und seine Auswirkungen*, ANWALTSBLATT [ANWBL] 321 (2013); Hans Kudlich, *Die Entscheidung des Bundesverfassungsgerichts zu den strafprozessualen Absprachen: Konsequenzen für den Gesetzgeber?*, ZEITSCHRIFT FÜR RECHTSPOLITIK 162 (2013); Frank Meyer, *Die faktische Kraft des Normativen: Das BVerfG und die Verständigung im Strafverfahren*, 66 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1850 (2013); Martin Niemöller, *Anmerkung zu BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10,* 33 STRAFVERTEIDIGER [STV] 420 (2013); Carl Friedrich Stuckenberg, *Anmerkung zu BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10,* ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 212 (2013); Thomas Weigend, *Anmerkung zu BVerfG, Urt. v. 19.3.2013 – 2 BvR 2628/10,* 33 STRAFVERTEIDIGER [STV] 424 (2013).

[43] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBL. I] 1074, as amended, § 257c.

[44] BVerfG, Case No. 2 BvR 2628/1066 at 1067–68. *See also* Weigend, *supra* note 42, at 424; Kudlich, *supra* note 42, at 164.

[45] BVerfG, Case No. 2 BvR 2628/1066 at 1058–59.

[46] *Cf. id.* at 1069.

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truth by extending the taking of evidence to all facts and means of proof relevant to the decision—per Section 244 (2) StPO—remains unaffected by the negotiations.[47] The abovementioned study by Altenhain et al., on the other hand, showed that about ninety-two percent of judges used comparison with the case files as a method to verify a confession, and that this method was not necessarily backed up by the taking of further evidence.[48] Hence, the Constitutional Court reminded the judges that an agreement-based confession needs to be verified "by the taking of evidence at the main hearing (cf. Section 261 StPO)".[49] Verification shall, according to the Court, not be subject to stricter rules than those that apply for "regular" confessions. Unfortunately, this is vague and does not help much. For example, it is unclear whether in cases where there is only one witness of the offense and no other evidence, this witness needs to be interrogated regardless of the existence of an agreement-based confession, or whether it will be sufficient for the court to verify the confession by further interrogation of the defendant.[50]

By providing a legal structure for negotiated agreements, the legislature made clear that any such agreements have to be negotiated within the provided legal framework. Informal agreements are therefore illegal.[51] According to the study by Altenhain et al., on the other hand, a majority of judges so far made most of their agreements informally and some even negotiated about the facts of the case or the verdict.[52] Therefore, the Constitutional Court emphatically reminded judges and prosecutors of the legal requirements for negotiated agreements.[53]

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[47] BVerfG, Case No. 2 BvR 2628/1066 at 1063. *See also* Stefan König & Stefan Harrendorf, *§ 257c*, *in* GESAMTES STRAFRECHT: STGB, STPO, NEBENGESETZE – HANDKOMMENTAR margin no. 7 (Dieter Dölling et. al eds., 3d ed., 2013).

[48] ALTENHAIN ET AL., *supra* note 39, at 100.

[49] BVerfG, Case No. 2 BvR 2628/1066 at 1063.

[50] König & Harrendorf, *supra* note 42, at 321.

[51] This was already the prevailing opinion before the decision of the Constitutional Court. *See* Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 2 StR 205/10, 30 STRAFVERTEIDIGER [StV] 673,674 (Aug. 4, 2010); Matthias Jahn & Martin Müller, *Das Gesetz zur Regelung der Verständigung im Strafverfahren—Legitimation und Reglementierung der Absprachenpraxis*, 62 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2625, 2630 (2009); Reinhold Schlothauer & Hans-Joachim Weider, *Das "Gesetz zur Regelung der Verständigung im Strafverfahren" vom 3. August 2009,* 29 STRAFVERTEIDIGER [StV] 600, 601 (2009); Eschelbach, *supra* note 37, at margin no. 42.5. For the dissenting opinon, cf. Martin Niemöller, *Anmerkung zu BVerfG, 1. Kammer des 2. Senats, Beschl. v. 05.03.2012 - 2 BvR 1464/11*, 32 STRAFVERTEIDIGER [StV] 387, 388–89 (2012).

[52] ALTENHAIN ET AL., *supra* note 39, at 36–37, 77–89.

[53] BVerfG, Case No. 2 BvR 2628/1066 at 1064–67.

