Consensual justice and search for substantive truth in criminal proceedings in Germany and Austria

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Importance of substantive truth in criminal procedure

- the purpose of the criminal process - to discover the truth about the crime committed
- difference between procedural systems with regard to the method they consider as the best for searching for the truth.
- *Inquisitorial-mixed* system - relies on the serious effort of a powerful judge, who may **-** within the limits of the law **-** collect at the trial any evidence he or she deems necessary for investigating the matter before the court.
- *adversarial* system - relies on the assumption that the trial is the competition between opposing parties that best serves the interest of finding the truth:
- searching for the truth' takes a lot of time, effort, and often financial expenditure.
- general increase in population and a increase in criminal cases in the course of the 2oth century, raised pressure to create procedural modeles that avoid the expensive search for the truth.
- consequence - advancement of procedural arrangements that try to replace the time-consuming and onerous search for the truth at a public trial **by** other forms of disposing of cases, relying on consensus rather than thorough fact-finding as the basis for the disposition of the case.
- this conclusion valid not only in the common law world but also to supposedly inquisitorial – mixed legal systems such as those of continental Europe

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Consensual justice in German criminal procedure law and search fors substantive truth

- Germany's criminal justice system is based on the notion that the prime task of a criminal trial is to find the material truth. Finding the truth is an objective goal and not subject to the interests of the defense or prosecution. (Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 26, 1981)

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Plea bargaining in German law I

- 1970s - informal plea bargaining stated to develop in the practice of German judiciary.
- become widespread in 1980s and 1990s, in complete secrecy at first, than more and more in open light
- from 1997 basically accepted with judgements of highest German Courts.
- around 50% of all criminal cases pending before German courts were concluded on the basis of plea agreements even before 2009.
- 2009. - introduced a form of plea bargaining in German Criminal procedure code

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Plea bargaining in German law II

- rather unique approach in comparison to almost all other commonly-known judicial systems - the role of court. section 257c par. 1. - "*the court may reach an agreement with the parties on the further course and outcome of the proceedings*".
- importance of search for material truth in German legal order: "*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*."
- 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
- is the leading role of the court the consequence of principle of search for material truth?

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Plea bargaining in German law III

- the practice in part perceives the legally agreed upon formalities as substantially irrelevant and feels them to be redundant.
- conclusion: legislation was only able to influence the practice to some extent.
- the consequence - efforts were made to reach an informal consensus evading the new regulations that were seen as being too complicated and unpractical.

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Plea bargaining in German law IV

- legal status of agreements that have been made before or outside of trial evading the regulation - decision of Federal Constitutional Court, judgment of 19 March 2013, on agreements in criminal proceedings

- the FCC ruled that the compliance is a constitutional requirement. Therefore, deviance from legal requirements set in art. 257c CPP is not only forbidden, but also, under certain conditions, punishable.

- FCC stressed the continuing obligation to investigate the procedural truth, which cannot be modified by any agreement, and granted the legislative decision of upholding the duty of *ex proprio motu* investigation to the status of a constitutional order.

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Plea bargaining in German law V

- "*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 because the scope of possible agreements has been clearly reduced".*
- "*This could put an end to negotiated agreements as a widely used instrument of criminal procedure."*
- Is this optimism grounded?

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Collaborators of justice in German law I

- German law provides a legal framework for cooperation with collaborators of justice in substantive law, namely section § 46b of the German Criminal Code
- judges can mitigate the punishment of crown witnesses or waive punishment entirely if the witness has committed a moderately serious or a serious offence and if he or she discloses knowledge of facts that *contribute significantly* to the investigation of a serious criminal offence from an exhaustive list of crimes under § 100a para. 2 of the German CPP
- mechanism for securing the truthfulness of the information of the suspect (StGB)
- German law does not have procedural rules regulating the above-described collaboration

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Plea bargaining in Austrian law I

- plea bargaining is not mentioned.
- the Supreme Court considers plea bargaining as inadmissible.
- in decision from August 2004., Supreme court not only declared plea bargains as forbidden, but it has even declared that the parties involved in it are subject to punishment.

  "*A such agreement – which is essentially not comparable to any procedural and legally defined steps taken towards a "diversion" – must be rejected ..., but mainly because of its flagrant contradiction to the basic principles of Austrian criminal procedure, in particular the principle of ascertaining the material truth – which excludes any agreements of the court with (possible) criminals; it may expose the persons involved to the risk of liability under disciplinary law and criminal law.*".
- .

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Plea bargaining in Austrian law II

- 2010. - Supreme Court held the same course of inadmissibility of plea bargaining and elaborated: *”Such plea bargaining that is complied with by the judge – which is inconsistent with the system of a liberal criminal procedure i.a. on the grounds that it is beyond any control in the case of documentation being required by jurisprudence or legislation – constitutes therefore grounds for a reopening of the case*

- practice differs?

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Collaborators of justice in Austrian law I

- since 2011. the institute of crown witness (*Kronzeuge*) is regulated in the new section 209a of the Austrian Code of Criminal Procedure (Strafprozeßordnung - StPO).
- the possibility exists for the public prosecutor's office to withdraw from prosecution due to the cooperation of perpetrators of a criminal offence 1) which is subject to the jurisdiction of a regional court, 2) which is subject to the competence of the Special Prosecutor's Office for Economic Crimes and Corruption or which meets the criteria of section 20b StPO, or 3) which falls under sections 277, 278, 278a or 278b of the Austrian Criminal Code or which is related to such an appointment, association or organisation.
- the Austrian crown witness regulation does provide for full impunity for the crown witness, and the criminal procedure against the crown witness can be terminated without a formal guilty verdict in criminal proceedings
- cautious approach - initial limitation of application 2011-2016, second limitation to the end of 2021.

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Conclusion - truth remain an indispensable feature of criminal process?

- Difference between criminal and civil process
- Issue of budget for justice department
- Importance of conducting extensive research of practice
- Danger of great gap between legislation and practice – legal insecurity – what should legislator do?

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Thank You for Your attention

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