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Appendix B

THE CODE OF CRIMINAL PROCEDURE :

EXTRACTS

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A. EXAMINING WITNESSES

§ 68. Examination Concerning the Person

The examination begins by asking the witness about his surname, given name, age, status or occupation, and place of residence. It the situation requires it, questions should be put to the witness concerning any circumstances that affect his credibility in the instant case, in particular his relations with the accused or the victim.

§ 69. Examination Concerning the Case

(I) The witness shall be asked to give a narrative account of what he knows about the subject matter of his examination. Before his examination the witness shall be told the subject matter being investigated and the person of the accused if there is one.

(II) If necessary further questions shall be asked in order to clarify and complete the testimony or to explore the basis on which the knowledge of the witness rests.

(III) The requirements of § 136a apply equally to witnesses.

§ 136. Initial Examination

(I) At the start of the initial examination the accused shall be told what act he is accused of and which provisions of the criminal law may apply. He shall be advised that the law (Gesetz) permits him to respond to the accusation or to decline to speak about the case (zur Sache), and to consult with defense counsel of his choice at all times, even before his examination. He shall also be instructed that he may move for the taking of particular evidence [tending] to his exculpation. In appropriate cases the accused shall also be advised that the may respond in writing.

(II) The examination should give the accused the opportunity to explain away the grounds of suspicion against him and to bring for ward the facts favorable to him.

(III) At the initial examination of the accused attention shall also be given to investigating his personal circumstances.

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[1] ที่มา: Comparative Criminal Procedure: Germany by John H. Langbein

§ 136a. Forbidden Methods of Examination

(I) The accused's freedom of decision and action shall not be impaired through ill-treatment, fatigue, physical abuse, druges, torture, deception, or hypnosis. Force may be used only insofar as permitted by the law of criminal procedure. It is forbidden to threaten an illegal measure and to promise an advantage not authorized by law.

(II) Measures that impair the accused's memory or comprehension are not allowed.

(III) The prohibitions of subsections I and II apply without regard to the consent of the accused. Statements obtained in contravention of these prohibitions may not be used even if the accused agrees to the use.

C. PROSECUTORIAL DISCRETION

§ 151. The Principle of the Formal Criminal Charge (Anklagegrundstaz)

The convening of a judicial investigation [i. e., a trial] is conditioned upon the preferring of a formal charge (Klage)

§ 152. Prosecution; the Rule of Compulsory Prosecution (Legal itatsprinzip)

(I) The public prosecutor is responsible for preferring the of ficial charge.

(II) Except as otherwise provided by law he is required to take action against all prosecutable offenses, to the extent that there is a sufficient factual basis.

§ 153. No prosecution of Minor Matters (Opportunitatsprinzip)

(I) If the proceeding concerns a misdemeanor, the prosecutor may refrain from prosecuting with the consent of the court competent [to try case], if the guilt of the actor would be regarded as minor (gering), and there is no public interest in prosecutiong

§ 153a. Discontinuing a Proceeding upon Fulfillment of Conditions

(I) With the consent of the court competent [to try the case] and of the accused the prosecutor may in a misdemeanor case decline provisionally to prefer the charge on condition that the accused

1. perform a particular act of compensation for the harm resulting from the crime,

2. pay a sum of money to a charitable organization or to the state,

3. perform some other charitable work, or

4. undertake support obligations in a particular amount, if these conditions (Auflagen und Weisungen) are approporiate in [a situation of] minor guilt to overcome the public interest in criminal prosecution. The prosecutor shall fix a period for the accused to fulfil the conditions, at most six months in the case of subsections 1-3 of the first sentence, one year in the case of subsection 4. The prosecutor may suspend conditions subsequently and extend the period once for up to three months : with the consent of the accused he may impose and alter conditions subsequently. If the accused fulfils the conditions, the act may no longer be prosecuted as a misdemeanor. If the accused does not fulfill the accused does not fulfill the conditions, he will not be reimbursed for efforts undertaken toward their fulfillment.

§ 153b. Noprosecution

(I) If the circumstances are present under which the court could refrain from imposing punishment [under the applicable section of the substantive criminal law], the prosecutor may decline to prefer the official charge with the consent of the court that would be competent to try the case.

§ 154. Unimportant Collateral Offenses

(I) The official charge need not be preferred if the punishment to which it can lead is negligible compared with a punishment imposed or anticipated against the accused for another act.

§ 154a. Limiting Prosecution

(I) If the anticipated punishment ……for certain severable parts of an act, or for some of a group of offenses committed through the same criminal act, is negligible, the prosecutor may limit the prosecution to the remaining parts of the act or to the remaining offenses. The limitation shall made a matter of record.

