How to Justify the Open Court Principle in Criminal Proceedings*

Katrin Gierhake

1. Introduction

In Germany, the legal basis of the open court principle is found in section 169 S 1 of the Courts Constitution Act (*Gerichtsverfassungsgesetz*, GVG): 'The hearing before the adjudicating court, including the pronouncement of judgments and rulings, shall be public.'[1]

This principle of publicity applies not only to ordinary jurisdictions, but also, for example, to labour courts, administrative courts and the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG).[2] The open court principle means that everyone is permitted to enter the courtroom during the main hearing, as long as there is enough room.[3]

---

* This text is a short version of an article that has been published in German: Katrin Gierhake, 'Zur Begründung des Öffentlichkeitsgrundsatzes im Strafverfahren' (2013) 68 Juristenzeitung 21, 1030-1038. I would like to thank the translators and editors provided by the Max Planck Institute Luxembourg, Ushanthi Wezenberg and Alex McCafferty, and Dr. Brian Cooper (Bonn) for their excellent work.

1 See also Art 6, para 1 of the European Convention of Human Rights: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

2 See § 52 ArbGG, § 55 VwGO, § 61 SGG, § 17 BVerfGG. Voluntary jurisdiction, proceedings under the JGG (minors), when the defendants are all minors (§ 48 I JGG) are not public. See Otto Rudolf Kissel/Herbert Mayer, *Gerichtsverfassungsgesetz* (6th edn CH Beck 2010) § 169, para 5ff.

3 Eberhard Schmidt, *Deutsches Strafprozessrecht – Ein Kolleg* (Vandenhoeck & Ruprecht Verlage 1967) 65; Lutz Meyer-Goßner, Bertram Schmitt, *StPO mit GVG und Nebengesetzen* (55th edn CH Beck 2012) § 169 GVG, para 3; critical about this narrow understanding of publicity, as access to the main hearing Joachim Scherer, *Gerichtsöffentlichkeit als Medienöffentlichkeit* (Athenäum 1979) 1-4 (according to

In his 1960 essay, Bockelmann observed that no other provision in the current procedural law is as uncontested as this one.[4] The German Federal Court of Justice (*Bundesgerichtshof*, BGH) describes the principle of publicity as an 'ancient democratic claim' that 'entered the consciousness of the people as a matter of course' and therefore 'needs protection from any form of weakening'.[5] The publicity of criminal proceedings is one of the 'fundamental principles of the constitutional state'.[6] The importance given to the principle of publicity in criminal procedural law by the legislator is reflected by the fact that a violation of open court principle section 338 No 6 Criminal Procedure Act (*Strafprozessordnung*, StPO) is an absolute ground for appeal.[7]

So, if this principle of the publicity of proceedings is really that uncontested and its standing is so self-evident, an argument for its legitimacy seems redundant. Should the grounds for a principle that is commonly accepted and even protected and enforced by legislation and the judiciary be questioned? The answer has several elements:

- First, justification of principles in the law is required even apart from when conflicts arise in the application, scope or interpretation of legal norms. Existing principles and concepts of law have to withstand a critical evaluation by the individuals governed by them, and be considered reasonable and just.[8]

---

him, publicity means 'transparency of the judicial process'; on the limitation of the public according to available space, see Claus Roxin/ Bernd Schünemann, *Strafverfahrensrecht* (27th edn CH Beck 2012) 412 (with further references). On the term 'indirect publicity' through media: Scherer argues that publicity through media should have the same meaning as publicity in terms of § 169, para 1 GVG. For the difference between direct and indirect publicity, see Eberhard Schilken, *Gerichtsverfassungsrecht* (4th edn CH Beck 2007) para 171ff, 178ff: direct publicity affects personal attendance during the court hearing, while indirect publicity means the coverage and reporting for the entire public through media, for example print, TV and broadcast. See also: Jochen Witzler, *Die personale Öffentlichkeit im Strafverfahren* (Centaurus Verlag 1993) 157.

4 Paul Bockelmann, 'Öffentlichkeit und Strafrechtspflege' (1960) NJW 217.

5 See BGHSt 4, 279 (283) with reference to BGHSt 1, 334 (335) and 2, 56 (57).

6 BGHSt 9, 280, 281. See also Rudolf Kissel/ Herbert Mayer (n 2) § 169, para 4 (with further references).

7 See also BGHSt 1, 334 (335, 336); 4, 279.

8 Rainer Zaczyk, 'Über Begründung im Recht' in: Rainer Zaczyk, Michael Köhler, Michael Kahlo (eds), *Festschrift für E.A. Wolff* (Springer 1998) 409ff.

