

# Presumption of Innocence: procedural rights in criminal proceedings

Social Fieldwork Research (FRANET)

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## **PART A. EXECUTIVE SUMMARY**

This study was commissioned by the EU Fundamental Rights Agency (FRA) and will serve as the basis for a comparative analysis of the implementation of Directive 2016/343/EU in a number of Member States. In Germany, the implementation of the Directive, which stipulates the fundamental rights of defendants in criminal proceedings, comprised only individual law changes concerning the right to be present at the trial. The Federal Ministry of Justice considered the other rights included in the Directive to be regulated in accordance with European Law already. The study discusses the implementation of these rights in Germany from the perspective of judges, public prosecutors, police officers and defence lawyers. A total series of twelve qualitative interviews was conducted with persons from these groups, mainly in the area of Berlin, between February and July 2020. The findings discussed in this report are the result of qualitative content analysis of the interviews. The report focuses on the implementation of the right to be presumed innocent in general, public references to guilt, the presentation of suspects and accused persons, possible exceptions to the presumption of innocence, the right to remain silent and not to incriminate oneself as well as the right to be present at the trial and to have a new trial.

### **The right to be presumed innocent in general:**

The first chapter is based on the interviewees' own reflections on how they implement the right to be presumed innocent in practice and on factors that could have an impact on this right. First of all, almost all interviewees indicated that the presumption of innocence played a major role in their everyday work. When asked about potential factors that had an effect on guaranteeing the presumption of innocence, defence lawyers named considerably more factors than the other interviewees. The group of judges, public prosecutors, and police officers, on the other hand, stated that in practice the presumption of innocence applied in principle equally to all people, regardless of factors such as ethnic or social origin or previous convictions. Exceptions to this were, in their view, more likely to be individual cases than structural problems. From the experience of defence lawyers, an accumulation of interlinked factors such as location or milieu of the crime, age, skin colour or origin of the suspects, could potentially have a negative impact on the right to be presumed innocent. In addition, several defence lawyers mentioned problems of institutional racism in relation to pre-trial detention, which had the potential to undermine the presumption of innocence. From their experience, for instance, suspects with a non-German or non-Central European ethnic origin would already be detained for lesser accusations and for a longer period of time.

### **Public references to guilt:**

The reflections of the interviewees showed that within the courts, the public prosecutor's offices and the police, the overwhelming amount of media work was done by their respective press offices. The majority of the lawyers indicated that they rarely liaised with the media, as this would often not be in the interest of their clients. The interviews indicated that the public authorities are generally rather reluctant to publish personal details of suspects and accused persons. Nevertheless, cases were reported in which officials illegally sold information to the media or in which the media found out details about accused persons through their own research. Most interviewees stated that media, in particular tabloid media, had a rather negative influence on the defendants' rights. The most commonly named points of criticism were identifying, emotional and prejudging reporting, in particular in conjunction with the ethnic origin or nationality of suspects, lack of legal knowledge and incorrect use of legal terminology. Additionally, several interviewees pointed out that the nature of the offence could have a negative impact on media coverage, for instance if the offence was regarded as particularly despicable by society, such as sexual offences. Furthermore, it is discussed on the basis of the interviewee's considerations, to which extent the population as well as the professionals

working in the criminal justice system could be consciously or subconsciously influenced by media coverage and the public opinion in general.

### **The presentation of suspects and accused persons:**

For this part of the study, interviewees were at first asked about measures that were used to physically restrain suspects and accused persons in pre-trial detention. According to the interviewees, the most commonly used measures were handcuffs, which were only used for security reasons. The interviewees reported that handcuffs would generally be removed at the beginning of a trial and only ordered by a judge if there were concrete indications for risk of physical harm or flight. Some interviewed defence lawyers made a few differing experiences and mentioned individual extreme cases, in which more severe measures (shackles, glass cases) were ordered and some lawyers complained about the fact that they were sometimes not allowed to sit next to their clients. In addition, the interviewees discussed the effects of these measures besides serving security, with particularly the defence lawyers finding them stigmatising. All interviewees stated that accused persons were allowed to wear civilian clothes of their own choice during trial and a larger group amongst them came to the conclusion that the choice of clothing could have an impact on the way the defendant was perceived by the judge. Finally, the interviewees talked about possible safeguards against being 'presented as guilty'. For most of them, it was worth noting that in Berlin, defendants were led from the detention centre to the courtroom through an underground corridor, thus under the exclusion of the public. Another thing that was frequently mentioned by most interviewees was that trials against young people were not public.

### **Burden of proof:**

In this chapter, interviewees were asked about exceptions to the presumption of innocence and about the effects of a confession. All interviewees indicated that there were no legally prescribed exceptions. However, a larger group of defence lawyers and a judge criticised several systematic issues in the German criminal procedure which might in practice lead to a reversal of the presumption of innocence. Their criticism was mainly pointed at the design of the three stages of the criminal procedure: The first stage, the investigative proceedings (*Ermittlungsverfahren*), is followed by the intermediate proceedings (*Zwischenverfahren*), in which the court reviews the prosecution's indictment. The purpose of the non-public intermediate proceedings is that the court, as an independent second instance, shall review whether there are indeed sufficient grounds for suspicion (*hinreichender Tatverdacht*) before the suspect is exposed to a public main trial (*Hauptverfahren*). As the court of the intermediate proceedings and the court of the main trial are identical, the judges have to review their own previous decisions. According to the interviewees, this leads to the so-called *inertia* effect, which describes that humans tend to over-evaluate clues that prove a once formed hypothesis and to under-evaluate information that speaks against it. Therefore, they claimed that the presumption of innocence could potentially be turned into the opposite, as the defence could feel overly pressured to refute the accusations in the main trial. Furthermore, all interviewees pointed out that a confession was not an exception to the presumption of innocence, as according to case law, it always had to be reviewed by a judge for credibility, plausibility and consistency with other evidence. The practical experiences of the interviewees on the effect of a confession differed, as several defence lawyers had experienced that – depending on each individual case – confessions could shorten the trial completely and were sometimes believed too quickly, as long as there were no contradictions. In addition, some of the interviewees discussed the effects of a plea bargain (*Verständigung im Strafverfahren*), often referred to as 'deal' by the interviewees. The plea bargain in criminal proceedings is regulated conclusively by law in section 257c Code of Criminal Procedure. Its most common application is an agreement on the expected sentence in the event of a confession. In practice, the interviewees were of the opinion that the prospect of a lower sentence could pressure defendants to make false confessions.

### **The right to remain silent and not to incriminate oneself:**

In the view of all interviewees, the right to remain silent was respected before all courts. They described that judges would always inform about it correctly and would not draw any negative conclusions from silence. The rest of the chapter is mainly characterised by discussions on the way the police implemented the rights to remain silent and not to incriminate oneself. Whilst the interviewed police officers generally did not see any problems in this respect, except for a few individual cases, the majority of the defence lawyers reported that the police would regularly not inform suspects about their rights, in particular in hectic situations. From the experience of the group of defence lawyers, this discrepancy between theory and practice also extended to the implementation of the right not to incriminate oneself, as they reported of frequent pressuring, false claims and deceptions by the police with the aim to drive suspects into self-incrimination. A few of the interviewees from the group of judges and prosecutors also stated that suspects were sometimes pressured by the police, for example when it came to providing passwords. However, they could not determine whether this was happening in an unlawful manner.

### **The right to be present at the trial and to have a new trial:**

The most commonly mentioned measure that could be ordered as a consequence of non-appearance at the trial was the issuance of an arrest warrant (*Haftbefehl*). All interviewees indicated that defendants were informed about this on the summons, but a group of defence lawyers strongly criticised that this information was only provided in German (which was legally admissible according to one of the lawyers). Ultimately, the interviewees discussed their understanding of 'effective participation'. There was once more a different perception between the defence lawyers and the other interviewees, as the latter were of the opinion that the status quo of legal provisions was generally sufficient for this matter. On the other hand, a group of defence lawyers pointed out two things that were most urgently needed to achieve effective participation in their view, namely improving access to the file for defendants without a lawyer as well as further extending mandatory defence (*notwendige Verteidigung*), even to minor offences.

## **PART B. INTRODUCTION**

This report comprises social fieldwork research as well as two case studies which were gathered and analysed as part of the evidentiary basis of this project.

The social fieldwork research was undertaken by means of interviews conducted with various professional groups. In total, **12 interviews** were carried out in the timeframe of 25 February to 30 July 2020. This included four interviews with judges and public prosecutors (J), four interviews with defence lawyers (L) and four interviews with police officers (P). The geographic distribution of interviewees focused on the area of Berlin. The distribution by gender was balanced in groups J and L. Group P, however, comprised four male interviewees. As the study was mainly conducted in Berlin, most of the following descriptions apply to the situation in Berlin and may not be indicative of the situation in other parts of Germany.

Information on the case studies was gathered using a template designed by FRA. The template asked for the following information: brief description of the case; timeline of events; media coverage; key issues; key consequences or implications of the case with regard to the presumption of innocence; decision of the case and reporting of the media on it.

The first two interviews with a criminal judge and a criminal defence lawyer were held face-to-face in their respective offices. Due to COVID-19 and the measures to restrict social contacts, face-to-face interviews were generally no longer possible from mid-March onwards. All but one of the remaining interviews were therefore conducted via electronic means of communication.

### **B.1 PREPARATION OF FIELDWORK**

The interviewer was trained by reviewing the relevant literature on defendants' rights in Germany and an onboard training session on interviews for FRANET by the expert on social fieldwork. The questionnaires and data protection documents were translated by a jurist to ensure that all legal terms were used correctly.

### **B.2 IDENTIFICATION AND RECRUITMENT OF PARTICIPANTS**

The study is based on twelve interviews, conducted between February and July 2020. Ten interviewees were working in Berlin, whilst two of them were from Baden-Württemberg and North Rhine-Westphalia, respectively. The identification process of interviewees is explained in the following sections. Different cover letters outlining the scope and the aim of the study were drafted for each group (J, L, P) and used for the interview requests. Depending on each group, different approaches were used for the identification and selection process of interviewees.

#### **Group J (judges and public prosecutors)**

As the study focused on the area of Berlin, interview requests were processed through the press office of the criminal courts in Berlin. This way, a judge working at the regional court (*Landgericht*), as well as a district court (*Amtsgericht*) judge with media experience, agreed to be interviewed. There were no real challenges faced in recruiting participants for the interviews from this group.

For the public prosecutor's office, the same procedure was required. Hence, the request was forwarded to the public prosecutor's press office. It was not possible to directly address the public prosecutors and ask them for an interview, as they needed an official confirmation from the press office. Some difficulties occurred due to COVID-19 as the press office did not want to forward the interview request to the other public prosecutors for the time being, as they were all fully occupied

with adapting to the new overall situation. However, it was possible to find a public prosecutor with media experience who agreed to be interviewed. Furthermore, the interview request had been disseminated through the channels of professional associations (*Deutscher Richterbund*) before. This way, a public prosecutor from Baden-Württemberg agreed to be interviewed. The interview recruitment process was partly affected by COVID-19, but still worked well.

### **Group L (criminal defence lawyers)**

As there is an ample variety of criminal defence lawyers in Berlin, interview candidates were not difficult to identify and requests were directly sent to individual lawyers. The selection of interviewees was balanced in terms of gender (two men, two women) and covered several areas of penal law (broad variety from white collar crime and rather wealthy clients with an educational background to clients that lived in rather precarious circumstances and had limited access to education etc.). The aim was to get a good overview of the differences and commonalities of their perspectives and experiences with the criminal justice system.

### **Group P (Police Officers)**

The interview requests for research purposes at the police in Berlin were handled by a research unit of the Berlin police. The requests were sent out to them in February, followed by a constant exchange via e-mail and telephone. The police announced that due to the COVID-19 pandemic, they would generally not provide any staff for research requests until further notice. Further requests to the press office of the Potsdam Police (a large city bordering Berlin), the Association of German Criminal Investigators (BDK) and the Amnesty International Police and Human Rights Coordination Group also remained without result. An extension of the requests to the police in further federal states of Germany was also considered unlikely to help, since their police faced the same COVID-19 related problems. For this reason, it was decided to acquire interviews through 'unofficial' channels, such as private contacts, which made it possible to find one interview partner. However, further inquiries through informal networks remained without result. The contact person at the research unit of the Berlin police tried to find interview partners through his/her private contacts as well, but only received refusals. Furthermore, the police officer who was interviewed was asked to disseminate the research request, but he did not receive any responses. Further efforts through a personal contact with a police chaplain were equally unsuccessful. Ultimately, it was possible to recruit one interview partner from the federal police (by the help of FRA), but still two interview partners were missing. After an extension of the deadline, it was eventually possible to conduct the last two remaining interviews in July.

## **B.3 SAMPLE AND DESCRIPTION OF FIELDWORK**

Police officers:

Requested: 4, completed: 4

Judges/prosecutors:

Requested: 4, completed: 4

Defence lawyers:

Requested: 4, completed: 4

The following table provides an overview of the sample based on which this report was drafted:



Table 1: Sample professionals

Code	Group	Operational expertise on criminal investigations and trials	Experience with media	Gender
1	Police officer	Yes	No	Male
2	Police officer	Yes	No	Male
3	Police officer	Yes	No	Male
4	Police officer	Yes	No	Male
5	Lawyer	Yes	Yes	Male
6	Lawyer	Yes	No	Female
7	Lawyer	Yes	No	Female
8	Lawyer	Yes	Rather no	Male
9	Judge	Yes	No	Female
10	Judge	Yes	Yes	Female
11	Prosecutor	Yes	No	Male
12	Prosecutor	Yes	Yes	Male

The average length of the interviews was approximately one hour. The duration varied from 53 minutes to one hour and 28 minutes. The atmosphere during the interviews was consistently pleasant and professional and the interviewees showed great interests in discussing the questionnaires. Most interviewees were very open about expressing their opinions. Defence lawyers generally seemed to be more open about expressing their personal opinion than officials from the judiciary and police officers, but officials clearly gave their personal opinion as well. Only three of the interviews were conducted face-to-face due to the COVID-19 pandemic, but this did not compromise the atmosphere. The rest of the interviews was conducted via electronic means of communication.

#### **B.4 DATA ANALYSIS**

All interviews were audio-recorded and transcribed. Individual interviews were summarised and analysed to enable the coding of recurring themes for the thematic sections of the interviews. Firstly, the further analysis of the sample focused on identifying themes which were common amongst the interviewees' replies, and to furthermore quantify the number of interviewees addressing each theme. Secondly, the analysis focused on the further development of the material in detail to derive relevant commonalities and/or discrepancies in experiences made by the respective interviewees, discussions and findings in light of the overall research objectives of this study. The discussions in the following chapters address aspects, dimensions and findings derived from qualitative content analysis.

#### **B.5 LEGAL FRAMEWORK**

According to the Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*), German criminal procedural law was predominantly in accordance with the requirements of Directive No. 2016/343/EU.<sup>1</sup> Therefore, the implementation of Directive No. 2016/343/EU comprised only specific law changes concerning the right to be present at the trial, in particular at the appeal trial (*Revisionshauptverhandlung*). These were prescribed in the 'law on strengthening the right of the accused to be present at the trial' (*Gesetz zur Stärkung des Rechts des Angeklagten auf Anwesenheit in der Verhandlung*)<sup>2</sup> which was passed on 17 December 2018, hence after the expiry of the time-limit for transposition on 1 April 2018.

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1

[www.bmju.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE\\_Staerkung\\_Recht\\_Angeklagter\\_Anwesenheit\\_Verhandlung.pdf?\\_\\_blob=publicationFile&v=2](http://www.bmju.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Staerkung_Recht_Angeklagter_Anwesenheit_Verhandlung.pdf?__blob=publicationFile&v=2)

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[www.bmju.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BGBl\\_Gesetz\\_Staerkung\\_Angeklagten\\_Anwesenheit\\_Verhandlung.pdf?\\_\\_blob=publicationFile&v=2](http://www.bmju.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BGBl_Gesetz_Staerkung_Angeklagten_Anwesenheit_Verhandlung.pdf?__blob=publicationFile&v=2)

## PART C. MAIN REPORT ANALYTICAL STRUCTURE

### C.1 The right to be presumed innocent in general

First, this chapter elaborates the legal basis of the right to be presumed innocent in Germany. This is followed by a description of how the interviewees from different professions implement the right to the presumption of innocence in practice. Furthermore, this part discusses the factors which, from the experience of the interviewees, may have an effect on guaranteeing the presumption of innocence. The chapter closes with an analysis of the results.

#### Legal Overview

In Germany, the principle of the presumption of innocence is neither explicitly mentioned in the Federal Constitution, the Basic Law (*Grundgesetz, GG*), nor in the Code of Criminal Procedure (*Strafprozessordnung, StPO*). However, it is recognised to be part of the principle of the rule of law that is laid down in Articles 20 (3) and 28 (1) of the German Basic Law.<sup>3</sup> Furthermore, Article 6 (2) of the European Convention on Human Rights (ECHR), which provides for the presumption of innocence, is part and parcel of German law.<sup>4</sup> The presumption of innocence applies during the entire criminal proceedings and gives the accused persons the right to be treated as innocent until they are found guilty in proceedings under the rule of law.<sup>5</sup> Preliminary decisions of a procedural nature which can be applied based on a specific degree of suspicion, such as pre-trial detention pursuant to section 112 of the Code of Criminal Procedure, do not conflict with the presumption of innocence.<sup>6</sup> Since the law does not further define the scope of the presumption of innocence, the case law of the European Court of Human Rights (ECtHR) serves as an aid to interpretation.<sup>7</sup>

- a. How are the different professions implementing the presumption of innocence?

All judges, public prosecutors and defence lawyers considered the presumption of innocence to be an important component of their work. The police officers generally attached great importance to the presumption of innocence in their daily work as well. However, some of them emphasised in particular that it was not their task to decide on the suspects' guilt, but to collect exonerating and incriminating evidence, which would then be assessed by the public prosecutor's office (Police officer/Germany; Police officer/Germany; Police officer/Germany; Police officer/Germany).

*“Da denke ich nicht drüber nach, ob die Person schuldig oder unschuldig ist, sondern ich will wissen, was sie zu dem Sachverhalt sagt.”* (Polizist\_in/Deutschland)

*“I do not think about whether a person is guilty or not, I want to know what the person has to say about the facts of the case.”* (Police officer/Germany)

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<sup>3</sup> Germany, Federal Constitutional Court (Bundesverfassungsgericht), Karlsruhe/2 BvR 589/79, 26 March 1987, available at <https://openjur.de/u/179041.html>.

<sup>4</sup> Germany, Federal Constitutional Court (Bundesverfassungsgericht), Karlsruhe/2 BvR 589/79, 26 March 1987, available at <https://openjur.de/u/179041.html>.