§ 154c. Victim of Coercion or Extortion

(I) If coercion or extortion (§§ 240, 253 of the Code of Criminal Law) was committed by threatening to reveal an offense, the prosecutor may decline to prosecute the act whose disclosure was threatened, unless atonement is essential on account of the gravity of the act.

D. PROSECUTOR AND COURT

§ 155. Scope of the [Judicial] Investigation

(I) The [judicial] investigation (Untersuchung) and decision extend only to the act designated in the charge (Klage, i.e. Anklage) and to the persons accused in the charge.

(II) Within these limits the courts are permitted and required to act independently; in particular, in applying the criminal law are not bound by the motions made.

§ 156.No Withdrawal of the Charge

The official charge can not be withdrawn [i. e., by the prosecutor] after the trial procedure has been convened.

E. THE PROSECUTOR'S PRETRIAL INVESTIGATION

§ 160. Investigative Proceedings

(I) As soon as the prosecutor learns by means of report or otherwise that an offense is suspected, he shall investigate the facts in order to decide whether to prefer the official charge.

(II) The prosecutor shall investigate not only not only inculpating but also exculpating evidence (*Umstande*), and the shall attend to the securing of evidence (*Beweise*) whose loss is feared.

(III) The prosecutor's investigations shall also extend to circumstances (*Unstained*) that are important for fixing the legal consequences of the offense [i. e., factors affecting sentencing].

§ 161a. Prosecutor's Examination of Witnesses and Experts

(I) Witnesses and experts are required to appear upon summons of the prosecutor and to make statements on the facts or render expertise.

(II) If the accused moves for the taking of evidence for his exculpation, this shall be done if it is of significance.

(III) The accused is required to appear upon summons of the prosecutor. Sections ….136-136a [supra, and] 168c (I) & (5) [regarding the permissible presence of counsel] apply accordingly.

F. REVIEW OF NONPROSECURITON

§ 170.Preferring the Official Charge; Discontinuing the Proceeding

(I) If the [pretrial] investigation provides sufficient cause for preferring the official charge, the prosecutor files a written charge (*Anklageschrift*) with the competent court.

(II) Otherwise the prosecutor discontinues the proceeding. He notifies the accused of this if the accused has been examined as such or if an arrest warrant was issued against him; the same applies if the accused has asked for notice or if it is palpable that he has a special interest in being notified.

§ 171. Notifyin the Moving Pary

If the prosecutor declines a motion to prefer the official charge or discontinues the proceeding after the conclusion of the [pretrial] investigation, he shall notify the person who made motion and state the reasons. If the person who made the motion is also the victim, he shall be instructed about the possibility of attacking the decision and about the interval permitted for doing so (§ 172 (I)).

§ 172. The Procedure to Compel the Charge (*Klageerzwingungsverfahren*)

(I) If the person who made the motion is also the victim, he is allowed to make a complaint against the decision to the prosecutor's superior officer within two weeks after the decision has been notified to him pursuant to § 171.

(II) If the prosecutor's superior rejects the complaint, the person who the motion may move within one month after he is notified for a judicial decision. He shall be instructed about this and about the requisite form; the period does not run when the in striation has not been given. The motion is not permissible if the proceeding concerns exclusively an offense that may be privately prosecuted by the victim, or if the prosecutor has declined to prosecute pursuant to § 153(I) , § 153a (I), or § 153b (I); the same applies in the cases of §§ 153c through 154(I) as well as……§ 154c.

(III) The motion for a judicial decision must state the facts and the evidence (*Beweismittel*) that are thought to justify the preferring of the official charge. It must be signed by a lawyer; regarding legal aid for the poor, the same rules apply as in civil litigation. The motion shall be filed with the court competent to meke the decision.

(IV) The state supreme court (*Oberlandesgericht*) has jurisdiction over the motion.

§ 173. Procedure of the Court

(I) Upon order of the court the prosecutor shall trun over his files to the court.

(II) The court may notify the accused of the motion and give him an interval for reply.

(III) The court may order investigations [ernittlungen) preliminary to its decision and may entrust them to a designated judge [a member of the court] or to a commissioned judge [not a member of the court.]

§ 174. Quashing the Motion

(I) If sufficient cause for preferring the official charge does not appear, the court quashes the motion and notifies the person who made the motion, the prosecutor, and the accused.

§ 175. Order to Prefer the Charge

If after hearing the accused the court finds the motion justified, it orders the preferring of the official charge. The prosecutor is obliged to carry out this order.