- Further, the meaning of the concept of open court has shifted noticeably in recent decades.[9] On the one hand, the rising influence of the media has promoted an increased concern for the privacy rights of persons involved in proceedings, especially in criminal matters.[10] On the other hand, the question arises if and under which circumstances the media must be granted access given the limited space of any court room.
- Finally, justification of the concept of publicity in criminal proceedings is necessary because its observance in practice is not as self-evident as portrayed in the above-cited literature and jurisprudence. The practical relevance of the principle of publicity has been seriously threatened by the profound change to the Criminal Procedure Act in 2009, which allowed agreements regarding the proceedings between the parties.[11] The introduction of plea bargains in criminal proceedings has also, as Roxin and Schünemann put it, 'paralysed the concept of publicity as a control mechanism in the constitutional state'.[12]

2. *The Foundations of the Principle of Public Proceedings*

First, I will outline the different lines of reasoning and their sources in the literature of the Enlightenment (section 2.1.), and secondly, I will present the specific reasoning in the area of criminal procedure (section 2.2.).

---

9 See Eberhard Schmidt, *Justiz und Publizistik* (Mohr Siebeck 1968); B. Tag, *Die Öffentlichkeit der Hauptverhandlung/ Eine Prozessmaxime im Wandel der Zeit* (Gullivier Verlag 1999); Jochen Witzler (n 3), 46ff; see, for a socio-historic perspective, Jürgen Habermas, *Strukturwandel der Öffentlichkeit/ Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (Luctherhand 1962).

10 See Heike Jung, 'Öffentlichkeit – Niedergang eines Verfahrensgrundsatzes?' in: Hans Joachim Hirsch, Günther Kaiser, Helmut Marquardt (eds), *Gedächtnisschrift für Hilde Kaufmann* (De Gruyter 1986) 891, 892.

11 Gesetz zur Regelung der Verständigung im Strafverfahren (dated 29 July 2009, applicable since 4 August 2009, BGBl I 2009, 2353. See: BVerfG, Judgement of 19 March 2013 – 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11.

12 Claus Roxin/ Bernd Schünemann, *Strafverfahrensrecht* (27th edn CH Beck 2012), 411.

2.1. General lines of reasoning and their foundations in the literature of the Enlightenment

2.1.1. Contemporary stand on the spirit and purpose of the guarantee of the principle of publicity

If one looks for the spirit and purpose of the principle of publicity, one may find at least four lines of argument:[13]

(1) The public can assert, through their presence in a court room, a certain ability to control the workings of the courts.[14] This mechanism is supposed to ensure that the courts follow the binding, democratically legitimated law. Court decisions are legitimized by the presence and control of the public.
(2) The presence of the public is further supposed to ensure the independence of the courts,[15] as undue influence from the state or private individuals is not possible under public scrutiny.
(3) The publicity of proceedings also safeguards individuals against the dangers of 'secret justice'. The principle of publicity prevents justice from being delivered behind closed doors.[16]

---

13 Peter-Paul Alber, *Die Geschichte der Öffentlichkeit im deutschen Strafverfahren* (Duncker & Humblot 1974) 36ff (historically); Bockelmann (n 4) 217 (218); Kissel/ Mayer (n 2) § 169, para 1 ff; Karl Peters, *Strafprozess* (4th edn CF Müller 1985), § 60, II c); Claus Roxin, 'Aktuelle Probleme der Öffentlichkeit im Strafverfahren' in: Jürgen Baumann, Klaus Tiedemann (eds), *Einheit und Vielfalt des Strafrechts, Festschrift für Karl Peters zum 70. Geburtstag* (Mohr Siebeck 1974), 393f; Claus Roxin/ Bernd Schünemann, (n 12) 409f; Manfred Wolf, *Gerichtsverfassungsrecht aller Verfahrenszweige* (6th edn CH Beck 1987) 243. Joachim Scherer (n 3) 5, holds that the purposes mentioned are partly inconsistent with one another.