<sup>5</sup> Germany, Federal Constitutional Court (Bundesverfassungsgericht), Karlsruhe/2 BvR 254/88, 29 May 1990, available at [www.mpil.de/de/pub/publikationen/archiv/rechtsprechung-voelkerrecht/r00.cfm?fuseaction\\_rspr=act&act=r8693\\_174](http://www.mpil.de/de/pub/publikationen/archiv/rechtsprechung-voelkerrecht/r00.cfm?fuseaction_rspr=act&act=r8693_174).

<sup>6</sup> *Ibid.*

<sup>7</sup> Germany, Federal Constitutional Court (Bundesverfassungsgericht), Karlsruhe/2 BvR 589/79, 26 March 1987, available at <https://openjur.de/u/179041.html>.

In addition, a high-ranking police officer stressed the importance of learning about human rights as defensive rights against the state during police training. According to him, this theoretical knowledge would then have to be transferred into practice in the police service (Police officer/Germany).

Within the group of judges, public prosecutors and defence lawyers, there were differences in how they valued and implemented the presumption of innocence, which can partly be attributed to their respective professional positions. Thus, a judge working in an appeal chamber explained that she was mainly reviewing judgments of lower instance courts and therefore implemented the principle by working in the most unbiased manner possible. She described that she tried to work without prejudice and to always question everything that was established before (Judge/Germany). Another interviewee, who was in charge of press and public relations work besides her work as a judge, saw the presumption of innocence as a core principle in this part of her work. She pointed out the importance of using correct legal terminology when talking about a case. For instance, she stressed that one must not call a 'suspect' a 'perpetrator' before a final judgment had been passed. She further emphasised the importance of linguistic details in her job by stating that she always made sure that the correct grammatical modus, was used when referring to accusations, to make clear that she was not talking about a conviction (Judge/Germany).

As some media, in particular tabloid media, disregarded these rules quite often, she stated that she was constantly fighting media prejudgment (Judge/Germany). A public prosecutor with experience in press and public relations work equally stressed the importance of using correct terminology to counteract media prejudgment (Prosecutor/Germany). One of the lawyers gave a similar answer, stating how essential it was for him/her to emphasise that an accusation does not equal a conviction. S/He added that s/he always paid attention to precisely using the correct terms for the different degrees of suspicion, which indicated how likely the accusations were (Lawyer/Germany).

Furthermore, all defence lawyers described that most of their work was dominated by the presumption of innocence. They explained that their starting point was mostly to assume that their clients were innocent, because the accusations needed to be proved. If there was no sufficient proof, they would enjoy the benefit of the doubt.

*"Ich bin Strafverteidiger, ich gehe immer davon aus, dass jemand unschuldig ist, den ich verteidige. Ich verteidige ja gegen einen Vorwurf. Das heißt, das ist sozusagen der Ausgangspunkt meiner alltäglichen Arbeit. Wenn ich das nicht hätte, dann hätte ich gar keine Arbeit. Also das ist sozusagen das, mit dem ich jeden Tag aufwache und wieder ins Bett gehe, so ungefähr. Das Prinzip der Unschuldsvermutung."* (Strafverteidiger\_in/Deutschland)

*"I am a criminal defence lawyer, I always assume that the people I defend are innocent, since I am defending them against an accusation. That is, so to speak, the starting point of my daily work. If I did not have that, then I would not have any work at all. So that is what I wake up with every day and go back to bed with: The principle of the presumption of innocence."* (Lawyer/Germany)

One of the lawyers also pointed out that despite the fact that all his/her work was related to the presumption of innocence, s/he did not perceive it as a 'guiding principle' that s/he applied consciously. Instead, s/he stated that s/he mainly tried to enforce his/her clients' interests within the bounds of what was legally possible (Lawyer/Germany).

A group of interviewees particularly stressed the effect the amount of incriminating evidence had on the proceedings and on the presumption of innocence. Hence, a public prosecutor claimed to apply the presumption of innocence rather 'generously', as in many of his cases, there was not enough

evidence. He described that a considerable amount of his proceedings was therefore discontinued (Prosecutor/Germany). Contrarily, one defence lawyer referred to the instances, in which there was enough evidence to prove that his client was the perpetrator, which made up about half of his cases. From his experience, the issue of proving the crime rather receded into the background in these cases, and the focus rather shifted on keeping the sentence as low as possible (Lawyer/Germany).

b. Potential factors that have an effect on guaranteeing the presumption of innocence

Asked about factors impairing the right to be presumed innocent in practice, the answers of the interviewees differed. On a general level, the interviewed judges, public prosecutors and police officers named significantly less potential factors than the group of criminal defence lawyers. Against this backdrop, all judges, public prosecutors and police officers claimed that the presumption of innocence applied to everyone, regardless of factors such as gender, ethnic groups, social background or previous convictions. Yet the interviewees within this group still shared different experiences. For instance, one judge admitted that she had a certain 'gut feeling' in some cases. Nevertheless, she indicated that this would not affect her work.

*“Unsere Großfamilien, die alle Hartz-IV-Empfänger sind, treten mit einem Verteidiger auf, von dem jeder hier im Hause weiß, der kostet 25,000 € am Tag. Man weiß, dass man das trotzdem per Akte bearbeiten muss, aber so ein gewisses Bauchgefühl, da muss wohl an dem Drogenvorwurf, an dem Geldwäscheworwurf was dran sein, hat man dann schon, klar.”* (Richter\_in/Deutschland)

*“In Berlin, we have our extended families who all receive social welfare but have a defence lawyer of whom everyone here in the house knows that he costs 25,000 Euros a day. You know that you still have to stick to what the file says about the case, but you have a certain gut feeling, that there might be some truth to the drug accusation or to the money laundering accusation.”* (Judge/Germany)

She emphasised that this feeling was nothing she could include in the reasoning of her judgment. Therefore, in her view, it was impossible to let herself be influenced by these circumstances.

A public prosecutor stated that previous convictions might have an impact on the way one perceived an accused person. However, he was convinced that factors such as ethnic origin did not play a role for the public prosecutor's office and the courts. He admitted that he was not certain if this also applied to individual police officers, though:

*“Wenn jemand schon zwanzigmal entsprechend aufgefallen ist, ist ihm dann die Tat sicher eher zuzutrauen. Aber, dass jetzt jemand deshalb nicht unter die Unschuldsvermutung fällt, weil er beispielsweise aus Syrien oder der Türkei kommt [...] oder schwarze Haut hat, also das ist sicherlich nicht so. Ich bin mir nicht sicher, wie das [...] einzelne Polizeibeamte handhaben, man liest da ja manches in den Medien [...] Aber ich glaube, dass solche Vorurteile jedenfalls bei der Staatsanwaltschaft oder den Gerichten keine Rolle spielen.”* (Staatsanwält\_in/Deutschland)

*“If someone has already come to notice of the police for a similar offence twenty times, one may certainly rather believe that he is capable of having committed the act. But that someone is not presumed innocent, because, for example, he comes from Syria or Turkey [...] or has black skin, is certainly not the case. I am not sure how individual police officers handle this, [...] because you read a lot of things about this in the media [...] But I believe that such prejudices do not play a role in the public prosecutor's office or the courts.”* (Prosecutor/Germany)

The police officers stated that they would not let themselves be influenced by factors such as ethnic or social origin or previous convictions. According to them, besides a few individual exceptions, the police applied the presumption of innocence equally to everybody (Police officer/Germany; Police officer/Germany). One of the police officers stated that he would only treat people differently than others during investigative measures if it was for purposes of self-protection or because there was a higher degree of suspicion against one person. According to him, this would for instance be the case if he found a piece of evidence in the rucksack of a suspect. In this case, they would focus their investigations on the persons whose circumstances indicated that they committed the crime. He stressed, however, that he would not do so for reasons lying within the persons themselves, such as previous convictions for instance (Police officer/Germany).

Despite this generally positive image, a high-ranking police officer identified a danger to the presumption of innocence in the fact that police officers could become blunted over time:

*“[Ich beobachte, dass bei jemandem, der] viele Jahre [...] im Bereich Kinderpornografie gearbeitet hat, oder Betäubungsmittelkriminalität, oder mit bestimmten Ethnien zum Beispiel im Ausländerrecht [...] eine Verrohung eintritt in der Sprache, im Denken und dann auch im Handeln. Da sehe ich sehr wohl eine Gefahr. [...] insbesondere in der Sprache [...] dass es dann dazu führt, dass Menschen stigmatisiert werden.” (Polizist\_in/Deutschland)*

*“[I observe that people who] have worked for many years [...] in the field of child pornography or drug-related crimes or with certain ethnic groups, for example in the law on foreigners [...] become blunted in their language, in their thoughts and then also in their actions. I see a danger there. [...] particularly in their language [...] and that this can lead to people being stigmatised.” (Police officer/Germany)*

As an example, he mentioned police officers calling suspects 'junkies' or claiming that they were the perpetrator, given their life circumstances alone. He believed that in such cases, an objective approach to the facts of the case was no longer possible, as the inner attitude of the police officers had an influence on their work, for example on how they asked questions in an interrogation. In his opinion, one would have to counteract these tendencies. He suggested that supervision by third parties, such as psychologists or sociologists, could be helpful. In his opinion, this could strengthen the legitimacy of the police (Police officer/Germany).

On the other hand, the defence lawyers evaluated the situation more critically. The entire group of defence lawyers experienced that there were factors that could generally endanger the application of the presumption of innocence in practice. One of the lawyers described that a criminal record could sometimes have a negative effect on the presumption of innocence. As far as the origin of suspects was concerned, s/he was of the opinion that the presumption of innocence did not count in general less for people from other ethnic groups than white Germans. However, s/he believed that an accumulation of factors, such as location of arrest by the police, age, and skin colour, could meet the prejudices of the authorities hence undermine the presumption of innocence (Lawyer/Germany).

Another lawyer had the impression that the 'shadier' the milieu, where the crime took place, was from the general perception (e.g. drug dealers, fights etc.), the less the presumption of innocence counted in practice. According to him/her, in these cases, it was as a rule very hard to defend the rights of his/her clients. S/He claimed that this was due to the fact that the alleged experienced and reliability of the police were put above the reasonable presumption of innocence. S/He illustrated this by means of an example:

*“Wenn Sie jemanden haben, der an Orten festgenommen wird, die mit Drogenhandel und Ähnlichem in Verbindung gebracht werden, und Polizisten berichten, dass sie diesbezügliche Beobachtungen gemacht haben, dann gibt es in dem Verfahren keine Unschuldsvermutung. Dann kann man noch so oft sagen, dass zwanzig Meter in der Nacht keine gute Beobachtungslage ist und dass es mehrere Leute gab, die genauso aussahen, es also völlig unklar ist, ob der Mandant jetzt der Täter ist – und dann sagen die: „Nein, nein.““* (Strafverteidiger\_in/Deutschland)

*“If you have someone who is arrested at places where there is considered to be a lot of drug trafficking with all the associated problems and police officers report that they made observations, then there is no presumption of innocence in the proceedings. Then you can repeat as often as you like that twenty metres distance at night is not a good observation situation, and that there were several people who looked just like the suspect, so that it is completely unclear whether the client is the perpetrator – they will not listen to you.”* (Lawyer/Germany)

He found it particularly worrying that the prejudices that made the police arrest a certain person were in his view often later reproduced by the public prosecutors and the judges.

In addition to that, the other defence lawyers described cases of prejudices that did not apply directly to the question whether a suspect was found guilty or not, but which were closely linked to this matter. In this context, one lawyer stated that from his/her experience, officials working in the justice system distinguished significantly according to the national origin of the suspects when applying the law, for instance when it came to presence at the trial. S/He saw this confirmed by anecdotes, such as a public prosecutor claiming that ‘one did not summon Albanians, but that one would bring them to court by means of a warrant’ (Lawyer/Germany).

Additionally, the lawyers shared experiences of the different handling of pre-trial detention cases involving suspects with non-central European origin. One of the lawyers illustrated this by means of an example:

*“Ich hatte schon viele kroatische Mandanten und habe in der Praxis erlebt, dass die deutlich schneller in Untersuchungshaft sitzen, weil Kroatien als EU-Mitgliedsstaat deutlich weniger akzeptiert ist als beispielsweise Frankreich.”* (Strafverteidiger\_in/Deutschland)

*“I had many Croatian clients and I experienced in practice that they are put much faster in pre-trial detention, because Croatia is much less accepted as an EU member state than France, for example.”* (Lawyer/Germany)

*“Ich glaube, dass (speziell im Haftrecht) für Nichtdeutsche die Unschuldsvermutung in der Praxis weniger beachtet wird.”* (Strafverteidiger\_in/Deutschland)

*“I believe that in practice, the presumption of innocence counts less for non-Germans (particularly in the law of pre-trial detention).”* (Lawyer/Germany)

Two other lawyers described similar cases. One of them told the story of a homeless Albanian client who was unjustifiably in pre-trial detention for several months. According to the interviewee stayed in detention despite a negative DNA test, which had already been known long before he was acquitted and eventually released from detention (Lawyer/Germany). Another lawyer referred to an empirical study s/he conducted on the issue of pre-trial detention. In his/her view, this study, showed amongst

others, that Germans could afford to be more criminal and to have more previous convictions than non-citizens before they would actually end up in pre-trial detention (Lawyer/Germany).

a. Discussion of findings

The interviews showed that the presumption of innocence is an essential principle of the criminal procedure in Germany, which plays an important role in practice, both in investigations and in subsequent court proceedings.

All in all, it can be concluded from the data obtained that the presumption of innocence is guaranteed in many parts in practice but that there are also several challenges.

At this point, it should be mentioned that the interviewees had different perceptions regarding the question whether there were factors which could potentially have an influence on guaranteeing the presumption of innocence. In this respect, interviewees working as judges, prosecutors or police officers named significantly fewer potential factors. They were generally of the opinion that the presumption of innocence applied equally to all persons regardless of ethnic origin, gender, previous convictions etc., and that there were at most be a few individual exceptions. On the other hand, the entire group of defence lawyers was of the opinion that there was a considerable number of factors that could potentially affect the application of the right to be presumed innocent by state authorities. Ethnic or national origin was not named as a factor alone. Instead, the interviewees indicated that rather an accumulation of factors, such as location of the alleged crime, age and skin colour, or specific milieus, such as drug trafficking, could have an impact on the right to be presumed innocent. Finally, the defence lawyers mentioned that from their experience, ethnic or national origin was a factor that had a significantly negative impact on the ordering and length of pre-trial detention.

To sum up, the information provided by the defence lawyers indicated structural issues, whereas the other interviewees believed that at most in individual cases the presumption of innocence could be affected by the above-mentioned factors. A final assessment of the actual situation is not possible in view of the limited number of interview partners. However, the criticisms, which are extensively illustrated by means of examples, indicate that there may indeed be room for improvement in the practical implementation of the presumption of innocence.

## C.2 Public references to guilt

This chapter deals with the issue of public references to the guilt of suspects and accused persons. After an overview of the legal situation, it is discussed how interviewees from the various professional groups liaise with the media. Next, the interviewees' reflections on the potential effects of media coverage on the presumption of innocence are discussed, as well as differences in media coverage of criminal proceedings in relation to certain groups of suspects and accused people. Furthermore, the chapter discusses the interviewees' experiences with persons other than officials engaged in the criminal justice system commenting on criminal proceedings and with remedies against being publicly referred to as guilty. Finally, the results of the chapter are discussed.

### Legal overview

At federal level, there is no regulation for the exchange of information between authorities and the media that has force of law. However, the press acts of the individual *Länder* contain, among other things, a right to information for journalists.<sup>8</sup> Furthermore, cooperation between authorities and the

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<sup>8</sup> For instance, section 4 Berlin Press Act (Berliner Pressegesetz), available at <http://gesetze.berlin.de/jportal/portal/t/ib0/page/bsbeprod.psml?action=controls.jw.PrintOrSaveDocumentContent&case=save>



media is currently regulated by internal guidelines such as those on criminal proceedings and sanctioning proceedings (*Richtlinien für das Strafverfahren und das Bußgeldverfahren, RiStBV*)<sup>9</sup> or by administrative orders issued by the judicial administrations of the federal states. As this legal framework is not considered to be sufficient by some experts, a discussion on further regulating the exchange of information between authorities and the media in criminal proceedings seems to get underway. In 2019, a working group of criminal law experts from scientific and practical backgrounds presented a draft law which provided for the addition of four sections to the end of the Code of Criminal Procedure (*StPO*) that regulate this topic.<sup>10</sup> Since this was not commissioned by the government and the government did not announce any concrete legislation plans in this area, the draft can rather be considered to be a starting point for a discussion on legal policy. Amongst others, the draft includes a paragraph which stipulates that the public prosecutor's office and the police are in principle obliged to provide information to the media, but this information has to be provided in compliance with the presumption of innocence and the right of the accused to defend themselves effectively must not be infringed.<sup>11</sup> The draft also addresses criticism of the police taking on a lot of media work, e.g. via social media. Therefore, the draft, provides that the police is allowed to report, but that the public prosecutor's office, as the leading investigative authority, may 'take over' the reporting.<sup>12</sup>

Non-state actor parties – such as the public, the press or alleged victims – do not themselves exercise public authority and therefore the presumption of innocence does not apply directly to them. In this context, however, the right to protection of honour enables persons who are unlawfully referred to as guilty to defend themselves. The protection of personal honour is part of the general right of personality pursuant to Article 2 (1) in conjunction with Article 1 (1) Basic Law (*GG*) and limits the freedom of opinion and freedom of the press in accordance with Article 5 (2) Basic Law (*GG*). Amongst others, it is possible to report the other party for defamation, libel or false suspicion as well as under civil law with, for instance, an action for counterstatement or an injunction etc.<sup>13</sup>

The framework conditions of press law are regulated by the respective press acts of the federal states which provide for journalistic due diligence.<sup>14</sup> In addition, there is a voluntary commitment of the publishers – the press code (*Pressekodex*) – in which, amongst others, section 13 stipulates that

<sup>9</sup> Clause 23 Guidelines for Criminal Proceedings and Sanctioning Proceedings (*Richtlinien für das Strafverfahren und das Bußgeldverfahren*), available at [www.bmju.de/SharedDocs/Archiv/Downloads/RiStBV.pdf?jsessionid=456232F7B7520B7906F8327941AF79F1.2\\_cid297?\\_blob=publicationFile&v=6](http://www.bmju.de/SharedDocs/Archiv/Downloads/RiStBV.pdf?jsessionid=456232F7B7520B7906F8327941AF79F1.2_cid297?_blob=publicationFile&v=6).

<sup>10</sup> See: Zöller, M., Esser, R. (2019), *Justizielle Medienarbeit im Strafverfahren: Entwurf des Arbeitskreises Strafprozessrecht und Polizeirecht (ASP) für eine die Pressefreiheit und das Persönlichkeitsrecht schützende Auskunftserteilung im Strafverfahren*, Nomos, Baden-Baden.

