



COURTS DOING DEALS
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It was my good fortune to have had a six-month stay at the Wiko, from mid-January to mid-July 2014. I wanted proximity to German sources in connection with research I have been doing regarding an important development that has been taking place in the administration of criminal justice in contemporary Germany. My stay at the Wiko was very productive. Thanks in part to the support of the wonderfully helpful Wiko library staff, I was able to locate and review the main documents and scholarly literature. Being at the

Wiko also enabled me to interview judges, practitioners, and legal academics familiar with the topic. I am now working on a scholarly article based on this work.

The subject of my research was what has come to be called the *Absprachen* phenomenon, literally “negotiating,” but better described as *confession bargaining* in cases of serious crime. This practice involves deep tensions with core principles of the *Strafprozessordnung* (the German Code of Criminal Procedure), principles that were carefully theorized and implemented in a notable nineteenth-century reform movement.

What happens in *Absprachen* practice is that the presiding judge of a criminal trial court engages in negotiations with the defense counsel who represents the defendant. These negotiations commonly take place somewhat in advance of the public trial; when successful, they result in a bargain about the conduct and the outcome of the case. In return for the judge’s undertaking to reduce significantly the punishment that would result if the court were to find the defendant guilty after a full trial on the evidence, the defendant agrees to confess the charge against him. The court then convicts the defendant, relying heavily upon the confession, which greatly shortens the trial and simplifies the work of the court. This practice of confession bargaining in cases of serious crime developed relatively rapidly and relatively recently. It was unknown into the 1970s, but today is thought to occur in at least a quarter of the caseload.

The German *Absprachen* system has eerie parallels to the deeply troubled American plea bargaining system, a somewhat differently constructed system of confession bargaining, administered by prosecutors rather than judges, which wholly dispenses with trial. American plea bargaining has effectively defeated the criminal justice system that the federal constitution purports to require. Whereas the constitution provides for jury trial “in all criminal prosecutions”, the latest data indicate that 97 percent of federal criminal cases are processed to conviction by means of negotiated confessions in the nontrial plea bargaining system. I have long been among the many critics of American plea bargaining (see e.g., Langbein, “Torture and Plea Bargaining,” *U. Chicago L. Rev.*, 1978), and I find it disheartening to see comparable practices emerge in Germany.

The claim is widespread that the trend to confession bargaining in Germany is a response to caseload pressures associated with the sometimes voluminous and complex evidence characteristic of some newer sorts of criminal offenses, such as economic (“white collar”) crime, environmental and other regulatory offenses, and large-scale narcotics cases. Whether that is true as an empirical matter is unclear; and in any event, confession bargaining has not been confined to such cases. Another widely suggested causal factor is

that confession bargaining results in part from the success of German defense lawyers in developing cost-inflicting techniques, such as demanding that courts conduct burdensome investigations into matters of slight importance. Confession bargaining can spare a court from such demands. The parallel to the historical development of American plea bargaining in this regard is striking. More than any other cause, it was defense counsel's role in making criminal trial ever more complex and time-consuming that ultimately made trial unworkable as a routine procedure, inducing the nontrial plea bargaining system.

Confession bargaining strikes at the two core principles of German criminal procedure, the duty of the court to seek the truth (the *Aufklärungspflicht*, StPO § 244(2)) and the guilt principle (*Schuldprinzip*, StPO § 261), the court's duty to base judgment in a criminal case solely upon the evidence heard at trial. What makes a spontaneous or voluntary confession persuasive is that it constitutes an admission against interest. But a bargained confession of the sort that has now become so pervasive in German criminal justice is not voluntary, because the defendant makes the confession for a strategic purpose, to get a reduced punishment. The bargain corrupts the confession. As the disparity grows between the sentence that the defendant is promised for confession and the sentence that is threatened for conviction if the defendant refuses to confess and is thereafter convicted, the inducement to waive defenses and accept the offered deal becomes ever more intense. Bargained confessions are in this sense coerced confessions.

Sadly, the German legislature in 2009 enacted legislation (StPO § 257c) validating confession bargaining. Reviewing the legislation in 2013, the constitutional court (*Bundesverfassungsgericht*) expressed its concern about the dangers of confession bargaining, but was unwilling to hold the legislation unconstitutional, although the court kept open the possibility that further experience would require constitutionally based intervention.

I conclude this report with a word of gratitude to the Wiko, not only for its research support, but also for the stimulating collective life of the fellowship. It was a unique experience to have had such sustained engagement with so remarkable a group of scholars and artists. The weekly colloquia on topics that ranged from patterns of evolutionary adaptation to the activities of Roman gladiators were endlessly stimulating. Berlin is one of the world's greatest centers for classical music, and the museums of art and archeology are simply inexhaustible. My wife and I will always be grateful for the opportunity that Wiko provided us to explore Berlin's cultural life.