14 See BGHSt 27, 13 (15: 'Kontrolle des Verfahrensgangs'); 24, 72 (74); Eberhard Schilken (n 3) para 155; Heinz Zipf, 'Empfiehlt es sich, die Vorschriften über die Öffentlichkeit des Strafverfahrens neu zu gestalten, insbesondere zur Verbesserung der Rechtsstellung des Beschuldigten weitere nicht-öffentliche Verfahrensgänge zu entwickeln?' *Gutachten C für den 54. Deutschen Juristentag* (CH Beck 1982), C 40ff; Edgar Jules Wettstein, *Der Öffentlichkeitsgrundsatz im Strafprozeß* (Schulthess 1966), 40ff; Historically on civil procedure Marie Theres Fögen, *Der Kampf um Gerichtsöffentlichkeit* (Duncker & Humblot 1974), 23ff; Herbert Schmidthals, *Wert und Grenzen der Verfahrensöffentlichkeit im Strafprozeß* (Peter Lang 1977), 118, n 190.

15 See also BGHSt 9, 280 (281).

16 BGHSt 7, 218 (221).

(4) The possibility of public scrutiny is further supposed to maintain and enhance public trust in jurisprudence.[17]

These four lines of argument are the result of the discussion on a fair justice system, which was already formed and established in the 18th and 19th century.[18] The discussion on the rationalisation of criminal procedure and the humanisation of substantive criminal law was the result of a new intellectual movement that regarded rationality and reason as the main measure and basis for all positive law.[19]

This movement was led by thinkers like Montesquieu and Voltaire in France, as well as Locke in England at the turn of the 18th century. In his book *On Crime and Punishment* (1766), Cesare Beccaria, a major figure of the Italian Enlightenment, argued for the humanisation of criminal law, and in particular for the publicity of criminal proceedings.[20] In Germany, those thoughts of the Enlightenment led to the important legal doctrines of Kant, Feuerbach and Hegel. Below I will briefly outline their thoughts on the principle of publicity,[21] before turning to specific issues concerning criminal proceedings.

---

17 See also BGHSt 3, 386 (387); ECtHR, *Pretto and Others v Italy* (1983) NJW 2177; RGSt 70, 109 (112); BGHSt 9, 280 (281).

18 Summary of the debate on the principle of publicity in the era of Enlightenment in: Peter-Paul Alber (n 13) 18ff; A historical outline starting from the Roman process in: Jochen Witzler (n 3) 15ff; See also Carl J von Sparre-Wangenstein, *Ueber Geschwornen-Gerichte und das Verfahren in peinlichen Sachen* (the Bavarian State Library 1819) 84ff.

19 Eberhard Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege* (3rd edn Vandenhoeck & Ruprecht 1995) § 203. For the historical debate in the era of Enlightenment in France, see Günter Haber, *Strafgerichtliche Öffentlichkeit und öffentlicher Ankläger in der französischen Aufklärung* (Duncker & Humblot 1979) 72ff (on Montesquieu), 85ff (on Voltaire), 106 ff (in particular on Beccaria), 135ff (on Rousseau). About the significance of the Enlightenment for law, state and society, see Ernst Cassirer, *Die Philosophie der Aufklärung* (Felix Meiner Verlag 1932), quoted from Volume 15 of the Hamburg Edition of the works of Ernst Cassirer (ECW) 313ff (with reference to Grotius, Leibniz, Pufendorf, Locke and Rousseau).

20 Cesare Beccaria, *Über Verbrechen und Strafen* (Insel Verlag 1755), translated and published by Wilhelm Alff), XIV, 78.

21 See also Torsten Liesegang, *Öffentlichkeit und öffentliche Meinung/ Theorien von Kant bis Marx (1780-1850)* (Königshausen & Neumann 2004).

2.1.2. *The open court principle in German legal philosophy of the Enlightenment*

Immanuel Kant argued in as early as 1795 that the principle of publicity is not merely one of many other procedural principles, but rather the basic principle fundamentally connected to the constitutional state. He contended: every (real) legal claim has the potential for publicity; without it, there would be neither justice, which can only be imagined as public, nor law at all.[22] He maintained that a lack of publicity indicates injustice. He wrote: 'All actions relating to the rights of other men are wrong, if the maxims from which they follow are inconsistent with publicity.'