<sup>11</sup> Section 501 (2) Draft law amending the Code of Criminal Procedure – Introduction of uniform federal regulations on media relations in criminal matters (*Entwurf eines Gesetzes zur Änderung der Strafprozessordnung – Einführung bundeseinheitlicher Vorschriften über die Medienarbeit in strafrechtlichen Angelegenheiten*), available at [www.uni-trier.de/fileadmin/fb5/prof/STR004/SoSe2019/Gesetzentwurf ASP.pdf](http://www.uni-trier.de/fileadmin/fb5/prof/STR004/SoSe2019/Gesetzentwurf ASP.pdf).

<sup>12</sup> Section 502 (2) s. 2 Draft law amending the Code of Criminal Procedure – Introduction of uniform federal regulations on media relations in criminal matters (*Entwurf eines Gesetzes zur Änderung der Strafprozessordnung – Einführung bundeseinheitlicher Vorschriften über die Medienarbeit in strafrechtlichen Angelegenheiten*), available at [www.uni-trier.de/fileadmin/fb5/prof/STR004/SoSe2019/Gesetzentwurf ASP.pdf](http://www.uni-trier.de/fileadmin/fb5/prof/STR004/SoSe2019/Gesetzentwurf ASP.pdf).

<sup>13</sup> For more information see Grabenwarter, C. (2019) 'GG Art. 5 (1), (2) recital 200 et seq., recital 204 et seq., Ehrenschaft durch das Strafrecht; Ehrenschaft durch das Zivilrecht' in: Maunz, T./Dürig, G. et al (eds.), *Grundgesetzkommentar*, Munich, C. H. Beck.

<sup>14</sup> E.g. section 3 Berlin press act (*Berliner Pressegesetz*), available at <http://gesetze.berlin.de/jportal/portal/t/3/page/bsbeprod.psml?action=controls.jw.PrintOrSaveDocumentContent&case=save>

reporting must be free of prejudice and that the presumption of innocence also applies to the press. In the event of violations, the Press Council (*Presserat*) may issue a non-binding reprimand.

In view of this rather fragmented legal situation, the case law on suspicion reporting by the media is of particular importance. These cases generally require that the conflicting constitutional positions of the parties – the general right of personality of the accused and the rights to freedom of speech and freedom of press<sup>15</sup> – are balanced on a case-by-case-basis. In this respect, the Courts have defined criteria as to when the reporting of suspicions may be allowed. This is the case if there is a suspicion of a criminal act, based on a minimum set of evidence, in which there is a special public interest, either because of the nature or severity of the criminal act or because of the person of the suspect. To avoid unjustified public prejudgment, it must further be pointed out clearly that it is no more than a suspicion that has not been proven. Hence, a presentation, which gives the impression that the person has already been convicted, must be avoided.<sup>16</sup>

a. How do the different professions liaise with the media?

The majority of the interviewees reported that they did generally not liaise with the media, with the exception of the two persons who had done press and public relations work for the public prosecutor's office (Prosecutor/Germany) and the criminal courts (Judge/Germany), and one defence lawyer (Lawyer Germany). The reasons the officials indicated for not liaising with the media were mainly formal. Hence, they stated that they were not competent to do so, as their authorities or courts had a press office for these purposes that they would refer the media to (Judge/Germany; Prosecutor/Germany; Police officer/Germany ; Police officer/Germany). For instance, a judge explained that she was not allowed to give interviews on her own initiative but that she had to ask the press office for approval. (Judge/Germany).

The two interviewees, who were in charge of press and public relations work, reported that in this role, they constantly liaised with the media. Here they were facing several issues with regard to the presumption of innocence. For instance, one of them described that in the past, the public prosecutor's office tweeted about the indictment too early, thus at a stage where it was not even clear whether there would be a main trial or not. She explained that the public prosecutor's office included the first name and the first letter of the last name of the suspect in its tweet. According to her, the media then found out who the person was and some newspapers, including Germany's biggest tabloid newspaper, reported on his case, not using the correct legal terminology. She described that the court eventually decided that there would be no main trial as there was no sufficient evidence. She then issued a press release which clarified the court's decision. However, according to her, the person had already been condemned by the media, which was a clear violation of the presumption of innocence in her eyes (Judge/Germany).

The public prosecutor with media experience remarked that there was a conflict of interest he regularly had to deal with: On the one hand, the authorities were reluctant to give out personal data, but that on the other hand, media coverage had become increasingly personalised and heavily relied on personal information to create stories that sold:

*“Die Medien haben weniger Interesse an einer [...] Berichterstattung über irgendwelche Rechtsfragen, sondern mehr Interesse daran eine Geschichte zu berichten, eine Geschichte zu einer Person [...]. Und die Versuchung ist da natürlich groß, mit Namensangaben und Bildern*

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<sup>15</sup> Art. 5 (1) Basic Law (GG), available at [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.pdf](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf).

<sup>16</sup> Germany, Federal Court of Justice (Bundesgerichtshof), Karlsruhe/ VI ZR 51/99, 7 December 1999, available at <https://lexetius.com/1999,317>.

*[zu berichten], [denn] durch soziale Netzwerke steht eine Menge an Bildmaterialien zur Verfügung [...]* (Strafverteidiger\_in/Deutschland)

*“The media are less interested in [...] reporting on any legal issues, but more interested in reporting a story, a story about a person [...]. And the temptation is certainly great to [report] with names and pictures, [because] through social media, there are a lot of pictures available [...]*” (Lawyer/Germany)

He explained that the public prosecutor’s office did not pass on personal information (Prosecutor/Germany), which was confirmed by a group of two defence lawyers. They explained that – with one exception – they had not made the experience that the public prosecutor’s office or the court would publish information on suspects in an inadmissible manner (Lawyer/Germany; Lawyer/Germany). The public prosecutor added that that media on the other hand did not adhere to the same standards of protection of rights of personality and if they found out personal details of suspects, it could have serious effects on the persons’ rights to be presumed innocent:

*“Es hat natürlich für die Person, je nachdem wie prominent berichtet wird, extrem stigmatisierende Wirkungen. [...] Wenn man sagt, dadurch ist die Unschuldsvermutung verletzt, dann wird man dem im weiteren Sinne zustimmen müssen [...] Wenn so berichtet wird, obwohl ich nicht verurteilt bin und der Eindruck erweckt wird, dass ich Täter bin, dass ich schuldig bin [...] Wir sind nicht verantwortlich für das, was die Medien berichten. Aber wir halten uns bei unserer Auskunft an die Medien strikt daran, immer darauf hinzuweisen, [...] dass ein Beschuldigter in einem Ermittlungsverfahren [...] selbstverständlich noch nicht verurteilt ist, der ist noch nicht mal angeklagt [...] es geht erstmal nur darum, aufzuklären was passiert ist.”* (Staatsanwält\_in/Deutschland)

*“It obviously has extremely stigmatising effects for the person, depending on how prominently it is reported. [...] If one says that this violates the presumption of innocence, then one will have to agree to that in a broader sense [...] If the impression is given that I am a perpetrator, that I am guilty, although I am not convicted [...] We are not responsible for what the media reports. But when we inform the media, we always strictly point out that [...] a suspect in an investigation [...] is of course not yet convicted, he has not even been accused [...] it is only a matter of investigating what has actually happened.”* (Prosecutor/Germany)

The group of defence lawyers mainly described that they did rarely or not at all liaise with the media, because this would most of the time not be in the interest of their clients. One lawyer put it as follows:

*“Medienberichterstattung ist in der Regel nicht sehr beschuldigtenfreundlich. Deswegen ist das etwas, was man als Verteidiger oder Verteidigerin besser selten macht.”* (Strafverteidiger\_in/Deutschland)

*“As a rule, media do not really report in favour of the accused persons. Therefore, this is something that you do not do often as a defence lawyer.”* (Lawyer/Germany)

Another lawyer elaborated that s/he found liaising with the media difficult, as in his/her role as defence lawyer, s/he would generally not want to reveal the things that would make a good story and thus, be in the interest of the media (Lawyer/Germany). Both of them added that their general impression was that most defence lawyers liaised with the media very rarely, but that they also knew a few colleagues that did so successfully.

In this context, one of the lawyers mentioned that the media occasionally turned to him/her and asked for a statement from his/her side. Unlike the other interviewees, s/he explained that s/he decided on a case-by-case basis whether s/he liaised with the media or not. His/Her general impression was, that it would often be advisable to make at least some kind of statement. However, s/he said that this might be a difficult situation, as in many cases remaining silent might be the right strategy in court, whereas remaining silent in relation to the media might lead to a stronger prejudgment. By means of an example of media coverage on one of his/her cases, s/he explained when and why it might be important to liaise with the media:

*“[Die] Presseberichterstattung [...] kam: „Das Monster! Der Türsteher der linken Kneipe schlägt irgendwie Leute kaputt!“ [...]. Und da ist es dann schon wichtig zu reagieren. Wenn man das nicht richtigstellt und dem nicht die eigene Geschichte entgegenstellt, dann wird sich das immer weiter fortsetzen. Und diese Artikel sind noch heute im Internet zu finden, wobei letztlich das Landgericht dann festgestellt hat, dass dieser Vorwurf erstens überhaupt nicht zutraf, also nie so ein brutaler Überfall war und zweitens durch Notwehr ganz überwiegend gerechtfertigt war. Also das hatte sich dann sozusagen letztlich ganz anders dargestellt. Aber die Möglichkeit, dazu zu schweigen, bot sich also im Umgang mit der Presse nicht so an.”*  
(Strafverteidiger\_in/Deutschland)

*“The press coverage came: ‘The monster! The bouncer of the left-wing pub beats up people!’ [...] And that is when it is important to react. If you do not correct this and do not counter this with your own story, it will continue. And these articles can still be found on the Internet today, whereby in the end the regional court found that the accusations firstly were not true at all [...] that it was never such a brutal attack, and secondly that it was quite predominantly justified by self-defence. So the story had ultimately turned out to be quite different. But the option to remain silent about it was not really a possibility when dealing with the press.”*  
(Lawyer/Germany)

#### b. Mapping of laws and guidelines

Not all interviewees were entirely aware of the laws and guidelines relating to cooperation with the media. This has to be seen in context with their respective experience in this field, as those regularly liaising with the media gave very detailed answers about this (but not only them). A large group of interviewees, including judges, public prosecutors and lawyers, named either Article 5 Basic Law, which prescribes, amongst others, freedom of press, or the press acts of the Federal States of Germany or the case law of the Federal Constitutional Court on suspicion reporting or all combined. By some interviewees, it was further pointed out that there were guidelines for the police and the public prosecutor’s office (Lawyer/Germany; Police officer/Germany). Other interviewees also referred to specific sections in laws and explained them, of which two will be presented in the following:

One interviewee explained that pursuant to section 4 of the Berlin press act, the authorities had to provide information to the media. According to him, this right to information was limited if otherwise the investigations would be jeopardised (e.g. one would not announce an imminent apartment search), as well as by the personal rights of the persons involved. He explained that one always had to evaluate to what extent the public interest in information exceeded the private interest in secrecy. He stated that in principle, the following rule applied here: the greater the public interest in information, the more private information might be given. According to him, this had to be always decided on a case-by-case basis (Prosecutor/Germany).

A judge pointed out that it was a criminal offence according to section 353d Penal Code, among others, to quote the wording of the indictment before it was publicly announced in the main trial. Hence, if

an official released the indictment before and it was then quoted by the media, the official would assist to this offence. According to her, if indictments were leaked before the main trial the media would in practice rephrase the wording of the indictment to avoid committing a criminal offence. In her view, this would still violate the presumption of innocence, though (Judge/Germany).

### **Selected case study**

In August 2018, within the context of investigative proceedings for a fatal stabbing in the city of Chemnitz, the arrest warrant for a suspect was photographed by a prison officer and, among others, sent to an extreme right-wing organisation. It was then further disseminated through social media. As the suspect was of Iraqi origin, it was suspected that the prison officer had published the document for racist motives. The document was blackened in places, but the name and address of the suspect and the names of witnesses were visible. The official who had published the arrest warrant was sentenced in October 2019 to a suspended sentence and community service for breach of official secrecy (*Verletzung von Dienstgeheimnissen*) under section 353b of the Criminal Code (*Strafgesetzbuch, StGB*) and the prohibited communication about court proceedings (*verbotene Mitteilung über Gerichtsverhandlungen*) under section 353d of the Criminal Code (*StGB*).

Similarly, a police officer indicated that he observed several cases in which colleagues sold official secrets to the press:

*“Dass Kollegen für ein Entgelt auf Anfragen von Pressevertretern [...] Dienstgeheimnisse verraten [...] das ist auch schon leider passiert. [...] Oder dass ich feststellen muss, dass manchmal bei verdeckt geplanten Durchsuchungsmaßnahmen auf einmal ein Vertreter der [Zeitung] schon vor Ort ist – wo ich mich dann frage: Woher sollen die das wissen?”*  
(Polizist\_in/Deutschland)

*“Unfortunately, it has already happened that colleagues revealed official secrets in response to enquiries from members of the press [...] for a fee [...] Or that I have to find out that sometimes a representative of the [tabloid newspaper] is suddenly already on the spot during an undercover search – so that I ask myself: How are they supposed to know?”* (Police officer/Germany)

The police officer explained that he regularly initiated criminal proceedings for breaches of official secrecy (*Verletzung von Dienstgeheimnissen*) in these cases, which are then investigated by the Berlin criminal police.

#### **c. Effects media has on presumption of innocence**

A large group of interviewees, including persons from all interviewed professions, stated that the media had a negative effect on the presumption of innocence. Against this background, the majority of interviewees made an important differentiation between the effect the media had on the court (or the public prosecutor's office or the police, respectively), on the one hand, and on the public, on the other hand. In brief, the following discussion shows that a large part of the interviewees were of the opinion that the media had an impact on the public, whereas they rather thought that they had no influence on judges, public prosecutors or police officers.

## Impact on courts, public prosecutor's office, police

As far as the courts were concerned, a group of interviewees, including judges, a defence lawyer and police officers, stated that they considered the judges to be independent from what was written or talked about in the media (Judge/Germany; Judge/Germany; Lawyer/Germany; Police officer/Germany; Police officer/Germany; Police officer/Germany).

*"Ich halte unsere Gerichte für so neutral, dass es die überhaupt nicht beeinflusst. [...] Auch wenn der Druck manchmal vielleicht schon groß ist, das ändert ja nichts an der Tatsache, ob du es beweisen kannst oder nicht. Und daher sind da die Möglichkeiten super eingeschränkt, auch für einen Richter." (Polizist\_in/Deutschland)*

*"I consider our courts to be so neutral that it does not affect them at all [...]. Even if the pressure may perhaps be high sometimes, that does not change the fact whether one can prove it or not. So there are super limited possibilities, even for a judge." (Police officer/Germany)*

*"Auf mich nicht, mich interessiert das gar nicht was in der Presse steht." (Richter\_in/Deutschland)*

*"It does not have any influence on me, I am not interested in what the press says." (Judge/Germany)*

The public prosecutors and police officers claimed that they were not influenced by the media and did not feel pressured to act in a certain way during the investigations. Furthermore, some of them claimed not to know whether judges were entirely free of media influence in their decision-making (Prosecutor/Germany; Prosecutor/Germany; Police officer/Germany). One of them called this an almost 'philosophical' question and believed that judges could only partially block out what media reported on their cases. However, he thought that assuming an 'influence' would go too far (Prosecutor/Germany). One judge, who claimed to be free of influence herself, was concerned that lay judges (*Schöffen*) might be influenced by the media and could form an opinion on the case already before the main trial had started (Judge/Germany).

A group of two defence lawyers were of the opinion that media coverage could build up pressure and therefore also influence judges, even if this might happen subconsciously:

*"Ich glaube, dass das einen Einfluss hat, weil auch die Richter natürlich Menschen sind, die sich irgendwie durch eine öffentlich geäußerte Meinung beeinflussen lassen." (Strafverteidiger\_in)*

*"I believe that it has an influence, because the judges are of course also people who are somehow influenced by a publicly expressed opinion." (Lawyer/Germany)*

One police officer, who negated being influenced by the media in his own everyday work, suspected that this might be different for high-ranking police officers, though, as he described that media were able to generate political pressure, e.g. by reporting that the police was not able to get the drug trafficking situation in an area under control. From his perspective, however, low-ranking officers would generally stick to their working principles and not let themselves be influenced by this kind of pressure (Police officer/Germany). Likewise, the issue of public pressure was raised by another police officer. He said that there might be a certain pressure to do nothing wrong, in particular when investigating celebrities. In his opinion, this could lead to police officers feeling inhibited in their work (Police officer/Germany). Another police officer admitted that it might be possible that the police would direct investigations at someone if there was a hint by the media. However, he did not think

that this was a problem regarding the presumption of innocence, as this would just mean that they would investigate, but not that the person would be convicted (Police officer/Germany).

### Impact on the public

As mentioned above, a larger group of interviewees was of the opinion that media coverage could have a negative impact on the public. They explained that the need for highly personalised and emotional stories of some media could lead to identifying and prejudging media coverage which could eventually violate the presumption of innocence. For a few interviewees it was important to point out that this did not apply to all media, though (Judge/Germany; Lawyer/Germany; Police officer/Germany).

*“Die Medien haben natürlich ein Interesse daran, eine persönliche Geschichte zu berichten und haben weniger Interesse an einer Berichterstattung über Rechtsfragen.”*  
(Staatsanwältin\_in/Deutschland)

*“The media have great interest in reporting a personal story, rather than reporting on legal issues.”* (Prosecutor/Germany)

In this respect, a lawyer and a police officer pointed out that identifying and prejudging media coverage could destroy existences, in particular, as it would last on the internet forever (Lawyer/Germany; Police officer/Germany). The interviewees gave several examples for identifying media coverage. According to them, the media suggested that the accused persons had already been convicted, although this was not the case. Many of the defence lawyers had already experienced this with their own clients. One interviewee described that s/he had a case, where a marijuana plantation was discovered in the cellar of an elderly couple. According to him/her, the media showed considerable interest in this case, which affected the lives of his/her clients massively:

*“Die Presse hat das Haus fotografiert und dann die Vornamen und die Nachnamen mit einem Punkt abgekürzt. Das führt in einer Kleinstadt zu einer derartig treffsicheren, vollkommen eindeutigen Identifizierung [...] und dann haben die Presseleute uns nicht nur im Gericht aufgelauert, sondern die haben sich [...] bereits auf dem Parkplatz versteckt und bereits in das Auto und beim Aussteigen mit Teleobjektiv Fotos gemacht. Da bestand dann gar nicht mehr die Möglichkeit zu sagen: ‘Jetzt kommt die Presse rein und jetzt haben Sie die Möglichkeit, sich was vors Gesicht zu halten [...] Die sind einen gesellschaftlichen Tod gestorben [...] jeder ihrer Skatfreunde, [...] Friseur und Ex-Arbeitskollegen weiß ganz genau, dass bei denen eine Hanfplantage mit mehreren Kilo Ertrag im Keller gefunden wurde.”*  
(Strafverteidiger\_in/Deutschland)

*“The press photographed the house and then abbreviated the [...] names with a dot. In a small town this leads to such an accurate, completely unambiguous identification [...] and then the press people not only ambushed us in the courtroom, but they had already hidden [...] in the parking lot and already taken photos with a telephoto lens into the car and while they were getting out of the car. There was no chance to say: ‘Now the press is coming in and now you have the chance to put something in front of your face’ [...] They died a social death [...] every one of their card game friends, [...] hairdressers and ex-work colleagues knew exactly that a cannabis plantation with a yield of several kilos was found in their cellar.”* (Lawyer/Germany)

Another lawyer described his/her experiences with identifying media coverage in the case of one of his/her clients as follows:

*“Bei einem Fall [...] geht es um eine große Autodiebesbande [...] Da ist auch ein Polizist angeklagt und [...] was den angeht, wird extrem viel derart berichtet, dass man ihn identifizieren kann. [Sein Gesicht] ist zwar verpixelt, aber sein Name und [...] der erste Buchstabe des Nachnamens stehen da, sowie dass er Polizist ist und sein Alter. Ich denke, man könnte den schon identifizieren, wenn man ihn nur grob kennen würde.”* (Strafverteidiger\_in/Deutschland)

*“One case [...] involves a large gang of car thieves [...] A police officer has also been accused and [...] as far as he is concerned, there is an extremely large number of reports in which he can be identified. [His face] is pixelated, but his name and [...] the first letter of his last name is there, as well as that he is a policeman and his age. I think you could identify him if you knew him only roughly.”* (Lawyer/Germany)

In addition, a judge and a defence lawyer referred to the case of a missing Berlin girl. According to them, a blatant media prejudice of the first-time arrested person had taken place, even though he had been released from prison again at that time (Lawyer/Germany; Judge/Germany).