§ 176. Posting Security

(I) Before deciding on the motion the court may order person who made the motion to post security for the foreseeable costs of the state and of the accused arising from the proceeding. Security shall be posted in cash or securities…..

§ 177. Costs

The costs of the proceeding concerning the motion shall in the event of [quashing pursuant to] § 174. . . be imposed upon the person who made the motion.

G. DECIDING WHETHER TO CONVENE A TRIAL

§ 199. Deciding Whether to Convene a Trial

(I) The court competent to try the case shall decide whether or not to convene (*eroffnen*) the trial procedure.

(II) The Anklage shall contain the motion to convene the trial procedure. The files shall be submitted with the Anklago to the court.

§ 200. Contents of the Anklage

(I) The Anklage shall indicate the person accused, the act of which he is accused, the time and place of its commission, the legal elements of the crime and the applicable provisions of

the criminal law….. It shall also indicate the evidence (*Beweismittel*), the court that should conduct the trial, and the [name of the] defense counsel.

(III) The Anklage shall also set forth the material results of the [prosecutor's pretrial' investigation.

§ 201. Communication of the Anklage

(I) The presiding judge of the court communicates the written Anklage to the accused and at that time requires him to declare with in a certain period of time whether he wishes to move that particular evidence be obtained before [the court makes] the decision Whether to convene the trial procedure, or whether he wishes to make objection to the convening of the trial procedure.

(II) The court decides on motions and objections. If the court denies an objection of the accused based upon want of jurisdiction (stop §16), the accused has the right to interlocutory appeal. Otherwise, the decision of the court [respecting the convening of the trialporocedure] may not be attacked [i.e., appealed].

§ 202. Ordering Particular Evidence to Be Obtained

Before deciding whether to convene the trial procedure the court may order particular evidence to be obtained for the better clarification of the natter. The decision may not be attacked.

§ 203. The Oder to Convene

The court shall order the convening of the trial procedure if, according to the results of the preparatory proceeding, the accused appears sufficiently of having committed a crime.

§ 204. Refusal to Convene

(I) If the court decides not to convene the trial procedure, the order [of refuals] shall indicate whether it is based upon factual or legal grounds.

(II) The accused shall be informed of the order.

§ 206. Court Not Motion-Bound

In framing the order the court is not bound by the motions of the prosecution.

§ 207. Contents of the Order Convening the Trial Procedure

(I) In the order convening the trial procedure the court accepts the Anklage [as the basis] for the trial and designates the court that will conduct the trial.

(II) In accepting the Anklage for trial the court shall set forth any modifications required. If

1. the Anklage alleges several acts and the court refuses to convene the trial procedure respecting some of them,
2. the prosecution is limited pursuant to § 154a to particular severable parts of an act or such parts are reintroduced into the proceeding,
3. the cout's evaluation of the act differs in law from that of the Anklage, or
4. the prosecution is limited pursuant to § 154a to some of a group of offenses committed through the same criminal act, or such offenses are reintroduced into the proceeding.

§ 210. Appeal (Rechtsmittel)

(I) The order convening the trial procedure cannot be attacked by the accused.

(II) The prosecution is entitled to interlocutory appeal against an order refusing to convene the trial procedure . . . .

(III) If the appeal court sustains the appeal, it can also order that the trial shall take place before another chamber of the court that issued the [quashed order] or before a neighboring court in the same state

H. TRIAL PROCEDURE

§ 238. Conducting the Trial

(I) The presiding judge conducts the trial, examines the accused, and takes the evidence (*Beweis*).

(II) If one of the trial participants objects to a ruling of the presiding judge regarding the conduct of the case, the [entire] court decides.

§ 239. Cross-examination

(I) If prosecutor and defense counsel jointly move it, the presiding judge shall leave to them the examination of the witnesses and experts designated by prosecutor and accused. The prosecutor examines first the witnesses and experts he has designated, the defense counsel those for the accused.

(II) Also following this examination the presiding judge shall put such questions to the witnesses and experts as appear him necessary for further clarification of the case.

§ 240 Right to Question

(I) The presiding judge judge shall permit the associate judges to put questions to the accused, the witnesses, and the experts.

(II) The presiding judge Shall permit the prosecutor, the accused, and the defense cousel, as well as the lay judges, to do likewise.

§ 243. Course of the Trial

(I) The trial begins with the call of the case. The presiding judge ascertains whether the accused and the defense counsel are present and the evidence (*Beweisnittel*) readied, especially whether the witnesses and experts who have been summoned have appeared.