Based on that reasoning, the mere formal principle of publicity is a criterion for the substantial lawfulness of an act.[23] It is remarkable how Kant substantiated this argument. He asserted that the incompatibility of a maxim for action (*Handlungsmaxime*) with the principle of publicity itself proves the injustice of the maxim, the reason being that the mere need for secrecy must indicate the unjust nature of the maxim. A general and necessary rejection by the public can only have its cause in the injustice of the maxim.[24]

---

22 See Immanuel Kant, *Zum ewigen Frieden*, Anhang, II., B 98, 99; A 92, 93 (Immanuel Kant, *Perpetual Peace: A Philosophical Sketch, translated by Mary Campbell Smith* (Gale, Making of Modern Law 2013),185): 'If I look at public right from the point of view of most professors of law, and abstract from its matter or its empirical elements, varying according to the circumstances given in our experience of individuals in a state or of states among themselves, then there remains the form of publicity. The possibility of this publicity, every legal title implies. For without it there could be no justice, which can only be thought as before the eyes of men; and, without justice, there would be no right, for, from justice only, right can come. ... Having thus, as it were, abstracted from all the empirical elements contained in the concept of a political and international law, such as, for instance, the evil tendency in human nature which makes compulsion necessary, we may give the following proposition as the transcendental formula of public right: "All actions relating to the rights of other men are wrong, if the maxims from which they follow are inconsistent with publicity."'.

23 See Claus Dierksmeier, 'Zur systematischen Liberalität von Kants Politik- und Staatsbegriff' in: Henning Ottmann (ed), *Kants Lehre von Staat und Frieden* (Nomos 2009) 42, 49.

24 See Immanuel Kant, *Zum ewigen Frieden*, Anhang, II., B 98, 99; A 92, 93, Campbell Smith (n 22) 185: 'For there is something wrong in a maxim of conduct which I cannot divulge without at once defeating my purpose, a maxim which must therefore be kept secret, if it is to succeed, and which I could not publicly acknowledge without infallibly stirring up the opposition of everyone. This necessary and universal resistance with which everyone meets me, a resistance therefore

G.W.F. Hegel demanded publicity of court proceedings in his book *Elements of the Philosophy of Right*, published in 1821, in the chapter on the 'Administration of Justice'. More precisely, in § 224 he supported the need for publicity of judicial proceedings and judgements with the argument that such proceedings affect not only the parties involved, but also the general public.[25] The application and implementation of the law through individual proceedings have a general validity and are therefore also of general interest. Hegel elaborated on this argument by adding: 'A primary characteristic of a right is that the citizens should have confidence in it, and it is this aspect which requires that justice should be dispensed in public.'[26]

Anselm Ritter von Feuerbach, also in 1821, devoted a book to the topic of publicity and orality of the maintenance of justice.[27] Secrecy, according to Feuerbach, was 'the concealing veil for the bad and rotten'[28] and was in any aspect against the nature of justice. He further asked what the reasons could be for justice to seek secrecy. Was it not rather the case that justice, by shying away from publicity, raised the suspicion of hiding 'shade-loving injustice under its veil' and therefore lost its integrity and its persuasiveness? Feuerbach clearly pointed out: 'Justice, from which one has to fear injustice, is not any better than open injustice itself. And if justice is one of the main pillars of the state (…), it is still necessary for justice to be perceived necessary that justice is also perceived as such by the public.'[29]

---

evident *a priori*, can be due to no other cause than the injustice with which such a maxim threatens everyone.' See also Claus Dierksmeier (n 23) 49.

25 Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (Nicolai1821) § 224 (Add.), 377 (Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, edited by Allen W Wood, translated by Hugh Barr Nisbet (CUP 1991) ('EphR') 254): 'The rights of the subjective consciousness include not only that of making the laws publicly known (see § 215), but also the possibility of knowing [zu kennen] how the law is actualized in particular cases, i.e. of knowing the course of the external proceedings, legal arguments [Rechtsgründe], and so forth – the publicity of the administration of justice; for the course of law is in itself an occurrence of universal validity, and although the particular content of the case may be of interest only to the parties themselves, its universal content (ie the right within it and the decision on this right) is of interest to everyone.

26 Ibid.

27 Anselm Ritter von Feuerbach, *Betrachtungen über die Öffentlichkeit und Mündlichkeit der Gerechtigkeitspflege* (Gießen 1821). See also Josef Coparaelissen, *Tätigkeit und Theorien Feuerbachs im Strafprozeß* (Bonn 1963) 135ff.