### **Selected Case Study**

In February 2019, a 15-year old girl from Berlin disappeared, the main suspect being her brother-in-law in whose house she was last seen. The case was of great interest in the media: Particularly in tabloid media, there was almost real-time reporting with new articles and headlines every day. The reporting was prejudging and focused on the brother-in-law as the main suspect, quickly after the girl disappeared and despite the fact that there was practically no reliable evidence, but at best speculation. The brother-in-law was identified by the media and non-blurred pictures of his face alongside his first name and the first letter of his last name were published. The style of the reports, and the headlines in particular (such as: ‘Much more than a suspicion’), was mostly sensational and speculative.

Another thing that was frequently criticised by several interviewees was the lack of legal knowledge and the incorrect use of the legal terminology by journalists (Judge/Germany; Lawyer/Germany; Lawyer/Germany). According to them, this could lead to misperceptions of the trial in public and to prejudice.

*“Meine Erfahrung ist, dass Medienberichterstattung über Strafverfahren in der Regel keine gute Qualität hat [...] Sie ist in der Regel schlecht recherchiert, was die Tatsachengrundlage angeht und den meisten Journalisten fehlt es schlicht an juristischem Sachverstand.”* (Strafverteidiger\_in/Deutschland)

*“My experience is that media coverage of criminal cases is usually not of good quality [...] It is usually poorly researched in terms of factual basis and most journalists simply lack legal expertise.”* (Lawyer/Germany)

Closely linked with this was the reproach made in particular by one judge and one defence lawyer, that most media rarely reported on the whole trial, but instead only on the accusations at the beginning of the trial. They explained that the accusations in the beginning of a trial were often more serious than the judgment in the end. In their view, this led, to a distorted public perception: The general public would believe that there were more serious crimes than there actually were (Judge/Germany; Lawyer/Germany). In the following quote, the judge reflected how she experienced this issue in her work:



*“Wenn ich hinten Presse sitzen habe, und kriege mit, was die hinterher schreiben, weiß ich, die waren nicht bei mir in der Hauptverhandlung, schreiben aber über meine Hauptverhandlung. Im Zweifel gehen die auch nach der Anklageverlesung und kriegen die Hauptverhandlung gar nicht mit, so dass mir ganz klar ist, das was da geschrieben wird, stimmt im Zweifel überhaupt gar nicht mit dem tatsächlichen Verfahren überein. Das weiß aber die Bevölkerung nicht [...], die werden sich schon beeinflussen lassen davon.” (Richter\_in/Deutschland)*

*“If the press sit in the back of the courtroom, and I get to see what they write about the trial afterwards, I know that they were not with me in the main trial [...]. They rather just go after the accusations have been read out and do not even take notice of the main trial itself. That is why it is quite clear to me that what they write is not at all in accordance with the actual trial. But the population does not know that [...], they will let themselves be influenced by it.” (Judge/Germany)*

Positive effects of media coverage on the presumption of innocence were named very rarely. For instance, judge and a public prosecutor and a police officer were convinced that the media were an important mediator to enable the publicity of proceedings and could thus contribute to a fair trial (Judge/Germany; Prosecutor/Germany; Police officer/Germany).

*“Ganz grundsätzlich sehe ich es sehr positiv, dass auch unsere Arbeit von den Medien aktiv begleitet wird – Aber natürlich kann ich nicht irgendeinem Pressevertreter von Anfang an meine Ermittlungsschritte alle darstellen oder sagen, was ich jetzt als nächstes machen will.” (Polizist\_in/Deutschland)*

*“In principle, I consider it to be very positive that our work is actively followed by the media – But of course, I cannot just give a representative of the press a full report on the steps I have taken in my investigation or tell them what I want to do next.” (Police officer/Germany)*

A lawyer was also of the opinion that judges could feel encouraged to look particularly closely at possible evidence and take the presumption of innocence more seriously if the largest possible public was involved in the proceedings (Lawyer/Germany).

However, a larger group of interviewees stated that they liked the idea of public scrutiny of the criminal justice system performed by the media in principle; However, they but doubted that it would work, in respect of their previous experiences with how the media reported on criminal cases (Judge/Germany; Prosecutor/Germany; Lawyer/Germany; Lawyer/Germany; Lawyer/Germany; Police officer/Germany; Police officer/Germany). Hence, they explained that the media was not neutral enough, too fast-paced and too focused on personal stories rather than legal issues to fulfil this task.

*“Sollte es jemals eine neutrale Zeitung geben oder eine neutrale Berichterstattung, dann mag das so sein, tatsächlich haben wir sie aber nicht.” (Richter\_in/Deutschland)*

*“Should there ever be a neutral newspaper or neutral reporting, then that may be the case, but in fact we do not have that.” (Judge/Germany)*

*“Ich bin mir ganz sicher, dass weder Sie das möchten noch ich. Der einzige Ort, an dem Recht gesprochen wird, ist [...] in der Gerichtsverhandlung. Dabei soll es auch bleiben. [...] Der Bürger ist durch diese Medienberichterstattung doch gar nicht in der Lage, das differenziert zu unterscheiden und zu bewerten, insbesondere vor dem Hintergrund Fake News.” (Polizist\_in/Deutschland)*

*“I am quite certain that neither you nor I want that. The only place where justice is spoken is [...] in court. And that is the way it should stay. [...] Through media coverage, the citizens are not in a position to differentiate and evaluate, especially against the background of fake news.” (Police officer/Germany)*

In addition, the majority of the defence lawyers raised the concern that the public opinion was only in the sense of more and higher sentences and prejudgment. They saw a risk that this could have a negative influence on the rights of accused persons (Lawyer/Germany; Lawyer/Germany; Lawyer/Germany).

*“Die Idee der öffentlichen Kontrolle finde ich sehr gut und es wäre auch schön, wenn es funktioniert. Ich habe nur das Gefühl, dass es dann eher in die Richtung gehen würde, dass die Öffentlichkeit meint, dass die Strafen vielleicht zu niedrig ausfallen.” (Strafverteidiger\_in/Deutschland)*

*“I think the idea of public scrutiny is very good and it would be great if it worked in practice. I have a feeling though, that this would rather go into the direction that the public would demand for higher sentences.” (Lawyer/Germany)*

One of the interviewees, a defence lawyer, gave another example reflecting his/her opinion that the public was generally not in favour of strengthening the suspects' rights. In this respect, s/he described that media coverage could have an effect on the ordering of pre-trial detention, which s/he found alarming. S/He observed that as a rule with a few exceptions, suspects were always detained, whenever there was a fatality. The interviewee considered this to be a legally unjustifiable connection because s/he thought that these were often cases with no urgent suspicion of deliberate manslaughter, but of manslaughter through negligence. For these cases, however, s/he saw no legally justifiable reason to order pre-trial detention. In the interviewee's opinion, this phenomenon was connected to the fact that the general public might not accept a suspect in freedom despite the fatality (Lawyer/Germany).

*“Ich glaube, [...] dass es einen rechtlich nicht vertretbaren Zusammenhang zwischen Todeserfolg und U-Haft [gibt]. Es gibt [...] fast gar keine Fälle, in denen U-Haft vermieden wird, wo jemand zu Tode gekommen ist. Und das ist sicherlich nicht richtig, weil es [...] häufig auch fahrlässige Tötung ist und da überhaupt keine Untersuchungshaft sinnvoll ist. Aber, dass [...] man bei einem Todeserfolg regelmäßig U-Haft verhängt, selbst wenn es keinen dringenden Tatverdacht für ein vorsätzliches Tötungsdelikt gibt, hängt sicherlich auch mit der öffentlichen Wahrnehmung zusammen; [...] dass dann darüber berichtet wird, dass [...] der mutmaßliche Täter sogar freigekommen ist.” (Strafverteidiger\_in/Deutschland)*

*“I believe there is a legally unjustifiable connection between fatality and the ordering of pre-trial detention. There are [...] almost no cases in which detention is avoided where someone was killed. That is certainly not appropriate, because [...] it is often involuntary manslaughter for which there is no sense in pre-trial detention at all. But the fact that [...] if someone was killed, detention is regularly imposed, even if there is no urgent suspicion of a an intentional killing, is certainly also connected with public perception; [...] that it is then reported that [...] the suspected perpetrator has even been released.” (Lawyer/Germany)*

A comparable observation was made by another lawyer. S/He believed that pre-trial detention led to higher sentences, because the authorities felt like they had to justify for the detention, since it would be embarrassing for the state if a person was detained and received a low sentence:

*“Das zweite Riesenproblem für die Unschuldsvermutung ist Untersuchungshaft [...]. Denn wenn Untersuchungshaft vollstreckt wird, entsteht immer [...] ein Rechtfertigungseffekt. [...] Wenn am Ende des Verfahrens in einem Urteil eine Strafe rauskommt, für die Untersuchungshaft außer Verhältnis steht, eine Geldstrafe zum Beispiel oder erst recht ein Freispruch, dann wäre es was Peinliches, [denn man hätte] jemanden zu Unrecht eingesperrt. [...] Diese Blöße will sich kein Gericht geben und deswegen führt Untersuchungshaft zu einer höheren Strafe [...].”* (Strafverteidiger\_in/Deutschland)

*“The second major problem for the presumption of innocence is pre-trial detention, because it always creates a justification effect. [...] If, at the end of the trial, a sentence is imposed which is disproportionate to the pre-trial detention, for example a fine, or even more so an acquittal, it would be embarrassing, because someone would have been wrongfully detained. [...] Therefore, pre-trial detention leads to a higher sentence [...].”* (Lawyer/Germany)

d. Differences in media coverage concerning certain groups

aa. Men and women

Two interviewees, both of them defence lawyers, had the impression that the media reported differently on cases of male and female suspects, claiming that the media often used sexist clichés (Lawyer/Germany; Lawyer/Germany). One of the lawyers pointed towards a particular pattern s/he observed when media reported about female suspects:

*“Ich finde, dass [...] wenn es um weibliche Angeklagte geht, oft auf diese Diskrepanz abgestellt wird zwischen dem, wie eine Frau eigentlich zu sein hat und wie sie dann in dem Fall tatsächlich ist.”* (Strafverteidiger\_in/Deutschland)

*“I think that when it comes to female defendants, this discrepancy between how a woman should be and how she actually is, is often referred to.”* (Lawyer/Germany)

S/He illustrated this by giving the example of a female suspect who was portrayed by the media as an 'angel faced killer with ice cold eyes'. In his/her view, by portraying her that way, the media suggested that the suspect, a pretty blue-eyed woman, should actually be an angel and behave like one, emphasizing the stark contrast to the accusations of having committed a violent crime. In the interviewee's opinion, this kind of reporting might indicate that the accusations were worse as if the suspect did not have these physical attributes (Prosecutor/Germany).

The majority of interviewees from all groups saw differences as well, but not primarily linked to the way the media reported on cases of male or female defendants. Instead, they mostly did not see the gender of the suspects as a decisive factor, but rather that certain crimes, such as violent crimes or human trafficking for instance, were overwhelmingly committed by men. That is why they concluded that the media coverage necessarily focused on men. In addition, a large group of interviewees from all professions stated that the type of criminal offence had a bigger impact on the way it was portrayed by the media than the fact whether the suspect was male or female (Judge/Germany; Judge/Germany; Lawyer/Germany; Police officer/Germany). In this context, they described that for certain offences, the public understanding and acceptance were significantly lower than for others. According to them, for instance sexual offences were regarded as particularly despicable (Judge/Germany; Judge/Germany; Lawyer/Germany). As the majority of these crimes were committed by men, this would also reflect in the negative media coverage on these cases, so that some media might be more willing to give up the presumption of innocence here. A smaller group of other interviewees, among

them a public prosecutor and a lawyer, saw the main difference simply in the fact whether it was a tabloid or a quality newspaper reporting (Prosecutor/Germany; Lawyer/Germany).

#### bb. Other groups

When asked about other characteristics of a defendant than sex/gender that might affect how the media reported on a case and how this might impact the presumption of innocence, the vast majority of interviewees from all groups named the ethnic or national origin of a defendant as a factor with a generally negative impact (Judge/Germany; Judge/Germany; Prosecutor/Germany; Prosecutor/Germany; Lawyer/Germany; Lawyer/Germany; Lawyer/Germany; Police officer/Germany; Police officer/Germany). Within this response, they made several differentiations. First of all, a couple of interviewees noted that this observation could be made more frequently with tabloid media than with quality media.

Furthermore, a public prosecutor had the impression that for people from African countries, the Middle East or ethnic minorities such as Sinti and Roma, or refugees in general, the media often rather suggested guilt than innocence (Prosecutor/Germany). In this context, one of the judges observed that when reporting on a crime, some media focused on the nationality of the suspects (Judge/Germany). She explained that in some cases, the nationality of the suspects was essential for understanding the crime and therefore, it had to be mentioned; for instance, when it came to a so-called honour killing. She explained that contrarily in the event of a 'normal' bodily injury or a 'normal' theft or robbery, nationality did not matter directly. Nevertheless, she observed that it sometimes was still mentioned in the media, such as e.g. 'The Polish construction worker stole the car'. She said that she could only explain this to herself in such a way that crimes sometimes only became news because journalists worked with clichés. Otherwise, one might not report about them at all, because the news that a 43-year-old had stolen a car would then no longer be news. She considered this to be very dangerous for the presumption of innocence.

*“Vereinzelte Medien nennen immer unbedingt die Nationalität. Und meines Erachtens wird das dann auch dazu eingesetzt, um Vorurteile zu schüren.”* (Richter\_in/Deutschland)

*“Some media always mention the nationality. And in my opinion, this is also used to stir up prejudice.”* (Judge/Germany)

A police officer shared this view and explained why he considered naming the nationality of suspects dangerous in the majority of cases:

*“Ich bin der Meinung, dass man diese Verknüpfung [zwischen Nationalität und Straftat] wirklich nur herstellen kann, wenn wir zu diesem Kontext wirklich wissenschaftlich valide Erkenntnisse haben. Dass es [...] was jetzt zum Beispiel dieses Thema Ehrenmord angeht, einen ganz klaren Beleg dafür gibt, dass das sozusagen für eine Ethnie typisch ist. [...] Aber ansonsten würde ich das auch für nicht gut erachten, weil das wieder Tür und Tor öffnet für Thesen, für Verschwörungstheorien und Verallgemeinerungen.”* (Polizist\_in/Deutschland)

*“In my opinion, a link [between nationality and crime] can really only be drawn if there really are scientifically valid findings on this subject. That there is very clear evidence that this is, so to speak, typical for an ethnic group [...] for instance in case of the subject of honour killings. [...] But apart from that, I would not consider that to be appropriate, because it opens the door again for hypotheses, for conspiracy theories and generalisations.”* (Police officer/Germany)

One of the interviewed police officers had a different view on this matter, as he was convinced that the media wasted too much energy on not naming the nationality. In his opinion, they should rather

focus on explaining what the crime was about. However, he also held the view that the media made frequent use of stereotypes in connection with the origin, such as assuming that the perpetrator of a stabbing had to be a foreigner or that there had to be a right-wing background if the victim of a crime was not German.

*“Ich nehme eher wahr, dass [...] in Bezug auf die Nationalität von Tätern immer so ein Brimborium drum herum [gemacht wird] [...] Man sollte [...] mehr Zeit und Inhalte darauf verwenden, den Leuten darzulegen, dass es nicht um die Nationalität der Person geht, sondern dass es um eine Tat geht, aus welchen Gründen diese auch immer begangen wurde [...] Wenn eine Straftat gegen einen Ausländer begangen wird, dann wird sofort die rechte Keule gezogen, unabhängig davon, ob es zutrifft oder nicht. [...] Umgekehrt ist es eigentlich im Grunde genommen genauso: Messerstecherei bedeutet sofort Ausländer. Das ist totaler Quatsch.”* (Polizist\_in/Deutschland)

*“My perception is rather that [...] with regard to the nationality of perpetrators, there is always a big fuss being made [...] More time and content should be spent [...] on explaining to people that it is not about the nationality of the person, but that it is about a criminal act, for whatever reason it was committed [...] If an offence is committed against a foreigner, a right-wing background is immediately assumed, regardless of whether it is true or not. [...] The other way around it is actually basically the same: A stabbing immediately means foreigner. This is total nonsense.”* (Police officer/Germany)

A larger group of interviewees named another factor that was closely linked to the origin of suspects, namely family or ‘clan’ affiliations (Lawyer/Germany; Lawyer/Germany; Police officer/Germany). According to them, suspects who allegedly belonged to one of the big extended families which were publicly associated with organised crime, or who just happened to have the same family name, were often portrayed as guilty if there was an accusation against them. One interviewee stated that s/he saw this generalisation as a big problem. S/he therefore criticised that their rights of personality were not respected by the media.