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First, the Court states that it is the obligation of the prosecutor to make sure, by refusing his or her necessary consent,[54] that no illegal agreements are concluded. In addition, the prosecutor shall be obliged to appeal against illegal agreements. This is somewhat surprising,[55] taking into account that prosecutors are also interested in reducing their workload by such agreements. It is unheard of that the public prosecutor appealed against a negotiated agreement in favor of the defendant,[56] while there are cases known where it was the prosecutor who threatened the defendant into such an agreement.[57]

Second, the Constitutional Court demanded the nullification by the courts of appeal of decisions based on illegal agreements, even if the agreements only violate the formal requirements set down in Section 257c StPO and Sections 243 (4), 273 (1a) StPO. The legislature gave the negotiation procedure a formal structure in order to optimize the transparency of negotiations for the public and to optimize the documentation of negotiations in the record of proceedings for the courts of appeal to check the legality of the procedure. The documentation obligations refer to the way negotiations were proposed and led and to their contents and results.[58] It is also necessary to document any informal, preliminary talks outside the main hearing about such agreements,[59] even if in the end no agreement is reached. Finally, it needs to be documented explicitly if an agreement has *not* been negotiated.[60] Violations of the documentation requirements are seen by the Federal Constitutional Court to be "quasi-absolute" grounds for appeal on law, although they were not set down in Section 338 StPO. Section 337 StPO, which is applicable instead, actually requires that the judgment be based upon a violation of the law, which means that the violation needs—at least potentially—to have influenced the decision. This is simply presumed by the Federal Constitutional Court. The strict position of

[54] *See* STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBL. I] 1074, as amended, § 257c (3), sentence 4.

[55] König & Harrendorf, *supra* note 42, at 322; Weigend, *supra* note 42, at 426.

[56] This is possible in Germany, see Section 296 (2) StPO, since the prosecutor is legally required to do his or her work objectively, see Section 160 (2) StPO.

[57] *See, e.g.,* Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 3 StR 411/04, 25 STRAFVERTEIDIGER [STV] 201 (Jan. 12, 2005).

[58] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBL. I] 1074, as amended, § 273 (1a), sentence 1.

[59] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBL. I] 1074, as amended, § 243 (4) and 273 (1a) sentence 2.

[60] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBL. I] 1074, as amended, "§ 273 (1a), sentence 3.

the Federal Constitutional Court will pose problems, especially with regard to the rule to state in the record of proceedings that an agreement was *not* negotiated.[61]

Third, the Court threatens judges with punishment who participate in illegal, informally negotiated agreements, if they state in the record of proceedings that an agreement has not occurred.[62] This is a problematic position that was not thoroughly thought through: The Federal Constitutional Court only refers to a punishment pursuant to Section 348 *Strafgesetzbuch* (Criminal Code; StGB), which punishes public officials who make false entries in public records. Yet, Section 339 StGB—perverting the course of justice—limits the penal accountability of judges: If a judge is not found guilty according to Section 339 StGB for deeds committed during the conduct or decision of a trial, he or she cannot be found guilty of any other offence committed by conducting or deciding the trial.[63] Additionally, it can be doubted that such an act as described above can actually be subsumed under Section 348 StGB. We will not pursue this further here.[64]

These were only the main rules the Federal Constitutional Court set for future negotiated agreements. Clearly, the restrictive interpretation will significantly reduce the attractiveness of negotiated agreements as an easy way to end proceedings. That is, at least if judges and the other participants in agreements, like the defense, now start to play by the rules. If they do not, the Federal Constitutional Court will not save Section 257c StPO once again from the verdict of unconstitutionality: The 19 March 2013 Constitutional Court judgment was just a "conditional acquittal" for the legal framework of negotiated agreements, as the Court made clear beyond doubt.[65]

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[61] These problems refer to the rule that a judgment can never be based upon a mere mistake in the record of proceedings, Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 678/54, 7 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 162 (Feb. 1, 1955), and to the possibility of a retroactive correction procedure even after an appeal has been filed. *See* Bundesgerichtshof [BGH - Federal Court of Justice], Case No. GSSt 1/06, 51 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 298 (Apr. 23, 2007); Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 5 StR 169/09, 55 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 31, 33–34 (Jan. 28, 2010); *cf.* König & Harrendorf, *supra* note 42, at 323 with further references.

[62] BVerfG, Case No. 2 BvR 2628/1066 at 1064.

[63] For the prevailing opinion, see Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 1 StR 56/56, 10 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 294, 298 (Dec. 7, 1956); Lothar Kuhlen, *§ 339*, *in* NOMOS-KOMMENTAR ZUM STRAFGESETZBUCH margin no. 90 (Urs Kindhäuser et. al eds., 4th ed., 2013). For the dissenting opinion, see, e.g., Ulrich Stein & Hans-Joachim Rudolphi, *§ 339*, *in* SYSTEMATISCHER KOMMENTAR ZUM STRAFGESETZBUCH, margin no. 1d (Jürgen Wolter ed., 8th. ed., Status: May 2013).

[64] *But see* König & Harrendorf, supra note 42, at 324.

[65] BVerfG, Case No. 2 BvR 2628/1066 at 1069–70. *See also* Kudlich, *supra* note 42; Niemöller, *supra* note 42, at 423–44; König & Harrendorf, *supra* note 42.

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D. Increased Importance of Section 257b Strafprozessordnung?

Hence, the judiciary is uncertain how to continue. Given this uncertainty, the importance of open communication will increase.

Consequently, judges will increasingly resort to discussions pursuant to Section 257b StPO: In order to evade the risks involved in any negotiated agreement after the judgment of the Constitutional Court, many judges now start "thinking aloud." There are virtually no restrictions for the communication of such thoughts in the courtroom. Most importantly, the strict rules for negotiated agreements pursuant to the abovementioned judgment do not apply. The court just informs the defense about its "thoughts on sentencing," but stresses explicitly that it is not willing to come to an agreement according to Section 257c StPO.