28 Ibid, 89.

29 Ibid, 92. See on this thought in relation to criminal procedure also Carl Joseph Anton Mittermaier, *Die Mündlichkeit, das Anklageprinzip, die Öffentlichkeit und das Geschwornengericht* (Gottischer Verlag 1845) 335, 336.

Summarizing those thoughts, there are *two* lines of reasoning which acknowledge the principle of publicity as mandatory for justice:

(1) Firstly, the Kantian fundamental thought that 'real' justice does not have to fear publicity. Justice can only be thought of and imagined as public, and the mere need for secrecy implies injustice.
(2) Secondly, the ideas of Hegel and Feuerbach acknowledged the *intrinsic connection of the public to the judicature* and, following this, the necessity for *public trust in the judicature*.

2.1.3. Inherent limitations to the principle of publicity in light of the role of the media as a justice reporter

Looking at the current debate on the media as justice reporter[30] in light of, inter alia, Feuerbach*'s* arguments, there is an *inherent limitation* of the principle of publicity: It cannot be the goal to equate justice or a judgement in any way with the opinion of, or dependent on, the public. More precisely: Through involving the *public opinion in the process of reaching a verdict*, there might be a risk of losing a calm and impartial environment, focused on and dedicated to delivering justice.

According to section 169 S 2 Courts Constitution Act (GVG), audio and video recordings are in principle prohibited in Germany; the new version of the paragraph, though, will limit this prohibition to those recordings that are intended for publication. In this way, the coverage of a trial can be subjected to the court rules and regulations,[31] which would be impossible throughout a live-broadcast. This prohibition exists especially for the privacy rights of an accused, but also for the dignity of the court, which is not to be subjected to the 'control' of public opinion.

The inadmissibility of those recordings covers any transmission to an unmanageable and anonymous audience, such as through the internet or television.

In the new version of the law there are a few exceptions to this prohibition in respect of historical records or pronouncement of judgments of the German Federal Court of Justice.

---

30 On the issue of media and publicity of court proceedings, see Jung (n 10) 891, 908.

31 See Klaus Volk, 'Referat beim 54. Deutschen Juristentag' *in Verhandlungen des 54. Juristentags (CH Beck 1982)* Band II, Part K, K 29 (K 31ff).

2.2. Special Features in the Context of Criminal Proceedings

In 19th century literature one can also find specific thoughts on the issue of publicity in the context of criminal proceedings.

Feuerbach points out the differences between civil and criminal proceedings: in civil proceedings the party in front of a judge is a free person; in criminal proceedings, however, the accused is a person compelled to attend or even in custody under the control of the judge.[32] But there still have to be at least impartial witnesses to the proceedings, so that the defendant has the opportunity to object to the procedural process, for 'silent walls cannot give testimony in his favor.'[33]

Besides, and this is an essential argument, the public also attend proceedings in their own interests and right, since 'the crime not only harms the victim, but also the entire polity, state and public as a whole.'[34] The mention of injury to the entire polity through crime has a special relevance for criminal proceedings. It is argued that the matter of a criminal proceeding *itself*, in contrast to other proceedings, directly involves the public.

The public would not only serve as an *observer*, but would itself be *a party harmed by the committed crime.* This can only be argued if there is more to the correlation between the criminal act and the punishment by the state than a mere harm-restitution relationship between the offender and the victim, as would be the case in civil proceedings.

Feuerbach himself saw this aspect of the criminal act, in the sense that the crime is not only an attack on the goods of the victim, but in general a *wrongdoing* that always affects the law of the state in its totality.[35]

In the legal philosophy of *Hegel,* the intrinsic connection between crime and punishment and their relation to the public is crucial.[36] Crime is the

---

32 Anselm Ritter von Feuerbach, *Betrachtungen über die Öffentlichkeit und Mündlichkeit der Gerechtigkeitspflege* (Georg Friedrich Heyer 1821) 164.

33 Ibid, 165.

34 Ibid, 167-168.

35 See Feuerbach, *Lehrbuch des gemeinen in Deutschland geltenden Peinlichen Rechts* (Georg Friedrich Heyer 1801), in particular: §§ 26, 28, 37, 41 and *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts* (Henning 1799) 65. On Feuerbach's therory of violation of law eg Knut Amelung, *Rechtsgüterschutz und Schutz der Gesellschaft* (Athenäum 1972) 33ff; Luís Greco, *Lebendiges und Totes in Feuerbachs Straftheorie* (Duncker & Humblot 2009) 56ff; Uwe Murmann, *Die Selbstverantwortung des Opfers im Strafrecht* (Springer 2005) 63ff.