*“Bei jedem aus dem Milieu von Clans wird einfach überhaupt nicht darauf geachtet, welche Persönlichkeitsrechte die haben, sondern die werden eigentlich immer mit Fotos und Namen und allem dargestellt.”* (Strafverteidiger\_in/Deutschland)

*“The personal rights of everybody originating from the ‘clan milieu’ are not at all paid attention to. They are always portrayed with pictures and names and everything.”* (Lawyer/Germany)

When asked about other factors, such as disabilities for instance, the vast majority of interviewees replied that they did not have the impression that this was picked up by the media. They were rather of the opinion that the way the media reported on the case would rather depend on the type of offence. One judge remembered a case of a defendant in a wheelchair who was accused of having sexually abused children in 230 cases and received a relatively mild sentence. The interviewee recalled that the main question in the press was how a disabled person could commit such an act. She considered this to be a problem because this would mean that a person with a disability would not be expected to do so. According to her, a disability could not make any difference, though. She concluded that the media always reported on cases of people who they would not expect to commit such acts (Judge/Germany).

e. Persons other than officials engaged in the criminal justice system commenting on investigations and trials

A larger group of interviewees had experienced that persons other than officials engaged in the criminal justice system commented on investigations and trials. Most prominently mentioned were the examples of a man whose father had been killed by someone racing at excessive speed through the streets of Berlin, as well as a high-profile campaign against violence in public spaces that was launched by a woman after her brother had been killed. Two lawyers remembered that the son actively expressed his opinion on the case and commented on every new decision by the courts (Lawyer/Germany; Lawyer/Germany). Likewise, a police officer who worked in international criminal law described that in his field of work, NGOs drew attention to crimes very often and published information about the cases (Police officer/Germany).

The public prosecutor who described the example of the campaign against violence, found it particularly remarkable that the campaign developed an 'incredible momentum of its own'. According to him, they could actively seek press conferences and appointments with politicians, whereas state authorities had to exercise restraint in this respect. The interviewee explained that he could not say whether judges let themselves be influenced by this and that it depended on the individual case. However, he remembered that in this case, the court claimed that it had not been influenced (Prosecutor/Germany).

In this context, one judge expressed her concerns about the effects of press and public relations work by joint plaintiffs (*Nebenkläger*) or victims' families on the public in particular:

*“Das ist ihr gutes Recht. Aber es geht manchmal auch tatsächlich nach hinten los und kann tatsächlich auch zur Verletzung der Unschuldsvermutung führen, weil natürlich die professionelle Distanz nicht gegeben ist.”* (Richter\_in/Deutschland)

*“It is their right to do so. But sometimes it backfires and can actually lead to a violation of the presumption of innocence, because of course the professional distance is not there.”* (Judge/Germany)

According to her, this might particularly be dangerous if the media quoted them without giving the appropriate context. One defence lawyer believed that joint plaintiffs could also have an effect on the application of the presumption of innocence by the judges. In her view, judges would at least be affected subconsciously, because with the images and the stories of the relatives of the victim in mind, it might be harder for the judges to tell them that the accused could not be punished (Prosecutor/Germany).

On top of that, some interviewees stated that politicians occasionally talked about ongoing proceedings in public, but that this mostly backfired (Judge/Germany; Lawyer/Germany). Against this backdrop, an example given by one of the defence lawyers stood out. According to him, after the G20 protests, a mayor and other politicians had addressed the public, saying that they hoped for drastic measures to be taken against the protesters. In his/her view, the judiciary was influenced by this. According to him/her, one of his clients was unjustifiably detained. S/He remembered that there were many more cases of drastic punishment which s/he could only explain to himself/herself by political interference:

*“Ich habe selbst jemanden vertreten, der in U-Haft saß für nichts [...] Am Ende hat er eine Geldstrafe wegen eines Pfeffersprays [...] bekommen; und da ist sogar noch fraglich, ob das überhaupt rechtlich vertretbar ist, weil das Pfefferspray in [einem EU-Mitgliedsstaat]*

*zugelassen ist und er nun mal [Staatsangehöriger dieses Mitgliedstaats] ist. [Außerdem wird] das gleiche Pfefferspray in Deutschland verkauft, nur, dass dann Tierabwehrspray draufsteht. Dass am Ende dann das zur Untersuchungshaft führt, ist völlig unvertretbar. Das kann man nur mit G20 erklären, und es gibt viele solcher Fälle.” (Strafverteidiger\_in/Deutschland)*

*„I defended someone who was detained for nothing [...] In the end he got a fine for a pepper spray [...] and it is even questionable whether this is legally justifiable, because the pepper spray is permitted in [a EU Member State] and he is [a national of that Member State]. The same pepper spray is also sold in Germany, with the only difference that it says animal repellent spray on it. It is completely unacceptable that this leads to pre-trial detention. This can only be explained with G20, and there are many of these cases.” (Lawyer/Germany)*

### **Selected case study**

In the case of a fatal stabbing in Chemnitz in August 2018, the question of political interference in the proceedings was publicly discussed. The suspect in the case was from Syria, which led to a series of racist demonstrations and violent riots by right-wing extremists in Chemnitz, a city where 24.3 percent voted for the right-wing populist and in parts right-wing extremist Alternative for Germany (AfD) party in the last federal elections. In addition, political pressure came from Chemnitz's SPD (Social Democratic Party) mayor who described a possible acquittal of the accused Syrian as 'difficult' for her city. Furthermore, she said that she hoped for a conviction so that the relatives of the victim could 'find peace'. As elections in Saxony (the *Land*, in which Chemnitz is located) were about to take place in the same year, it was speculated that there was fear that an acquittal of the Syrian would give the right-wing populists further arguments against alleged 'criminal refugees'. Eventually, the accused was sentenced to 9 years and 6 months imprisonment. The judgment was criticised by several media and by the convict's defence lawyers, who considered it to be a politically motivated judgment. They further criticised a lack of clear evidence, for instance that there were no DNA traces of the convict on the weapon or on the victim and the defendant had no injuries that could indicate a physical confrontation with the victim. Furthermore, they added that the main witness entangled himself in several contradictions. In May 2020, the judgment became final, as an appeal (*Revision*) at the Federal Court of Justice (BGH) was unsuccessful.

#### f. Remedies

When asked for remedies against being publicly referred to as guilty by the media, all interviewees replied that it was possible to take civil law remedies such as for injunctions (*Unterlassung*) or a counterstatement (*Gegendarstellung*) against the media. One of the judges further mentioned that there were also penal law remedies such reporting the media for libel (*Verleumdung*), insult (*Beleidigung*) or false suspicion (*Falsche Verdächtigung*). However, she pointed out that in her role as a judge, she was generally not competent to give legal advice (Judge/Germany).

In addition, it is possible to lodge remedies against public officials, such as disciplinary complaints (*Dienstaufsichtsbeschwerden*). For instance, one defence lawyer explained that s/he did so against a public prosecutor who passed on identifying information about his/her client to the media. However, s/he made clear that from his/her experience, this happened very rarely (Lawyer/Germany). Furthermore, several interviewees described that one could file a motion of challenge for fear of bias against the judge (Lawyer/Germany; Lawyer/Germany; Lawyer/Germany; Prosecutor/Germany).

An additional effect of prejudging media coverage was mentioned by a group of interviewees, consisting of a judge, a public prosecutor and a lawyer. They explained that excessive media coverage could be taken into account in the sentencing as a mitigating factor. Therefore, clients who suffered from intense prejudging media coverage, would get a reduced sentence (Judge/Germany; Prosecutor/Germany; Lawyer/Germany). One interviewee explained that she often warned the media that the sentence might be less severe if they reported in a prejudging manner, expecting that a low sentence was not what the media wanted. Several times, she made the observation, however, that the media did not report on the reduced sentence afterwards, which annoyed her (Judge/Germany).

#### g. Discussion of findings

The data collected suggest that the requirements of Article 4 of Directive EU/2016/343 for public references to guilt are generally met in Germany. The interviewees indicated that when providing information on investigations in cases of public interest, authorities always pointed out that there had been no conviction (yet) and that there was only a suspicion that a person had committed a crime. The fact that the authorities provide information only via press offices can also ensure that the information is presented correctly in terms of content and language by persons trained for this purpose.

In addition, few cases were mentioned in which officials improperly passed on information about suspects to the media. If this does happen, there are possibilities to take legal action against this, as the case study and the descriptions of two interviewees showed. Another problem raised by one judge was that the public prosecutor's office sometimes posted information on proceedings on Twitter at a time when it was not clear whether there would be a main trial at all. In light of this negative example and the rather fragmented legal situation on media work of the authorities in criminal proceedings in general, including clear regulations on the rights and responsibilities in relation to the authorities' press work in the Code of Criminal Procedure could present a solution. As suggested by a group of experts, this could serve to balance the public's interest in information with the interests of the authorities and the accused persons.

Many of the issues mentioned by the interviewees are in the hands of the media and cannot be attributed to state authorities. The press representatives do not act in a legal vacuum either, as they for instance have to consider the press acts of the federal states and the case law on suspicion reporting. Nevertheless, almost all interviewees reported that the press regularly disregarded the presumption of innocence, presumably because personalised and emotionally charged reporting sells better. A further point of criticism was that media reporting often was of poor quality in terms of legal knowledge. Moreover, some interviewees described that often only the accusations were reported, but that there were no headlines about a subsequent judgement or even acquittal, so that the public gained a distorted perception of the severity of crimes committed. It was also frequently observed that the reporting on crimes committed by non-Germans or people with a migration background was significantly more negative and prejudicial, and that the presumption of innocence was more quickly disregarded when reporting on certain crimes that were particularly despised by society, such as sexual offences. Against this backdrop, most of the interviewees found that media reporting had a negative impact on the presumption of innocence, was capable of destroying the existence of suspects, and therefore could not be seen as an effective instrument for public scrutiny of the criminal justice system.

Hence, dealing with media coverage of criminal proceedings and finding a balance between freedom of the press and the personal rights of the accused can be considered a major challenge.



Whether judges are influenced in their decision making by the media and public opinion cannot conclusively be determined from the interviews conducted. Overall, however, there seems to be a rather greater trust in the independence of the courts. It is a fact, however, that judges are exposed to and are aware of a wide range of news about their criminal proceedings due to extensive media coverage. To what extent they can ignore this or actively counteract any influence is difficult to assess, as it is a highly subjective question and may be different in each individual case.

### C.3 The presentation of suspects and accused persons

This chapter first provides an overview of the legal regulations governing the presentation of suspects and accused persons. In the further course of the chapter, it is shown which measures are used in the experience of the interviewees to physically restrain suspects and accused persons. Moreover, it is discussed to what extent these measures can potentially impact the presumption of innocence in the opinion of the interviewees. Furthermore, the effect of accused persons' clothing on the presumption of innocence is discussed. In the following, the interviewee's experiences with safeguards for vulnerable groups are described. It is then discussed, which legal remedies are available in practice against the use of physical restraint measures. Finally, the results of the chapter are summarised and analysed.

#### Legal overview

Defendants are allowed to wear civilian clothes in court. If the press is present during a hearing, they are allowed to cover their faces. In addition, measures such as media exclusion, pixilation or a ban on taking pictures are possible in accordance with section 176 of the Courts Act (*Gerichtsverfassungsgesetz, GVG*).<sup>17</sup> The use of measures to physically restrain defendants, such as handcuffs or shackles, is possible in principle, but not in the sense of a stigmatising 'perp walk'. Instead, they serve as security measures.

Provisions on measures during the transport of prisoners can be found in the Prisoner Transport Regulation (*Gefangenentransportvorschrift, GTV*), an administrative regulation of the federal states. The ordering of shackles in the main trial can be based on section 176 Courts Act (*GVG*) or section 231 (1) sentence 2 Code of Criminal Procedure (*StPO*). The measures are ordered by the presiding judge, who has a discretionary power,<sup>18</sup> and are carried out by the court guard, a judicial officer or by police officers.<sup>19</sup> Since the use of shackles is a considerable interference with fundamental rights, certain conditions have to be met for the measure to be lawful. There must be concrete facts that justify a reason for physically restraining the defendant and the purposes intended by the measure must not be achievable by a less severe means.<sup>20</sup> The danger of escape alone is not sufficient to order this measure, but it is sufficient if other indications exist, such as the suspicion of violence against persons or objects, or suicidal intentions.<sup>21</sup> It must also be taken into account that the physical restraint during

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<sup>17</sup> Germany, Federal Constitutional Court (Bundesverfassungsgericht), Karlsruhe/1 BvR 1534/16, 8 July 2016, available at [www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/07/rk20160708\\_1bvr153416.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/07/rk20160708_1bvr153416.html).

<sup>18</sup> Germany, Federal Court of Justice (Bundesgerichtshof), Karlsruhe/1 StR 22/62, 10 April 1962, available at [www.servat.unibe.ch/dfr/bs017201.html](http://www.servat.unibe.ch/dfr/bs017201.html).

<sup>19</sup> Gmel, D. (2019), 'StPO § 231 recital 2, Anwesenheitspflicht des Angeklagten' in: Hannich, R. *et al* (eds.), *Karlsruher Kommentar zur Strafprozessordnung*, Munich, C. H. Beck.

<sup>20</sup> Germany, Higher Regional Court (Oberlandesgericht), Hamm/5 RVs 134/13, 9 January 2014, available at [www.justiz.nrw.de/nrwe/olgs/hamm/j2014/5\\_RVs\\_134\\_13\\_Beschluss\\_20140109.html](http://www.justiz.nrw.de/nrwe/olgs/hamm/j2014/5_RVs_134_13_Beschluss_20140109.html).

<sup>21</sup> *Ibid.*

the hearing must not hinder the legal defence of the person concerned, for example by making it difficult or impossible to take notes.<sup>22</sup>

There are remedies against these measures. However, the measures based on section 176 of the Courts Act (*GVG*) can only be objected to if they have an effect that goes beyond the legal force of the judgment itself. Physical restraint measures that are based on section 231 (1) sentence 2 Code of Criminal Procedure (*StPO*), can also be challenged with a complaint according to section 304 (1) Code of Criminal Procedure (*StPO*) or section 238 (2) Code of Criminal Procedure (*StPO*).<sup>23</sup>

a. Measures used to present the accused and its impact on their presumption of innocence

All interviewees reported that handcuffs were used in practice.

As far as the investigative proceedings are concerned, the police officers described that they used handcuffs regularly, such as during apartment searches. They said that this had nothing to do with the presumption of innocence, as they only used them for self-protection, to calm the situation, prevent escalation and to have a different level of communication with the suspects (Police officer/Germany; Police officer/Germany; Police officer/Germany). However, some of them admitted that the use of handcuffs might have an influence on the way the neighbours, or other spectators perceived the suspect, which one police officer did not consider to be problematic, though:

*“Als Problem sehe ich das überhaupt gar nicht, sonst hätte ich den falschen Beruf. Aber natürlich hat es nach außen hin für die Person einen Einfluss auf die Meinung der Nachbarn, die das sehen, wenn der gefesselt in so einem Funkwagen abtransportiert wird. Aber auf meine Meinung halt nicht.”* (Polizistin/Deutschland)

*“I do not see this as a problem at all, otherwise I would have the wrong profession. But of course it has an outward influence on the opinion of the neighbours, who see it when the person is tied up and taken away in a police car. Not on my opinion, though.”* (Police officer/Germany)

In addition, the police officer explained that under certain circumstances, he would take safeguards to cover the handcuffs, e.g. with a jacket, or by walking off suspects through the back entrance. However, he differentiated by the nature of the allegations. In his opinion, these safeguards could be applied for minor allegations, such as administrative offences (*Ordnungswidrigkeiten*), but not for serious criminal allegations.

*“Bei einem Menschen, der schon 18 Mal einem auf die Fresse gehauen hat und drei Raubüberfälle gemacht hat, ist mir das eigentlich schlichtweg egal, ob irgendjemand die Handschellen sieht oder nicht.”* (Polizist\_in/Deutschland)

*“With a person who has already punched someone in the face 18 times and has done three robberies, I do not really care if anyone sees the handcuffs or not.”* (Police officer/Germany)

The interviewed judges, public prosecutors and defence lawyers all experienced the frequent use of handcuffs, and occasionally shackles, for suspects that were in pre-trial detention. As the study was

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<sup>22</sup> Germany, Federal Constitutional Court (Bundesverfassungsgericht), Karlsruhe/2 BvR 2374/10, 19 April 2011, available at [www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2011/04/rk20110419\\_2bvr237410.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2011/04/rk20110419_2bvr237410.html).

<sup>23</sup> Germany, Higher Regional Court (Oberlandesgericht), Saarbrücken/1 Ws 28/16, 8 March 2016, available at <https://dejure.org/ext/05873f0b6e1bcd6ccb0104bb8fcfdc47>.

mainly conducted in Berlin, most of the following descriptions apply to the situation in Berlin and may be different in other parts of Germany. The majority of the interviewees stated that defendants which were in pre-trial detention were brought to courtroom handcuffed. They described that in Berlin, the detention centre was connected to the criminal court through underground corridors through which the handcuffed defendants were lead, so that this would happen under the exclusion of the public (Judge/Germany; Judge/Germany; Prosecutor/Germany; Lawyer/Germany; Lawyer/Germany; Lawyer/Germany; Lawyer/Germany). One of the interviewees who did not work in Berlin, but in Baden-Württemberg, explained that they did not have such an underground system, as the detention centre was 70 kilometres away from the court. Therefore, it was not possible to do the entire transport to the courtroom under the exclusion of the public (Prosecutor/Germany).

Whilst one of the lawyers criticised that his clients regularly had to wear handcuffs in courtroom, which was according to him often unjustified (Lawyer/Germany), most of the interviewees pointed out that the handcuffs would usually be removed once the defendants had arrived inside the courtroom.

*“Im Saal tragen unsere Angeklagten keine Handschellen oder Fußfesseln. Das heißt, die Medien würden das niemals sehen und die Zuschauer auch nicht.”* (Richter\_in/Deutschland)

*“Our accused people do not wear handcuffs or shackles in the courtroom. This means, that the media and the spectators would never see this.”* (Judge/Germany)

A larger group of the interviewees explained that handcuffs during the hearing only served as security measures (Judge/Germany; Judge/Germany; Prosecutor/Germany; Prosecutor/Germany; Police officer/Germany; Police officer/Germany) Thus, they could only be ordered if there were concrete indications of escape attempts or risk of of physical harm. Therefore, both interviewed judges believed that these measures had no effect on the presumption of innocence.

*“Das ist eine reine Gefahrenabwehr, das hat nichts mit Unschuldsvermutung zu tun.”* (Richter\_in/Deutschland)

*“This is a mere security measure; it has nothing to do with the presumption of innocence.”* (Judge/Germany)

On the other hand, the public prosecutors and defence lawyers were of the opinion that these measures had at least some kind of impact on the presumption of innocence.

*„Wenn Sie gefesselt auf der Anklagebank sitzen, dann wird natürlich schon der Eindruck vermittelt durch solche Bilder, dass das ein gefährlicher, schlimmer Verbrecher ist.“* (Staatsanwält\_in/Deutschland)

*“If you sit tied up in the dock, then of course the impression is given by such pictures that you are a dangerous, bad criminal [...] Of course, it has a certain influence [on the public]. It would be strange if it did not leave an impression.”* (Prosecutor/Germany)

However, several of them differentiated between their impact on the public and on the public officials. They assumed that professionals were used to the appearance of an accused person in handcuffs and were therefore free of influence. However, they generally did not consider the public to be able to do so. (Prosecutor/Germany; Prosecutor/Germany; Lawyer/Germany; Police officer/Germany). One police officer believed that this was often related to the public's lack of knowledge about the reasons

for ordering handcuffs. He was of the opinion that therefore many people automatically associated handcuffs with guilt (Police officer/Germany).