(II) The witnesses leave the courtroom. The presiding judge examines the accused concerning his personal circumstances.

(III) Thereupon the prosecution reads the accusation [from the Anlage]

(IV) The accused is then advised that he is free to decline to speak about the case (*zur Sache*). If the accused is willing to speak, he will be examined about the case pursuant to the provisions of § 136 (II). Prior convictions of the accused shall be brought out only to the extent that they are important for the decision. The presiding judge decides if they are to be brought out.

§ 244. Taking Evidence

(I) The taking of evidence (*Bewis*) follws the examination of the accused.

(II) In order to search out the truth the court shall on its own motion extend the taking of evidence to all facts and means of proof (*Beweismittel*) that are important for the decision.

(III) A motion to take evidence shall refused if the taking of the evidence is impermissible. Otherwise a motion to take evidence may be refused only if the taking of the evidence is super fluous because the matter is common knowledge, if the fact to be proven is unimportant or is already proven, if the evidence is wholly inappropriate or unobtainable, if the motion is meant to delay the proceeding, or if a material proposition to be proven for the exculpation of the accused may be treated as though the fact concerned were true.

(IV) A motion to take evidence by examining an expert can also be refused if the court itself possesses the necessary expertise, except where otherwise provided. The hearing of an

additional expert can also be refused if the contrary of the fact concerned has already been proven through the former expert opinion; this does not apply if the expertise of the former expert is doubted, if his opinion is based upon inaccurate factual presuppositions, if the opinion contains contradictions, or if the new expert has available means of research that appear superior to those of a former expert.

(V) A motion to take evidence by holding a view [of premises] can be refused if the court in its duty-bound discretion deems a view unnecessary for investigating the truth.

(VI) An order of the court is required for the refusal a motion to take evidence.

§ 249. Reading of Written Matter

Documents and other written matter serving as evidence are read out at the trial. This applies in particular to prior judgments in criminal matters, criminal records, and extracts from parish records and citizen registries, and it also applies to the records (*Protokolle*) made concerning the taking of a judicial view.

§ 250. The Principle of Personal Examination

If the evidence of a fact is based upon a person's observation, this person shall be examined at the trial. The examination may not be replaced by reading the record of an earlier examination, or by reading a written statement.

§ 251. Reading of Records

(I) The emanation of a witness, expert, or co-accused may be replaced by the reading of the notes of former examination by a judge, if

1. the witness, expert, or co-accused has died or become insane, or if his whereabouts cannot be discovered;

2. the witness, expert, or co-accused cannot apperat at the for a long or indefinite time because of illness, infirmity, or other impediments that cannot be overcome;

3. the witness or expert cannot be expected to appear at the trial on account of great distance, having regard to the importance of the testimony;

4. the prosecutor, defense counsel, and accused agree to the reading.

(II) If a witness, expert, or co-accused has died, or if he cannot be examined by a judge within a reasonable time for some other reason, notes of other [i.e., police and prosecutor's]

examinations as well as documents containing written statements originating from him may be read.

(III) If the reading serves purposes other than direct adjudication, in particular in deciding whether to summon and examine someone as a witness, notes of examinations, documents and other written matter serving as evidence may be read.

§ 253. Reading of a Record to Aid Recollection

(I) If a witness or an expert states that he no longer remembers a fact, the relevant part of the record of his former examination may be read to aid his former examination may be read to aid his recollection.

(II) The same may be done if a contradiction arises during the [trial] examination that cannot be otherwise otherwise settled or resolved without interrupting the tral.

§ 254. Reading of Confessions and in Contradictions

(I) Statements of the accused contained in a record made by a judge may be read for the purpose of evidencing a confession.

(II) The same may be done if a contradiction arises during the [trial] examination that cannot be otherwise settled or resolved without interrupting the trial.

§ 257. Comments of Accused, Prosecutor, and Defense Counsel

(I) After the [trial] examination of each witness, expert, or co accused, as well as after the reading of each piece of written matter, the accused shall be asked if he wishes to comment.

(II) After the examination of the accused and after each taking of evidence, the prosecutor and the defense counsel, upon demand, are also to be given opportunity to comment.

(III) The comments should not trench upon the closing remarks.

§ 258. Closing Remarks

(I) After the taking of the evidence is concluded, the prosecutor and then the accused have the right to speak and to make motions.

(II) The prosecutor has the right to reply; the accused is entitled to the last word.

(III) Even if defense counsel has spoken for him, the accused shall be asked whether he himself has anything to his defense.