36 Law, according to Hegel, is the means to the realisation of freedom, and the existence of freedom (see § 30 EphR), divided into interpersonal legal and equality principles, which are formally structured and truly universal. In the shape of legis-

infringement of right; punishment is the offsetting or cancellation of the crime – not only in the relationship between the offender and the victim, but also in respect to the general law. Punishment therefore means restoration of the broken right, serving the general objective to have general rules, giving the right back its actuality.

Therefore, criminal proceedings have to be understood as a way to restore generally valid law (*Wiederherstellung des Rechts*), as a form of re-

---

lation, according to Hegel, law becomes universal and is administered by the courts (§ 219 EPhR). The notion of *in*justice, and more specifically of crime, is connected to this notion of law and characterizes crime as the negation of law. With the negation of law, two main aspects of the dimensions of crime are mentioned. On the one hand, it is a breach of the interpersonal legal relationship, which is, according to Hegel, marked by the mutual respect for the other legal subject (§ 36 EphR). On the other hand, the general law is breached, specifically: the audacity to except oneself from the applicable law is an objection to the universality of law. Criminal injustice therefore stands in the way of the realisation of freedom, and 'crime' is then a direct and general violation of freedom – the latter explains the relation to the general legal public. If crime is understood in this manner, punishment in the sense of Hegel is the restoration of the breached concrete relationship and the violated general law. Punishment is the invalidation of the crime, 'which would otherwise be regarded as valid' (§ 99 EphR) and the restoration of right. More specifically on the main aspects of Hegel on criminal law §§ 90ff, 218 and 220 in EPhR; see on Hegel's legitimation of punishment Ossip Kurt Flechtheim, *Hegels Strafrechtstheorie* (2nd ed Duncker und Humblot 1975); Katrin Gierhake, *Begründung des Völkerstrafrechts auf der Grundlage der Kantischen Rechtslehre* (Duncker und Humblot 2005) 110-123 and 135-141; Diethelm Klesczewski, *Die Rolle der Strafe in Hegels Theorie der bürgerlichen Gesellschaft* (Duncker und Humblot 1991); Michael Köhler, 'Strafbegründung im konkreten Rechtsverhältnis' in: Wilfried Küper/ Ingeborg Puppe/ Jörg Tenckhoff, *Festschrift für Karl Lackner* (De Gruyter 1987), 11ff; Michael Köhler,, *Der Begriff der Strafe* (R.v. Decker 1986); Helmut Mayer, 'Kant, Hegel und das Strafrecht' in Paul Bockelmann/ Arthur Kaufmann/ Ulrich Klug (eds), *Festschrift für K. Engisch zum 70. Geburtstag* (V Klostermann 1969), 54ff; Michael Ramb, *Strafbegründung in den Systemen der Hegelianer* (Duncker & Humblot 2005), 16ff; Wolfgang Schild, 'Juristisches Denken und Hegels Rechtsphilosphie' (1978) 29 Österr. Z. öffentl. Recht und Völkerrecht 5ff; Wolfgang Schild, 'Die Aktualität des Hegelschen Strafbegriffs' in Erich Heintel (ed), *Philosophische Elemente der Tradition des politischen Denkens* (Vienna and Munich 1979), 199ff; Kurt Seelmann, 'Hegels Straftheorie in seinen "Grundlinien der Philosophie des Rechts"' (1979) JuS 687ff; Kurt Seelmann, 'Wechselseitige Anerkennung und Unrecht/ Strafe als Postulat der Gerechtigkeit?' (1993) ARSP 79, 228ff; Stephan Stübinger, *Das 'idealisierte' Strafrecht* (V Klostermann 2008), 288ff. See also Kurt Seelmann, Paolo Bechhi, Wolfgang Schild, Gerhard Luf und Benno Zabel in: Andreas von Hirsch/ Ulfried Neumann/ Kurt Seelmann (eds), *Strafe – Warum?/Gegenwärtige Strafbegründungen im Lichte von Hegels Straftheorie* (Nomos 2011) 79ff.

actualizing the law.[37] The public is therefore not a mere spectator in criminal proceedings. On the contrary, it acts as an involved party, as it were – though certainly not in the normal sense as a kind of joint plaintiff to the proceedings. However, it is the law that has been constituted by the public itself in order to protect its freedom which is violated. The court acts to restore justice in the name of the public (the judgment is rendered in the name of the people).[38] The same goes for an indictment: it is rendered in the name of the public; therefore, it is also brought 'on behalf' of the public.