*“Ich glaube, ja, das assoziiert bei vielen Menschen etwas. Dieses Bild eines Menschen, der Handschellen anbekommen hat. Das ist so atypisch, damit verknüpfen viele den Aspekt Schuld. Das passiert automatisch. [...] Die vorsitzende Richterin [dagegen] [...] kennt den Sachverhalt. Sie weiß um die Tatumstände und sie weiß ja auch um [...] die Gefährlichkeit des Täters [...] Ich [würde] das System infrage stellen, wenn ich nicht versichert sein kann, dass [...] die Richterin die professionelle Distanz hat und nur nach den Fakten entscheidet.”* (Polizist\_in/Deutschland)

*“I think that many people associate this image of a person wearing handcuffs with something. It is so atypical, many people associate it with guilt. It happens automatically. [...] The presiding judge [on the contrary] [...] knows the facts. She knows about the circumstances of the crime and she also knows about [...] the dangerousness of the perpetrator [...] I [would] question the system if I could not be assured that [...] the judge has the professional distance and only decides according to the facts.”* (Police officer/Germany)

A larger group of defence lawyers was convinced that these measures also had an impact on the public officials. They justified this view with the assumption that the presumption of innocence was affected subconsciously by many things and that no judges could free themselves of the visual impressions they gained of the physically restrained defendant (Lawyer/Germany; Lawyer/Germany; Lawyer/Germany).

*“Jemand, der schon als Gefangener vorgeführt wird, wird natürlich auch als solcher behandelt und wahrgenommen. Und dann werden eben vielleicht auch seine Persönlichkeitsrechte und auch die Unschuldsvermutung als geringer eingestuft.”* (Strafverteidiger\_in/Deutschland)

*“Someone who is presented as a prisoner, is also treated and perceived like a prisoner. And then, one might give less value to his rights of personality and the presumption of innocence.”* (Lawyer/Germany)

*“Wenn man so reingeführt wird, dann kann sich kein Richter und keine Richterin davon freimachen, dieses Bild im Kopf zu behalten. Das ist also wirklich total schwierig, das nochmal loszuwerden, also diese zur Schau gestellte Gefährlichkeit.”* (Strafverteidiger\_in/Deutschland)

*“When you are brought in like this, no judge can be free to keep that image in mind. So it is really very difficult to get rid of that again, this exposed dangerousness.”* (Lawyer/Germany)

As extreme examples, two lawyers reported that they had defended two clients accused of terrorism, respectively, who were brought to the courtroom with their hands and feet tied, placed behind a glass case and accompanied by a special task force with machine guns (Lawyer/Germany; Lawyer/Germany). Both lawyers were of the opinion that there was no need for these measures as their clients were not dangerous according to them. One of the lawyers expressed his view on this case as follows:

*“Das war ein Mitte Fünfzigjähriger ganz netter, friedlicher, gut erzogener Mann, der in seinem ganzen Leben nie irgendwas Gewalttätiges gemacht hatte. Was klar war, da es sich auch aus der Akte ergab. Aber einfach, indem man ihm Handschellen und Fußfesseln angelegt hat und ihn so in den Gerichtssaal geführt hat und dann noch in so einen Glaskasten gesteckt hat, hat man [...] ein Bild kreiert von einem Terroristen. Und das führt natürlich schon zu einer Vorverurteilung.”* (Strafverteidiger\_in/Deutschland)

*“He was a very kind, peaceful, well-behaved man in his mid-fifties, who had never done anything violent in his whole life. This was clear, as it was in the file. But simply by handcuffing him and shackling his feet, leading him into the courtroom and then putting him in a glass case, you created an image of a terrorist. And of course this leads to a prejudgment.”*  
(Lawyer/Germany)

He reported that pictures of this were even published in the media, showing the handcuffs and the glass case and accidentally blurring the face of the interpreter instead of his client’s face (Lawyer/Germany). Besides the stigmatising effect, both lawyers found that it limited defence as they could not sit next to their clients and could only communicate through a hole in the glass. One of the judges admitted that it might look ‘martial’ if one placed an accused in a glass box with slits, but she pointed out that this would only be ordered if absolutely necessary:

*“Einige Angeklagte sitzen in [...] so einer Art Glaskasten mit Schlitzen, da können sie sich mit ihren Verteidigern unterhalten und mit dem Gericht kommunizieren sie über ein Mikrofon. [...] Ich weiß von Reaktionen von Zuschauern und natürlich auch Angehörigen, dass die das ganz schrecklich finden, jemanden hinter so einer Box zu sehen. Aber das machen wir wirklich nur in den Fällen, in denen das absolut für erforderlich erachtet wird. Von neunzig Gerichtssälen haben nur [...] drei oder vier diese Glaskästen [...] Da werden dann auch eher Mord und Totschlag verhandelt [...] und jetzt nicht eine Unfallflucht im Straßenverkehr.”*  
(Richter\_in/Deutschland)

*“Some defendants sit in [...] a kind of glass box with slits, where they can talk to their defence lawyers and communicate with the court through a microphone. [...] I know from the reactions of spectators and relatives that they find it terrible to see someone in such a box. But we really only do that in cases where it is considered absolutely necessary. Out of ninety courtrooms, only [...] three or four have these glass boxes [...] So this is rather used in cases of murder and manslaughter [...] than of a hit-and-run traffic accident.”* (Judge/Germany)

Besides these examples, a larger group of interviewees, including the judges and a lawyer, indicated that, as there were often no handcuffs ordered inside the courtroom, the only difference between the accused and the other people was where they sit (Judge/Germany; Judge/Germany; Lawyer/Germany). By some interviewees, separate seating was considered to be an issue as well, though. Hence, a group of lawyers complained that separate seating might limit the defence, as it would be more difficult to communicate with the clients (Lawyer/Germany; Lawyer/Germany). One lawyer who stated that his/her clients always sat separately, felt that this was not justified most of the time:

*“In den meisten Fällen sind die Mandanten nicht gewalttätig und dann sehe ich eigentlich nicht, weswegen sie jetzt abgetrennt sitzen müssten.”* (Strafverteidiger\_in/Deutschland)

*“In most cases, clients are not violent. Hence, I do not see why they would have to sit separately.”* (Lawyer/Germany)

All interviewees indicated that defendants were allowed to cover their faces if the press was at the trial, so that they did not have to appear in the media if they did not want to. A public prosecutor explained that according to case law, journalists were only allowed to take pictures or film at the beginning of the proceedings and had to leave the courtroom before the trial started. He described how this issue was handled in practice as follows:

*“In der Praxis ist es so: Die Sache wird aufgerufen, die Kameralente kommen rein, machen ein Bild von dem Saal und den Verfahrensbeteiligten und gehen wieder raus. Und dann geht es los. Das sieht das Bundesverfassungsgericht so vor. [...] [Bevor die Verhandlung startet], kann sich jeder vor das Gesicht halten, was er will. Da gibt es keinerlei Beschränkungen.“* (Staatsanwält\_in/Deutschland)

*“In practice, it is like this: The case is called, the cameramen come in, take a picture of the room and the involved persons and leave again. And then the hearing starts. This is what the Federal Constitutional Court provides for. [...] [Before the trial starts], anyone can put whatever they want in front of their face. There are no restrictions.”* (Prosecutor/Germany)

A group of defence lawyers added that in their view, covering one's face with a folder was to some degree degrading. They described that the Berlin Association of Defence Lawyers had therefore provided mirrors, which defendants could hold in front of their faces (Lawyer/Germany; Lawyer/Germany). Furthermore, one lawyer mentioned that it was also possible to obtain a pixilation order by the judge (Lawyer/Germany).

#### b. Clothing

All interviewees affirmed that defendants were allowed to wear civilian clothes during hearings. A group of more than half of the interviewees believed that clothing had an influence on how the judge perceived the defendants as a person (Prosecutor/Germany; Prosecutor/Germany; Lawyer/Germany; Lawyer/Germany; Lawyer/Germany; Lawyer/Germany; Police officer/Germany; Police officer/Germany). Here, the degree of estimated influence varied from rather limited to very strong. The interviewees mainly did not expect judges to base their decision whether a defendant was guilty or not on the type of clothing. Thus, they saw no direct influence on the presumption of innocence. Yet they were convinced that it affected the judges' general impression the defendants and that this played on a more subconscious level. With that in mind, a larger group of interviewees indicated that they would advise their clients to dress properly.

However, several interviewees indicated that not only 'shabby' clothing could have a bad influence, but that it could also go the other way around. In this context, two lawyers explicitly noted that defendants should pay attention not to 'disguise' themselves, as this might raise concerns that something was wrong with the clients and had a negative impact on their impression on the judge (Lawyer/Germany; Lawyer/Germany). An example for this was given by one of the judges who reported of a trial she recently had. It was against someone who allegedly stabbed his victim five times and could not explain why he would have committed the crime. The judge noticed that he was extremely well dressed, which appeared to be his regular clothing to her. As the accused's lawyer reacted submissively towards his client, the accumulation of these factors made the judge suspicious, what the background behind the crime was, for instance, whether he was a drug lord. Nevertheless, she pointed out that none of this had an impact on her decision as a judge, since she could not include any of these speculations in the reasoning of her judgment:

*“Ich hab dafür keine Beweismittel, [...] also vom Ergebnis kommt da nichts anderes raus, weil auch jedem Richter klar ist, das er sowas nicht in sein Urteil schreiben kann, man muss es ja begründen können. [...] Nicht dass es Einfluss auf die Unschuldsvermutung hat, hat es nicht. Aber es hat weitere Einflüsse, man denkt, dass etwas am Verfahren nicht stimmt [und die Staatsanwaltschaft ermittelt weiter].“* (Richter\_in/Deutschland)

*“I have no evidence for that and the result will be the same, because it is also clear to every judge that he cannot write something like that in his judgment, because you have to be able to justify it. [...] Not that it has any influence on the presumption of innocence, it does not. But*

*it has other influences, you think that something is wrong with the trial and thus, the public prosecutor saw reason for further investigations.” (Judge/Germany)*

### c. Presentation of vulnerable groups

The vulnerable group, which the vast majority of interviewees referred to, were young people. They explained that according to the law, proceedings against young people were excluded from the public, so that neither media representatives nor spectators were allowed in the courtroom. One interviewee pointed out that even the spokesperson of the court was not allowed in trials against young people (Judge/Germany). As additional safeguard, one interviewee described that the courtrooms for youth matters were specially secluded in the building to keep the public away. Except for one case, where a reporter tried to take pictures through the semi-open door, the interviewees did not report any problems in this area (Lawyer/Germany). Concerning the investigative proceedings, the interviewed police officers stated that they treated young people differently during investigative measures, so that they would generally not tie them up and call their parents or the youth welfare office (Police officer/Germany; Police officer/Germany; Police officer/Germany).

As far as people with mental disabilities were concerned, a larger group of interviewees were not aware of special safeguards, but also indicated that they lacked experience in this area, since people with mental disabilities were rarely addressees of criminal proceedings. Asked about physical disabilities, the majority of interviewees had just as little experience. One public prosecutor explained that somebody who would not be able to violate the security regulations by attempting to escape or physically harming someone due to a disability, would certainly not be handcuffed (Prosecutor/Germany).

Furthermore, several interviewees commented on general safeguards that did not apply to specific vulnerable groups. A group of interviewees, including a judge, public prosecutors and a lawyer, were of the opinion that no safeguards were needed as the measures were already used as discretely as possible, particularly in view of the fact that in Berlin, the accused were led to the courtroom through a corridor that was not accessible by the public and that handcuffs were mostly removed at the start of the trial (Judge/Germany; Prosecutor/Germany; Prosecutor/Germany; Lawyer/Germany).

*“Ehrlich gesagt finde ich ansonsten den Umgang mit diesen Sicherungsmechanismen schon sehr zurückhaltend; etwa, dass die Handfesseln gelöst werden, wenn derjenige dann im Gerichtssaal ist. Dass dann ja in der Regel auch erst das Filmen beginnt, wenn derjenige im Saal ist, dass er dann in der Regel schon keine Handfesseln mehr trägt.” (Strafverteidiger\_in/Deutschland)*

*“To be honest, I think these measures are handled in a very reserved manner. For example, the handcuffs are released when the person is in the courtroom; or the filming usually only begins when the person is in the courtroom, when he or she is usually not wearing handcuffs anymore.” (Lawyer/Germany)*

One lawyer contemplated that one could maybe take off the handcuffs before the people were brought into the courtroom but was not sure whether this would still meet the security requirements (Lawyer/Germany). Another defence lawyer stated that in his/her personal opinion, filming in the courtroom could generally be forbidden (Lawyer/Germany).

#### d. Reactions to presenting accused as being guilty

All interviewees stated that it was possible to legally object to measures such as handcuffs or separate seating, if one was convinced that they were not necessary.

*“Der Verteidiger kann dagegen vorgehen, klar. Beschwerden kann man sich bei uns über wirklich alles und für alles gibt es Rechtsmittel.”* (Richter\_in/Deutschland)

*„Of course, the defence lawyer can take action against this. One can literally complain about everything and there are remedies for everything.”* (Judge/Germany)

That being said, however, a group of the interviewees stated that they never had to deal with the issue of a remedy against these measures in their professional lives before (Judge/Germany; Judge/Germany; Prosecutor/Germany). One judge stated that this might be due to the fact that she worked at a district court where more drastic measures such as security glass were not used. However, she remembered that she had observed discussions about measures as separate seating in glass cases at the regional court (*Landgericht*):

*“Die kommen nur zum Einsatz in Fällen, [...] wo ein gewisses Gefährdungspotenzial gegeben ist. [...] Ich habe schon erlebt, dass [gefragt wurde], ob es wirklich nötig, dass [der] Mandant hinter Glas sitzt und dann wurde das kurz diskutiert. Wenn es vertretbar ist, lässt jeder Vorsitzende zu, [dass sie neben Anwalt sitzen dürfen.] Aber jetzt zum Beispiel im Rockerprozess, wo zehn Angeklagte saßen, die sind dann ja auch wegen Mordes verurteilt wurden, die sitzen natürlich nicht zwischen ihren Verteidigern. [...] Das wäre ja ein Risiko, das kann keiner eingehen.”* (Richter\_in/Deutschland)

*“They are only used in cases where there is a certain risk potential.[...] I have already experienced that [defence lawyers have asked] whether it was really necessary for [their] client to sit behind glass, and then this was briefly discussed. If it is justifiable, every judge will allow [the client to sit next to his lawyer.] [...] But for example in the 'biker trial', in which there were ten defendants – who were eventually convicted of murder – they were of course not sitting between their lawyers. [...] That would be a risk nobody could take.”* (Judge/Germany)

However, another judge, who once had a case of alleged terrorism, in which there was a police special task force present and all kinds of security measures were ordered, recalls that even then, no remedies were raised (Judge/Germany).

A larger group of defence lawyers has made experiences with remedies, however. One of the lawyers did not consider them to be very effective, though, as the measures were reviewed by the same judge who ordered them (Lawyer/Germany). In addition, s/he and another defence lawyer reported that they did not succeed with a remedy against the separate seating of a defendant, because it was justified with the structural conditions of the courtroom (Lawyer/Germany; Lawyer/Germany). Another defence lawyer reported that s/he regularly raised remedies and that it was also possible to ask for an interruption to formulate the concerns s/he had about these measures in writing (Lawyer/Germany). S/He added that these remedies could be raised immediately. A couple of interviewees further mentioned that it would theoretically be possible to file a motion for fear of bias against the judge if he or she ordered the measures for no reason, but in practice, they did not experience a situation in which they needed to do so. One of the defence lawyers shared another practical experience s/he made with remedies against restraint measures: When s/he asked the judge whether s/he could refrain from ordering these measures, the judge replied that he would try them on the first day and then see how it developed in the following days. The lawyer suspected that this ‘pragmatic solution’ was applied by the judge, because the press was there only during the first day (Lawyer/Germany).



#### e. Discussion of findings

The findings show that the requirements of Article 5 of Directive 2016/343 are essentially fulfilled. The legal situation in Germany, for example, only allows judges to order handcuffs for reasons of security, such as a concrete risk of physical harm or a risk of flight. Overall, it was reported that these measures were used in a rather restrained manner, so that defendants often sat in the courtroom without handcuffs. However, it should be noted that these measures are ordered by the presiding judge, who has discretionary powers. In practice, this led to a divergence in the interviewees' perception of whether the ordering of handcuffs was always necessary.

Some interviewees, in particular defence lawyers, stated that handcuffs and other measures would have a stigmatising effect, could therefore potentially affect the presumption of innocence, and would often not be necessary for security reasons. If a defendant considers the measures to be unreasonable, there are remedies available. While some interviewees complained that they were not particularly effective, others considered the legal options to be sufficient. The fact that several interviewees stated that they had never experienced that remedies were taken against these measures, might also indicate that these are used appropriately in most cases.

Furthermore, accused persons are allowed to cover their face when the media is present and to wear clothes of their own choice. Therefore, there is no risk that accused persons will have to wear 'symbols of guilt' such as prison clothes, or have their face photographed.

In addition, there are safeguards for young people, as proceedings against them are not public. Likewise, police officers indicated that they would be more careful with young people in investigative measures, e.g. by generally not using handcuffs. As far as general safeguards applying to all groups of defendants are concerned, the interviews revealed that defendants from pre-trial detention in Berlin were led through an underground corridor so that they did not have to walk past the public into the courtroom. The police officers also stated that under special circumstances, handcuffs could be covered, or suspects could be led out the back door during arrests in public, although this was not the norm.

#### **C.4 Burden of proof**

First, this chapter gives an overview of the legal situation regarding the burden of proof in criminal proceedings. This is followed by a presentation of the interviewees' reflections as to whether there are exceptions to the requirement for the prosecution to convince the court of the defendant's guilt. Furthermore, the effect of confessions on the criminal procedure is discussed. The chapter ends with a discussion of the findings.