The Federal Constitutional Court has emphatically argued in favor of an "open, communicative conduct of the hearing" and has described it to be "a clear requirement for an adequate conduct of the hearing."[66] Yet, Section 257b StPO does not set up any clear rules for such a "communication procedure." According to the Constitutional Court, open communication is a "non-binding discussion about the assessment of the facts of the case and the applicable law between the court and the participants of the hearing."[67] It is not possible, however, to have fully "non-binding" discussions in court: An assessment shared by the court with the participants creates trust. Hence, this assessment needs to be binding under the condition of the status quo. If the court wishes to deviate from a former assessment, it needs to advise the participants of the change.[68]

The legislature already stated in Section 273 (1) sentence 2 StPO that the course and contents of a discussion pursuant to Section 257b StPO need to be taken down in the record of proceedings, very much like it is the case for negotiated agreements. This already provides some clarity about the issues discussed in court. The notification of the participants about a deviation from a former assessment will also need to be recorded.[69] A deviation from a discussed assessment without advising the participants will deliver sufficient grounds for an appeal on law at least if a participant—for example the defendant—trusting the information provided by the court—for example about the

[66] BVerfG, Case No. 2 BvR 2628/1066 at 1068.

[67] *Id.*

[68] König & Harrendorf, *supra* note 42, at 322. *See also* Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 3 StR 39/11, 64 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3463 (June 30, 2011) (The court was able to change the defense strategy of the accused or even aimed at changing it.)

[69] Stefan König & Stefan Harrendorf, *§ 257b*, *in* GESAMTES STRAFRECHT: STGB, STPO, NEBENGESETZE – HANDKOMMENTAR margin no. 6 (Dieter Dölling et. al eds., 3d ed., 2013).

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punishment to be expected—abandons certain options, like further applications for the taking of evidence.[70] In addition, a confession that is declared because the defendant trusted in the preliminary assessment of the outcomes of the proceedings by the court should be rendered unusable if the court deviates from its earlier, shared assessment without informing the participants.[71] On the other hand, after correctly advising the participants, the confession will remain usable: The assessment shared in discussions according to Section 257b StPO is necessarily a preliminary one. Trust in such an assessment can only exist for the time being and under the condition of no change of the status quo.

The current legal situation of open communication in criminal trials is, however, still not very satisfying: What is missing is an *obligation* of the court to communicate openly with the participants, at least under certain circumstances. The penal law commission of the *Deutscher Anwaltverein* (German Bar Association) has proposed that the court be required to advise the participants of significant differences in the preliminary assessment of the taking of evidence or in the interpretation of the applicable law by the defense or prosecutor on the one hand and the court on the other, when these differences become evident to the court.[72] We have, however, argued elsewhere that such an obligation already exists under the current version of Section 257b StPO: In a situation in which misunderstandings or grave differences in the assessment of evidence or the interpretation of law become obvious to the court, the discretion of the court whether or not to commence discussions according to Section 257b StPO is reduced to zero—so-called *Ermessensreduktion auf null*—thus turning into an obligation.[73]

E. Conclusions

After the judgment of the Federal Constitutional Court, negotiated agreements have lost a great deal of their ability to cut short the way to a conviction by avoiding the hardship of finding the material truth; and rightly so. The scope of possible agreements has been clearly reduced; the same is true for the potential of such agreements to expedite the proceedings. This will put an end to negotiated agreements as a widely used, hackneyed instrument of criminal procedure.

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[70] BGH, Case No. 3 StR 39/11.

[71] König & Harrendorf, *supra* note 42, at 322.

[72] Strafrechtsausschuss des Deutschen Anwaltvereins, STELLUNGNAHME NR. 46/2006, 14.

[73] König & Harrendorf, *supra* note 69, margin no. 3; Petra Velten, *§ 257b, in* SYSTEMATISCHER KOMMENTAR ZUR STRAFPROZESSORDNUNG margin no. 2 (Jürgen Wolter ed., 4th ed., 2012) (consenting); Marc Wenske, *§ 257b, in* Karlsruher Kommentar zur Strafprozessordnung margin no. 8 (Rolf Hannich ed., 7th ed., 2013) (dissenting).

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In this situation, open communication will become increasingly useful. It will help to rationalize the conflict in the main hearing by focusing all participants on the main issues. In doing so, the pressure put upon the confession can be reduced. Defendants who know how the court tentatively assesses the evidence and which punishment the court is considering can concentrate their defense on the crucial questions. Furthermore, the defendant can make an informed decision about giving up some of his defense options. This will also help to speed-up criminal proceedings by reducing the workload of judges.

Such a development will be possible even without changing Section 257b StPO. The rule is, however, vague and should be further specified. There should be clear rules about situations in which the court is obligated to commence a discussion. The legislature should also clarify the procedure that applies when the court wishes to deviate from an earlier assessment shared with the participants, and the legal consequences of such a deviation.

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