In the context of a crime as directly involving the public, it has to be added that restitution can only be valid when carried out publicly, i.e. when directed towards the general public. Punishment is supposed to act not only as an instrument of restitution, but also to send a message that the community, regardless of the crime, is interested in upholding the general law. Therefore it is essential that the public can follow and comprehend the whole judicial process, and thus understand why an acquittal or sentence has been rendered. In the acquittal, as well as the conviction, lies a publicly manifested affirmation of the applicable law.

The character of *criminal proceedings particularly requires* the *principle of publicity*.

The public, in this context, is not only a mere observer, but involved in the proceedings in a complex way.

---

37 See Uwe Murmann, 'Über den Zweck des Strafprozesses' (2004) GA 65, 71, who evaluates the present debate on criminal procedure (65ff). See also Rainer Zaczyk, 'Prozeßsubjekte oder Störer?' (1993) StV 490, 491, and Rainer Zaczyk, 'Bindungswirkung eines rechtskräftigen Strafurteils für das materielle Strafrecht' (1988) GA 357, 359ff. On the debate about the aim of criminal procedure, see, for example, Ulfried Neumann, 'Materiale und prozedurale Gerechtigkeit im Strafverfahren' ZStW 101 (1989) 52ff; Hans-Ullrich Paeffgen, *Vorüberlegungen zu einer Dogmatik des Untersuchungshaft-Rechts* (Heyman 1986) 13ff; Klaus Volk, *Prozessvoraussetzungen im Strafrecht/ Zum Verhältnis von materiellem Recht und Prozessrecht* (Kremer 1978), in particular 183ff (193ff on 'Wahrheit', 196ff on 'Gerechtigkeit', 200ff on 'Rechtsfrieden'); Thomas Weigend, *Deliktsopfer und Strafverfahren* (Duncker & Humblot 1989) 173-219.

38 On this argument, see Rainer Zaczyk, 'Bindungswirkungen eines rechtskräftigen Strafurteils für das materielle Strafrecht' (1988) GA 356, 365.

3. *Violation of the Principle of Publicity by the Introduction of 'Negotiated Agreement' ('Deal') in Germany's Criminal Procedural Act*[39]

Based on the arguments above, I would like briefly to discuss the amendment to the German procedural code, which has been in place for 10 years[40] now and the subject of a fundamental ruling of the German Federal Constitutional Court (BVerfG).[41]

In section 257c, the Criminal Procedural Act (*Strafprozessordnung*, StPO) now permits an agreement 'deal' between the court and the involved parties.[42] It reads: '(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.'

This section allows the parties to agree on a sentence in return for a confession or some other behaviour during the process by the defendant.[43] Along with introducing this provision for an agreement between the parties, other measures were added to further the consensual elements in criminal proceedings. According to the amendments, the parties can – during preliminary proceedings, interlocutory proceedings and at the beginning or during the main hearing – 'discuss the progress of the proceedings, if this is considered fruitful to further the proceeding' (see sections 160b, 202a, 212 and 257b Criminal Procedural Act, StPO). Those discussions can already be in the light of reaching a agreement (as shown in § 243 IV Crim-

39 See Thomas Rönnau, *Die Absprache im Strafprozeß* (Nomos 1990) 165ff.

40 Law on the settlement in criminal proceedings (29.7.2009, in effect since 4 August 2009 (2009) BGBl I, 2353.

41 See BVerfG, Judgement of 19 March 2013 – 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11. On this issue (opposed), see Carl-Friedrich Stuckenberg, Entscheidungsbesprechung (2013) 4 ZIS, 212ff, and Gerhard Fezer 'Vom (noch) verfassungsgemäßen Gesetz über den defizitären Vollzug zum verfassungswidrigen Zustand,' (2013) 4 HRRS 117ff. In the case, the Supreme Court had to decide on the complaint against a criminal conviction, which was based on a settlement between the court, the advocate general and the accused according to section 257c StPO. The Supreme Court allowed for a settlement, though it criticised the wrongful execution in the proceedings. See also BVerfG, Judgement of 27 January 1987, 2 BvR 1133/86, (1987) NJW 2662f; Bernd Schünemann, Absprachen im Strafverfahren? Grundlagen, Gegenstände und Grenzen, *Gutachten B zum 58. Deutschen Juristentag in München* (CH Beck 1990) B 143ff.