#### **Legal overview**

In the German criminal justice system, the public prosecutor's office is not a party. Thus, the prosecution is obliged not only to unilaterally collect evidence of the suspect's guilt, but it must also investigate in favour of the accused person, section 160 (1), (2) Code of Criminal Procedure (*StPO*). The court investigates the facts of the case *ex officio* and thus tries to find out what truly happened, section 244 (2) Code of Criminal Procedure (*StPO*). The trial follows the principle of free judicial assessment of evidence, section 261 Code of Criminal Procedure (*StPO*). If the Court still has reasonable doubt after the assessment of all evidence, the decision rule of the benefit of the doubt (*in dubio pro reo*) applies. This means that the Court has to decide in favour of the defendant by

choosing the most favourable conclusion for the defendant from several possible conclusions.<sup>24</sup> This rule is universally accepted and applied, but not mentioned in the Code of Criminal Procedure (*StPO*) and the Federal Constitutional Court (*Bundesverfassungsgericht*) has so far left open whether it has constitutional rank.<sup>25</sup>

A confession is not an exception to the presumption of innocence. The court must be convinced that the confession is correct if it bases the defendant's conviction on it. According to the case law of the Federal Court of Justice, a confession does not relieve the judges of their duty to subject it to a critical review for plausibility and validity and to relate it to the other evidence.<sup>26</sup> In practice, a confession is often made within the framework of a plea bargain (*Verständigung im Strafverfahren*) pursuant to section 257c of the Code of Criminal Procedure (*StPO*). Section 257c of the Code of Criminal Procedure (*StPO*) provides that the court may agree with the prosecution and the defence on the outcome of the proceedings, in particular on the maximum sentence in the event that the accused makes a confession. The public prosecutor's office and the court often have an interest in such an agreement because it can reduce the time and effort of the proceedings. The advantage for the accused is that they gain certainty about the outcome of the proceedings and receive a lesser sentence due to the confession. The legal regulations on plea bargaining are conclusive and informal agreements are not permitted.<sup>27</sup> The BGH clarifies that the above-mentioned standards for the review of a confession also apply for confessions that were made within the framework of a plea bargain.<sup>28</sup>

With regard to the burden of proof, there are currently discussions on legislation on criminal asset recovery (*strafrechtliche Vermögensabschöpfung*),<sup>29</sup> i.e. measures that have an effect on the confiscation of assets, but not on the burden of proof in the event of a conviction in general. For example, the Federal Chamber of Lawyers and the Criminal Defence Lawyers' Association have criticised in part a new provision in section 76a (4) Penal Code (*Strafgesetzbuch, StGB*), section 437 Code of Criminal Procedure (*StPO*). According to this provision assets of unclear origin can be confiscated (*Einziehung*) regardless of proof of a concrete illegal act if they are considerably disproportionate to the lawful income of the suspect. The critics argue that this means in practice a reversal of the burden of proof. The person whose asset was confiscated would then have to substantiate that there was no criminal origin and offer appropriate evidence. The critics say that the provision violates the presumption of innocence and freedom to give evidence of the accused and restricts the freedom of the judge to assess evidence under section 261 Code of Criminal Procedure (*StPO*) in an inadmissible manner.<sup>30</sup>

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<sup>24</sup> Germany, Federal Court of Justice (Bundesgerichtshof), Karlsruhe/2 StR 198/06, 30 August 2006, available at <https://dejure.org/ext/d911a5c336de3db671eeafac5949d494>.

<sup>25</sup> Germany, Federal Constitutional Court (Bundesverfassungsgericht), Karlsruhe/2 BvR 814/87, 23 September 1987.

<sup>26</sup> Germany, Federal Court of Justice (Bundesgerichtshof), Karlsruhe/2 StR 322/15, 29 December 2015, available at <https://lexetius.com/2015,4763>

<sup>27</sup> Germany, Federal Constitutional Court (Bundesverfassungsgericht), Karlsruhe/2 BvR 2628/10, 19 March 2013, available at [www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/03/rs20130319\\_2bvr262810.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/03/rs20130319_2bvr262810.html).

<sup>28</sup> Germany, Federal Court of Justice (Bundesgerichtshof), Karlsruhe/2 StR 322/15, 29 December 2015, available at <https://lexetius.com/2015,4763>

<sup>29</sup> Act for the Reform of the Criminal Asset Recovery (*Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung*), available at [www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&start=/\\*\[@attr\\_id=%27bgbl117s0872.pdf%27\]](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=/*[@attr_id=%27bgbl117s0872.pdf%27]).

<sup>30</sup> Köllner, R., Mück, J. (2017), 'Reform der strafrechtlichen Vermögensabschöpfung', *Neue Zeitschrift für Insolvenz- und Sanierungsrecht (NZI)*, pp. 593-599.

Finally, in this context, the penalty order procedure (*Strafbefehlsverfahren*) pursuant to section 407 Code of Criminal Procedure (*StPO*) may be briefly mentioned. This is a simplified procedure without a trial for dealing with minor crimes. For this the court does not have to be convinced of the accused's guilt, but it is sufficient that the guilt is probable (*hinreichender Tatverdacht*). After having received the penalty order, the accused can lodge an objection within two weeks. If they do so, a main hearing is held; if they do not, the penalty order is equivalent to a final judgment, section 410 (3) Code of Criminal Procedure (*StPO*).

a. Exceptions to the burden of proof

All interviewees stated that there were no legally prescribed exceptions to the presumption of innocence. A couple of interviewees named procedural measures, such as apartment searches, as an example, in which a certain degree of suspicion sufficed for the authorities to act (Prosecutor/Germany; Lawyer/Germany). A larger group of interviewees stated that in case of overwhelming evidence, such as video recordings or if a person was caught in the act, this would still not lead to a reversal of the presumption of innocence, as just the probability that the suspect had actually committed the crime would be significantly higher and thus, the proceedings would be clearer (Judge/Germany; Lawyer/Germany; Police officer/Germany).

Apart from the non-existence of legally prescribed exceptions, though, a larger group of interviewees, including a judge and three defence lawyers, described that in their view, the criminal procedure in Germany was suffering from several systematic issues that could potentially reverse the presumption of innocence in practice (Judge/Germany; Lawyer/Germany; Lawyer/Germany; Lawyer/Germany). The most important issues they identified, were as follows:

According to the group of interviewees, major issues originated from the way the criminal procedure was designed. In brief, the criminal procedure consists of three stages. The first stage, the investigative proceedings (*Ermittlungsverfahren*), is followed by the second stage, the intermediate proceedings (*Zwischenverfahren*). During the intermediate proceedings, a judge reviews the indictment filed by the public prosecutor's office at the end of the investigative proceedings. If the judge comes to the conclusion that based on this information, a conviction is likely, he or she will accept the indictment to the main trial (*Hauptverhandlung*), the third stage of the proceedings.

The interviewees saw several issues related to the intermediate proceedings. First of all, they criticised the fact that pursuant to the law, the judge who reviewed the indictment during the intermediate proceedings and decided whether a conviction in the main trial would be likely, was the same judge who would be in charge of the main trial later on. The interviewees explained that this could lead to a biased judgment in the main trial. In their view, it was scientifically proven that people tended to have problems reviewing their own decisions critically. In this context, one interviewee pointed out the importance of the so-called *inertia* effect (Lawyer/Germany). According to her, this effect described the phenomenon that the human brain functioned in such a way that if one already had a hypothesis (e.g. 'X is the perpetrator'), one would only look for clues that confirmed this hypothesis. Hence, one would undervalue clues that spoke against the hypothesis. The interviewees stated that this could lead to judges merely searching for clues in the main trial to prove their preliminary decision made during the intermediate proceedings. In their view, however, this would not be in accordance with the law, as the code of criminal procedure prescribed that an accused person could only be sentenced on the basis of the main trial. The interviewees added that there were empirical studies on this issue. According to them, these showed through experiments that judges who did not know the file acquitted a significant amount more people in the main trial than judges who had knowledge of the file.

*“Das größte Problem in Deutschland für die Unschuldsvermutung [...] ist, dass bei uns der gleiche Richter oder die gleiche Richterin über die Eröffnung des Verfahrens entscheidet, die auch über das Urteil entscheidet. Also die Staatsanwaltschaft schickt eine Anklage und du liest dir das durch als Richter, sagst, ja, klingt gut, unterschreibe ich mal, ich lasse das Hauptverfahren zu und dann letztlich findet eine Beweisaufnahme statt und du sollst deine eigene Entscheidung im Nachhinein nochmal überprüfen. Aber wie gehen wir mit unseren eigenen Entscheidungen um? Also wir als Menschen und ich bin genauso, wir finden doch immer alles richtig, was wir früher gemacht haben.”* (Strafverteidiger\_in/Deutschland)

*“The biggest problem in Germany for the presumption of innocence [...] is that in our country the same judge decides on the opening of the main trial as decides on the final judgment. So the public prosecutor's office sends the indictment and you read through them as a judge, say, yes, this sounds good, I'll sign it, I'll start the main trial and then finally there is a hearing of evidence in the trial and you yourself should review your own decision afterwards. But how do we deal with our own decisions? We as humans, and I am the same, we always find everything right, what we did before.”* (Lawyer/Germany)

*“Es gibt in der StPO ganz wenig bis keine Vorkehrungen, dass sich Richter nicht mit derselben Sache nochmal beschäftigen. [...] Die ganzen psychologischen Effekte, die alle komplett nachweisbar sind – die StPO tut so als gäbe es die nicht.”* (Strafverteidiger\_in/Deutschland)

*“In the code of criminal procedure, there are very little to no safeguards to prevent that a judge works on the same case twice [...] All these psychological effects, that are all scientifically proven – the code of criminal procedure pretends that they do not exist.”* (Lawyer/Germany)

According to an interviewed lawyer, the *inertia* effect came into play during another part of the intermediate proceedings. S/He described that the judge who was in charge of the intermediate proceedings received the files including the indictment. From his/her experience, the judge would look at the indictment first and then at the files quickly. Due to the *inertia* effect, the judges would instinctively perceive everything that spoke for the hypothesis formed by the indictment much more strongly than everything that spoke against it while reading through the files.

*“Dieser Inertia-Effekt sorgt dafür, dass der Richter, wenn er sich nach der Anklage die Akten anguckt, nur nach Anhaltspunkten dafür sucht, die dieses Ergebnis bestätigen. Das ist nicht, weil er ein schlechter Mensch ist, sondern weil einfach unser Gehirn so funktioniert, dass wir alles, was für unsere Hypothese spricht, deutlich stärker wahrnehmen als alles, was dagegenspricht.”* (Strafverteidiger\_in/Deutschland)

*“The inertia effect ensures that when the judge looks at the files after having read the indictment, he will only look for clues that confirm this result. This is not because he is a bad person, but simply because our brain functions in such a way that we perceive everything that speaks for our hypothesis much more strongly than everything that speaks against it.”* (Lawyer/Germany)

According to her, there were also experimental studies that proved this phenomenon. S/He explained that the studies had been conducted on the basis of experiments with judges in comparison groups, with one of them receiving just the file and the other one receiving the identical file including the indictment. The interviewee said that the judges who had just the files, discontinued the intermediate proceedings and did not accept the case to the main trial significantly more often than the judges who also received the indictment. S/He added that the *inertia* effect was even increased by the fact that

there was a certain amount of trust between the public prosecutor's office and the court, so that the judges would tend to believe that the indictment was rather reasonable:

*“Weil die Staatsanwaltschaft ihm als Justizbehörde relativ nahesteht, gibt es da auch erstmal ein gewisses Vertrauen mit einem gewissen Schulterschluss, dass man erstmal als Richter denkt: „Okay, kompletter Quatsch wird es nicht sein, was der Staatsanwalt da gemacht hat.““* (Strafverteidiger\_in/Deutschland)

*“Since the public prosecutor's office is relatively close to him as a judicial authority, there is also a certain trust with a certain solidarity, so that one, as a judge, thinks: "Okay, it will not be complete nonsense what the public prosecutor has done there.”“* (Lawyer/Germany)

The interviewee claimed that these systematic errors often lead to a confirmation of the investigation hypothesis which would result in just 3.5 percent acquittals, which was, according to her, a considerably low rate. Against the backdrop that the courts and the public prosecutor's office were overburdened with work, s/he found it hard to believe that they were right with their investigative hypothesis so many times.

In view of the aforementioned issues, s/he reported that s/he had to explain his/her clients that they had to refute all accusations as quickly as possible once the case was at the stage of the main trial, which would mean for him/her that the presumption of innocence was practically turned into the opposite.

*“Das ist der größte Knackpunkt im System und das ist auch der größte Knackpunkt, wo die Unschuldsvermutung faktisch ins Gegenteil verkehrt wird.”* (Strafverteidiger\_in/Deutschland)

*“This is the biggest problem in the system, since the presumption of innocence is effectively turned into the opposite.”* (Lawyer/Germany)

As mentioned above, a group of interviewees, including defence lawyers and a judge, criticised the same systematic issues. The existence of these issues was in principle acknowledged by the interviewed public prosecutors as well, although they did not seem to see them as equally big problems (Prosecutor/Germany; Prosecutor/Germany).

In addition, two defence lawyers mentioned that there were other instances in which judges had to review their own decisions, such as the penalty order (*Strafbefehl*). This is a simplified, written procedure without a trial for dealing with minor crimes. If the accused lodges an objection against the order, a main hearing will take place, which is conducted by the same judge who signed the penalty order before and therefore already expressed that he or she considered the defendant's guilt to be probable (*hinreichender Tatverdacht*):

*“[Im Strafbefehlsverfahren läuft es dann] so: Der Richter unterschreibt einen Strafbefehl, ein schriftliches Urteil, [...] Dann wird Einspruch eingelegt und jetzt muss er seinen eigenen Schuldspruch nochmal korrigieren, wenn er zu einem anderen Ergebnis kommen will. Das macht er nicht. Und das ist [...] ein Riesenproblem.”* (Strafverteidiger\_in/Deutschland)

*„[In the penalty order proceedings it goes] like this: The judge signs a penalty order, a written judgement, [...] Then an appeal is filed and now he will have to review his own conviction again, if he wants to come to a different result. He does not do that. And that is [...] a major problem.”* (Lawyer/Germany)

One defence lawyer expressed the view that the reform of criminal asset recovery rules (*strafrechtliche Vermögensabschöpfung*) interfered strongly with the presumption of innocence. According to him/her, the law prescribed that for a confiscation of assets, it was not necessary to provide concrete evidence of an illegal act, but a suspicion that the assets originated from a criminal offence was sufficient. S/He gave an example of a client that showed in his/her view, how this new law worked in practice:

*“[Eine Frau] wurde [...] von Polizeibeamten kontrolliert [...] und bei ihr wurden im BH 500 Euro gefunden. Sie sagte, [dass das ihre] Sozialleistung [war], [...] die [ihr] in bar ausgezahlt [wird], weil [sie] kein Konto [hat] [...] Diese 500 Euro wurden beschlagnahmt [...], weil die Staatsanwaltschaft sagt: „[...] Die ist ja schon öfter wegen Diebstahl verurteilt worden und jetzt finden wir 500 Euro in bar – das finden wir unplausibel [...] Das muss aus irgendeiner Straftat herrühren und wird beschlagnahmt.“”* (Strafverteidiger\_in/Deutschland)

*“[A woman] was [...] checked by police officers [...] and 500 euros were found in her bra. She said that this [was] her social benefit, [...] which [she] is paid out in cash because she does not have a bank account [...] These 500 euros were confiscated [...] because the public prosecutor's office says: “[...] She has been convicted of theft several times before and now we find 500 euros in cash – we find that implausible [...] It must have come from some kind of crime and it will therefore be confiscated.””* (Lawyer/Germany)

#### b. Confession

All interviewees stated that a confession before a court was not considered as exception to the presumption of innocence. Even though one interviewed judge said that it was an exception, this has to be put into perspective, as she went on to explain that according to case law of the Federal Court of Justice, the confession had to be reviewed for credibility, plausibility and consistency with other evidence (Judge/Germany). A larger group of interviewees pointed out that it was important to review the confession, as defendants might have reasons to confess a crime they did not commit, such as for instance protecting another person (Judge/Germany; Judge/Germany; Lawyer/Germany; Police officer/Germany; Police officer/Germany).

*“Es hat schon immer Kriminalfälle [gegeben], wo jemand [...] ein Geständnis abgelegt hat, um jemanden zu schützen [...] Die Aufgabe der Polizei und der Staatsanwaltschaft ist, das [...] kritisch zu hinterfragen und die innere Logik und die Motivationslage und die Tatabläufe [...] aufzuhellen.”* (Polizist\_in/Deutschland)

*“There have always been criminal cases in which someone [...] has made a confession in order to protect someone [...] The task of the police and the public prosecutor's office is to critically question this [...] and to shed light on the inner logic and the motivations and the course of the crime [...].”* (Police officer/Germany)

Despite the fact that all interviewees were aware that a confession needed to be reviewed, their experiences with the effect of a confession on the proceedings differed quite a bit. On the one hand, all interviewees generally agreed that there was no ‘guilty plea’, so that confessions had to be reviewed to some extent and if they did not fit with the rest of the case, they would not be sufficient for a conviction. On the other hand, however, several of the defence lawyers shared the impressions that confessions were sometimes not checked from all sides, leaving a margin for error. One lawyer stated that according to research, 15 to 20 percent of confessions were false, which meant for him/her that a confession should not be sufficient as evidence (Lawyer/Germany). S/He therefore expressed his/her dissatisfaction with the way the courts dealt with confessions in practice:

*“Da weichen Theorie und Praxis enorm voneinander ab. In der Theorie muss es so sein, dass das Geständnis einer beschuldigten Person ein Beweismittel ist wie andere auch. Spricht dafür, dass der Vorwurf zutrifft, muss aber auch nicht stimmen. [...] Das passiert aber in der Praxis nicht. [...] Wenn meine Mandanten oder Mandantinnen ein Geständnis abgeben, dann werden sie dafür verurteilt und eine weitere Beweisaufnahme findet in aller Regel nicht mehr statt.”* (Strafverteidiger\_in/Deutschland)

*“Theory and practice differ enormously. In theory, the confession of an accused person is evidence like any other. It suggests that the accusation is true, but it does not have to be true either. [...] But that does not happen in practice. [...] When my clients make a confession, they are convicted for it and a further hearing of evidence usually does not take place anymore.”* (Lawyer/Germany)

In this context, the lawyer mentioned that one of his/her clients was accused of spraying graffiti and confessed to cover up his/her friends, although s/he was innocent. According to the interviewee, s/he was convicted even though there were no fingerprints or witnesses (Lawyer/Germany). Another defence lawyer stated that after a confession, the main trial would be completely different, as it included significantly less witnesses or other evidence and the confession would just be checked ‘a bit’:

*“Das ist glaube ich da an dem Punkt sehr anders als in den USA und deswegen hat man hier auch diese Problematik falscher Geständnisse oder erzwungener Geständnisse glaube ich zu einer geringeren Marge, weil niemand nur aufgrund eines Geständnisses, was überhaupt nicht zum Rest passt, verurteilt werden würde. Aber trotzdem ist es faktisch so, dass es eine Hauptverhandlung total abkürzt.”* (Strafverteidiger\_in/Deutschland)

*“I believe that this is very different at this point from the situation in the USA, and [...] this problem of false confessions or coerced confessions has a smaller margin here, because nobody would be convicted just on the basis of a confession that does not fit in with the rest of the case. But still, in fact, a confession shortens a trial completely.”* (Lawyer/Germany)

Most interviewee’s reflections show that a confession generally shortens proceedings. On the other hand, a police officer noted that the police had to investigate even more intensively if a confession had been made, so that the court and the public prosecutor's office had sufficient facts to review the confession for plausibility properly (Police officer/Germany).