42 See also § 257 c StPO, Carl-Friedrich Stuckenberg in: Löwe-Rosenberg, *StPO und GVG, Großkommentar* (26th edn De Gruyter 2013).

43 See, on the issue of settlements, Bertram Schmitt, 'Zu Rechtsprechung und Rechtswirklichkeit verfahrensbeendender Absprachen im Strafprozeß' (2001) GA 411, 412-413); Thomas Rönnau, *Die Absprache im Strafprozeß* (Nomos 1990) 22ff.

inal Procedural Act, StPO):[44] For the purpose of transparency during the main hearing, this article stipulates an obligation to notify the party of the existence of such settlements in cases where there have been talks about settlement. In those cases the main matter of such a settlement must be expressed.[45]

The German Federal Court of Justice (BGH), in its 1997 decision, saw the main problem with such settlements was that they were reached outside the main hearing and therefore violated the principle of publicity.[46] It saw a danger in detaching the settlements from the main proceedings and the main proceedings becoming 'a mere façade, which obscured the publicity of the reasoning behind the sentence and verdict.'[47]

A settlement between the court and the other parties, which includes a plea by the accused and a sentence, must therefore be reached in the main proceedings – with deliberation by the panel of judges. This, however, does not mean that there cannot be any talks between the parties before or outside of the proceedings to assess the willingness for such an agreement and the current positions; the court, however, must reveal such talks in the main hearing.[48]

This negotiated agreement undermines the rule that all talks must be held within the main hearing.[49] By allowing the court just to present the outcome and main points of these talks that excluded the public, those settlements are reached under the veil of secrecy and in the absence of any possibility for scrutiny, basically becoming an independent and informal proceeding parallel to the main hearing.[50]

Considering the specific need for publicity in criminal proceedings, mentioned above, the problem is obvious: If the whole proceeding is about the restitution of the general law and the public is an affected entity,

---

44 See Uwe Murmann, 'Reform ohne Wiederkehr? – Die gesetzliche Regelung der Absprachen im Strafverfahren' (2009) 10 ZIS 526, 530.

45 Ibid.

46 BGHSt 43, 195, 205; BGHSt 50, 40. See BGHSt 43, 195 and André Graumann, Vertrauensschutz und strafprozessuale Absprachen (Duncker & Humblot 2006) 48ff.

47 BGHSt 43, 195, 205.

48 Ibid, 205, 206 (Herbert Schäfer, 'Rechtsgespräch und Verständigung im Strafprozess' (1989) DRiZ 294; Jürgen Wolter *Systematischer Kommentar zur Strafprozessordnung: SK-StPO* (Carl Heymanns 2016) § 151 para 76.

49 See Thomas Weigend, 'Eine Prozessordnung für abgesprochene Urteile? (1999) NStZ 57, 59, 60 and Schmitt B, 'Zu Rechtsprechung und Rechtswirklichkeit verfahrensbeendender Absprachen im Strafprozeß' GA 2001, 411, 423, 424.

50 See BGHSt 43, 195 (206).

then any settlement between the court, advocate general and the defendant cannot reach full restitution. Neither the gathering of evidence, the ascertainment of a breach of law and the guilt of the defendant nor the conviction, acquittal or the reasoning for the sentence are made public. The applicable law on settlements within criminal proceedings therefore violates the principle of publicity.

4. Final Summary

The procedural principle of publicity is rightfully seen as a signal achievement of the constitutional state. This applies notably to criminal proceedings for several reasons. Here, the procedural principle of publicity not only protects the individual from the dangers of secret justice – it also retains the trust of the general public in the dignity of the judiciary. In criminal proceedings, the general public is, in a complex way, involved as a party to the proceedings; publicity is therefore an important part of restoring justice. A violation of the principle of publicity thus lies in the settlement agreements introduced in section 257 c criminal procedural act.