Generally, the effect of a confession seems to depend highly on the individual case: A group of interviewees, including the judges and a police officer, stated that in cases, in which there was little at stake, a confession was rather believed than in cases, in which there was a lot at stake, such as cases of alleged murder for instance (Judge/Germany; Police officer/Germany). Another police officer explained that particularly in case of violent crimes, certain findings in the crime scene were not disclosed to the accused to be able to rule out implausible confessions and to test, whether the suspects knew what they should know if they were the perpetrator (Police officer/Germany). Another factor mentioned was the complexity of the case. In this respect, one of the lawyers reported that in a complex case of computer fraud (*Computerbetrug*) one of his/her clients made a comprehensive confession and there were still 10 more trial days and multiple witnesses were heard. (Lawyer/Germany).

Nevertheless, one of the judges pointed out that even in case of minor offences, it would still be possible to hear witnesses after a defendant confessed, if there were any indications of contradictions (Judge/Germany).

A public prosecutor working in the area of drug-related crime and a police officer working in the area of human trafficking, both experienced that confessions were usually believed. They explained that this was due to the fact that in their respective areas of work, there was usually an extensive amount of evidence besides the confession so that most defendants would make a tactical confession towards the end of the proceedings to get a milder sentence. Thus, according to them, in these cases, there was usually no reason not to believe confessions as they were consistent with the other evidence.

*“Die meisten Fälle laufen so, dass man relativ umfangreiche [polizeiliche Ermittlungen hat], gerade in den Betäubungsmittelverfahren [...] Man hat beschlagnahmte Handys, [...] umfangreiche WhatsApp- oder andere Messenger-Chat-Verläufe, die man ausgewertet hat, man hat Telefone abgehört. [...] Irgendwann gestehen dann die Angeklagten in der Hauptverhandlung [...] Das ist ein taktisches Geständnis, weil sie sich dann natürlich zu Recht erhoffen, dass sie jetzt einen Strafrabatt bekommen.”* (Staatsanwält\_in/Deutschland)

*“Most of the time, you have relatively extensive police investigations, in particular in the drug cases [...] You have confiscated cell phones, [...] extensive WhatsApp or other messenger chat histories that you have analysed, you have phone taps [...] At some point in the main trial, the defendants will confess [...] This is a tactical confession, because of course, they rightly hope that they will get a lesser sentence.”* (Prosecutor/Germany)

*“Bei unseren Verfahren ist es [...] nicht in der Regel, sondern immer so: Wenn wir ein Geständnis bekommen, dann am Ende des Verfahrens.”* (Polizist\_in/Deutschland)

*“In our proceedings it is [...] not as a rule, but always like this: if we get a confession, then at the end of the proceedings”* (Police officer/Germany)

The effect of receiving a milder sentence was also mentioned by a larger group of interviewees, often in the context of a plea bargain (often referred to by the interviewees as ‘deal’) (Judge/Germany; Judge/Germany; Lawyer/Germany; Lawyer/Germany; Lawyer/Germany; Lawyer/Germany; Police officer/Germany). The plea bargain, which is regulated conclusively by law in section 257c Code of Criminal Procedure, is most commonly applied for an agreement on the expected sentence in the event of a confession. One of the defence lawyers pointed out that there was case law that determined how detailed a confession had to be within a framework of a ‘deal’ for further witnesses to be dispensable (Lawyer/Germany). In the eyes of another defence lawyer, ‘deals’ put defendants under a lot of pressure nonetheless, which could make them confess more than they actually did. S/He explained that some defendants would prefer having a lower sentence rather than having to proceed for a very long time without having any certainty about the result. According to him/her, this was a difficult situation for all lawyers, as they were not allowed to advise clients to make a false confession (Lawyer/Germany). The issue of false confessions within the framework of a plea bargain was acknowledged by an interviewed judge:

*“Es gibt oft genug Fälle eines falschen Geständnisses, gerade in Verbindung mit § 257c (Strafprozessordnung, StPO) nämlich dem Deal. Zwei Jahre Strafe [für ein Geständnis], das ist so ein tolles Angebot für viele Straftäter, sodass sie lieber gestehen, auch wenn es nicht stimmt. Dann bin ich verpflichtet, das Geständnis zu überprüfen.”* (Richter\_in/Deutschland)

*“There are often enough cases of a false confession, especially in connection with section 257c Code of Criminal Procedure, namely the deal. A sentence of two years [for a confession], that is such a great offer for many offenders that they prefer to confess even if it is not true. Then I am obliged to review the confession.”* (Judge/Germany)



As far as vulnerable groups were concerned, the interviewees could not name safeguards that would go significantly beyond the described duty to review each confession individually for plausibility, consistency etc. A lawyer mentioned that there was a relatively new legal provision requiring that a defence lawyer had to be present at the first interrogation, which s/he found a useful development in the Code of Criminal Procedure to protect the suspects' rights from the very beginning (Lawyer/Germany). Furthermore, a group of interviewees, including two police officers and a public prosecutor, mentioned that the police might stop interrogations in case of language barriers or assign an interpreter (Prosecutor/Germany; Police officer/Germany; Police officer/Germany; Police officer/Germany; Police officer/Germany). Ultimately, two interviewees explained that it was always possible to withdraw a confession (Lawyer/Germany; Police officer/Germany).

### c. Discussion of findings

Although there are no statutory exceptions to the presumption of innocence, the findings of the interviews suggest that the requirements of Article 6 of Directive 2016/343 are not fully met in practice.

According to several interviewees, systematic issues of the criminal procedure in Germany could potentially lead to a reversal of the presumption of innocence in practice. The criticism was directed above all against the design of the three stages of criminal proceedings, which provides that after the conclusion of the investigative proceedings, the judges must make a decision in the so-called intermediate proceedings (*Zwischenverfahren*) on the prospects of success of the indictment, which they must then review themselves in the main trial (*Hauptverhandlung*). This constellation, in which judges have to re-examine their own previous decisions, can, according to several interviewees, lead to a bias on the part of the judges. In their view, this may put considerable pressure on the defence to refute the accusations. Another systematic issue mentioned by one interviewee in this context was that during the intermediate proceedings, the judges would receive the indictment alongside the files. According to her, this bears the risk that judges might save time by believing the indictment's reasoning instead of reading through the entire file themselves.

It could be considered, first of all, that this criticism was mainly brought up by defence lawyers, who would overvalue these problems as they are to the detriment of their clients. However, the issue was also seen as particularly serious by one judge, and the public prosecutors acknowledged it in principle as well, only stating that they had no solution to the problem. This suggests that this may indeed be a systematic problem for which possible solutions – such as different judges for intermediate and main proceedings – should be discussed.

The question raised at the beginning of this chapter as to whether the reform of the criminal asset recovery law was compatible with the presumption of innocence, is also worth mentioning at this point. The experience of a lawyer indicates that this law has the effect in practice of confiscating assets from individuals on the basis of only a suspicion that the money originated from some crime. Since it is not necessary to prove from which concrete criminal act the money originates, the law is at least legally debatable.

There are also some challenges regarding the effect of confessions. The interviews revealed that, in accordance with the legal requirements, in practice a confession was reviewed for credibility, plausibility and consistency with other evidence. According to some of the interviewees, the main problems seemed to originate from the fact that confessions were often not reviewed thoroughly enough, so that false confessions could still occur. However, there were no clues in the interviews that a completely implausible confession could lead to a conviction. On the whole, the problems with regard to confessions therefore seem to be rather always to be considered in the context of the concrete individual case.

In the eyes of some interviewees, the case seemed to be more problematic if the confession was made in the context of a plea bargain. Here, they warned that the prospect of a lower sentence through a plea bargain carried the risk of putting the defendants under great pressure to make a confession, even if they were in fact not guilty. This issue was raised by several interviewees and should therefore be taken seriously. However, it should also be pointed out that the plea bargain is a formalised procedure and that the same requirements in terms of plausibility and credibility of the confession apply as in all other cases, which may decrease the risk of false confessions to some extent. A confession that is contradictory or completely unfounded should therefore not be able to lead to a plea bargain.

### **C.5 The right to remain silent and not to incriminate oneself**

In this chapter, the legal basis of the right to remain silent and the right not to incriminate oneself will be outlined first. Then, it will be discussed how these rights are implemented by the different professional groups among the interviewees. At the end of the chapter the results are summarised and analysed.

#### **Legal overview**

Despite its pivotal role for the legal position of the accused, the right not to incriminate oneself is neither prescribed explicitly by the Basic Law (*Grundgesetz*) nor by the Code of criminal procedure. However, its constitutional status is undisputed, with the prevailing view arguing that it is part of the human dignity.<sup>31</sup> Furthermore, it is reflected in several provisions in the Code of Criminal Procedure (*StPO*), such as sections 55, 136 (1), 136a (1), (3), 163a (3) and 243 (4) sentence 1. The most important manifestation of the right not to incriminate oneself is the right to remain silent. For this purpose, the law provides for an explicit duty to inform in section 136 (1), 55 (2) Code of Criminal Procedure (*StPO*). This information must provide the accused with clarity about their rights.<sup>32</sup>

Furthermore, the freedom from self-incrimination exempts the accused from any active participation in the clarification of the facts of the case. Therefore, they are not obliged, for example, to give a sample of their writing or voice for purpose of the preparing an expert opinion.<sup>33</sup> The principle does not prohibit that in certain situations the accused are forced to passively undergo evidence collection measures directed against them.<sup>34</sup> The question of whether the principle also protects against unconscious self-incrimination, which has been provoked by the law enforcement authorities by means of deception, such as listening traps or undercover investigators, is highly controversial and has not been conclusively clarified. According to the case law of the Federal Court of Justice (*Bundesgerichtshof*), with reference to the ECtHR, the principle appears at least to protect the defendants if psychological pressure was exerted on them in the course of the undercover interrogation.<sup>35</sup> In another case, in which the defendant revealed himself during a conversation by means of a listening device – without coercion – of his own free will and could have interrupted the conversation at any time, the Federal Court of Justice (*BGH*) did not see an interference with the

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<sup>31</sup> Germany, Federal Constitutional Court (Bundesverfassungsgericht), Karlsruhe/1 BvR 116/77, 13 January 1981.

<sup>32</sup> Germany, Federal Court of Justice (Bundesgerichtshof), Karlsruhe/3 StR 63/10, 29 April 2010, available at [www.hrr-strafrecht.de/hrr/3/10/3-63-10.php](http://www.hrr-strafrecht.de/hrr/3/10/3-63-10.php).

<sup>33</sup> Germany, Federal Court of Justice (Bundesgerichtshof), Karlsruhe/3 StR 551/85, 9 April 1986.

<sup>34</sup> Germany, Federal Constitutional Court (Bundesverfassungsgericht), Karlsruhe/2 BvR 2360/95, 15 September 1999, available at [www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1999/09/rk19990915\\_2bvr236095.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1999/09/rk19990915_2bvr236095.html).

<sup>35</sup> Germany, Federal Court of Justice (Bundesgerichtshof), Karlsruhe/3 StR 104/07, 26 July 2007, available at [www.hrr-strafrecht.de/hrr/3/07/3-104-07.php](http://www.hrr-strafrecht.de/hrr/3/07/3-104-07.php).

freedom from self-incrimination.<sup>36</sup> If accused persons decide to remain silent, there must be no disadvantages for them. The Court must not, for instance, justify a conviction on the grounds that the silence of the accused could be interpreted as implying that they had something to hide.<sup>37</sup> If – on the other hand – the defendant decides not to give information on certain aspects but to testify on the rest, it is possible to draw adverse conclusions from this partial silence.<sup>38</sup> In this case, the accused voluntarily made themselves available as evidence and thereby waived their freedom from self-incrimination.

If the freedom from self-incrimination is violated, the evidence obtained in this way must not be used. If the court uses the evidence nevertheless, and bases its judgment on this evidence, an appeal (*Revision*) can be lodged. However, in several cases, the Federal Court of Justice (*BGH*) requires that accused persons who have a defence lawyer object to the use of the evidence during the hearing (*Widerspruchslösung*). If they do not object, the evidence can be used and an appeal against the use of the evidence is no longer possible. The same applies to defendants who do not have a lawyer but were informed about this by the judge.<sup>39</sup> Furthermore, section 136a Code of Criminal Procedure (*StPO*) contains prohibited methods of interrogation, such as torture. Evidence obtained in this way must not be used even if the defendant consents to it, section 136a (3) sentence 2 Code of Criminal Procedure (*StPO*).

#### a. The right to remain silent in practice

The judges stated that informing the defendants about their right to remain silent was an essential part of the proceedings and that they would always do so before the defendants said anything (Judge/Germany; Judge/Germany). One judge summed up the importance of providing the defendant with this information as follows:

*“Das wäre ja der größte Fehler schlechthin, das als RichterIn nicht zu machen.”*  
(Richter\_in/Deutschland)

*“It would be the biggest mistake of all not to do that as a judge.”* (Judge/Germany)

The public prosecutors indicated that they did not implement the right to remain silent themselves as they were not present when the police did so during the investigative measures and in court, this was done by the judge. However, one public prosecutor mentioned that he might have to do some interrogations himself in the future so that he would have to inform the suspects about their right to remain silent as well (Prosecutor/Germany). None of the interviewees noticed any problems related to this in the courtroom, as they all made the experience that the judges respected the right to remain silent and informed correctly.

The interviewed police officers considered it as their ‘primary duty’ to inform the suspects about their rights, because according to them, otherwise the whole investigation measures would not have any value for the proceedings (Police officer/Germany; Police officer/Germany, Police officer/Germany; Police officer/Germany). However, the police’s implementation of the right to remain silent was a major point of discussion among all interviewed defence lawyers, as they made deviating experiences

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<sup>36</sup> Germany, Federal Court of Justice (Bundesgerichtshof), Karlsruhe/3 StR 400/10, 31 March 2011, available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=56378&pos=0&anz=1>.

<sup>37</sup> Germany, Federal Constitutional Court (Bundesverfassungsgericht), Karlsruhe/2 BvR 326/92, 7 July 1995.

<sup>38</sup> Germany, Federal Court of Justice (Bundesgerichtshof), Karlsruhe/4 StR 573/65, 3 December 1965.

<sup>39</sup> Germany, Federal Court of Justice (Bundesgerichtshof), Karlsruhe/5 StR 190/91, 27 February 1992, available at <https://openjur.de/u/173258.html>

in practice (see below). In this respect, one of the interviewed public prosecutors also admitted that he heard different things about the implementation of the right to remain silent by the police, but pointed out that he could not verify this:

*“Die Polizeibeamten belehren wohl in der Regel mündlich. Ich hoffe, dass sie auch immer belehren. Da hört man sehr unterschiedliche Dinge [...]”* (Staatsanwält\_in/Deutschland)

*“As a rule, the police officers provide the information orally. I hope that they always do so. People say different things about this [...]”* (Prosecutor/Germany)

The defence lawyers considered the implementation of the right to remain silent to be a fundamental element in their work and remaining silent to be a good idea in many instances. One lawyer explained that it was an important strategic decision which s/he often had to discuss with his/her clients. S/He believed that it depended highly on the individual case, but considered remaining silent generally a good idea:

*“Das ist eine ganz schwere Frage und auch oft ein großer Diskussionspunkt mit dem Mandanten, weil ganz viele Mandanten davon überzeugt sind, dass sie das ganz toll hinkriegen würden. Und dann schlottern ihnen so sehr die Knie vor Gericht, dass sie es eben doch nicht hinkriegen, selber was zu sagen.”* (Strafverteidiger\_in/Deutschland)

*“This is a very difficult question and often a major point of discussion with the client because many clients are convinced that they would do a great job. And then their knees shake so much in court that they just cannot manage to say anything themselves.”* (Lawyer/Germany)

Another lawyer also emphasised the importance of the right to remain silent in his/her work, stating that s/he would always advise clients to remain silent if they were arrested for example, because from his/her experience, it would always make things worse if one gave evidence without knowing the file.

*“Ich kenne keinen Fall, wo es sich irgendwie positiv ausgewirkt hat, auf einmal ohne Aktenerkenntnis irgendwas zu erzählen. Das heißt, es ist wirklich der Dreh- und Angelpunkt, das erste, worüber ich nachdenke.”* (Strafverteidiger\_in/Deutschland)

*“I do not know a single case, in which it had a positive impact if one started talking without knowing the file. This means the right to remain silent is really crucial and the first thing I think about.”* (Lawyer/Germany)

b. How is information on the right to remain silent and not to incriminate oneself shared with the accused?

A large group of interviewees explained that information about the right to remain silent was provided orally by the judges (Judge/Germany; Judge/Germany; Prosecutor/Germany; Prosecutor/Germany; Lawyer/Germany, Lawyer/Germany). One of the judges explained that she might adapt to the situation by asking accused persons that have a lawyer whether they talked about this before and might keep the information a bit shorter if needed. If accused persons were not defended, however, she stated that she would inform them particularly thoroughly and reassure herself whether they fully understood her.

*“Wenn ein Angeklagter nicht verteidigt ist, erkläre ich ihm dann auch alles ganz deutlich, damit er mich wirklich versteht; insbesondere bei Menschen, die aus anderen Kulturkreisen kommen, weil das da auch manchmal ganz anders gehandhabt wird.”* (Richter\_in/Deutschland)

*“If an accused does not have a lawyer, I explain it to him very clearly, so that he really understands me. Particularly with people from other cultures, because there the right to remain silent may be handled differently sometimes.” (Judge/Germany)*

The police officers indicated that they provided the information orally as well but recorded in writing that the information was given (Police officer/Germany; Police officer/Germany). One police officer mentioned that the suspects now even needed to sign that they received the information during an interrogation (Police officer/Germany). If suspects did not speak German, which a police officer working in the field of human trafficking experienced regularly, during interrogations the information would be read out and translated by an interpreter. According to the interviewee, everyone adhered to this formalised procedure (Police officer/Germany; Police officer/Germany; Police officer/Germany). Another police officer who had to inform suspects about their right to remain silent during field work, indicated that he tried to adapt to the situation and used rather simple words to guarantee that he was understood. He explained that there was no interpreter present during the investigative measures he participated in, so that he sometimes would have to arrange a new appointment if the suspects did not speak German, which could be communicated for instance by help of the suspects’ family members who spoke German (Police officer/Germany). Another police officer explained that he and his colleagues always ensured that the suspects understood the scope of their rights:

*“Es wird nicht nur runtergelesen, sondern es wird auch im Prinzip noch mal eine Verständnisfrage gestellt, wenn man den Eindruck hat, dass er/sie das – weil es doch ein bisschen juristisches Deutsch ist – vielleicht nicht verstanden haben könnte. Dann sind auch die Kolleg:innen so versiert und geschult, dass sie nachhaken und auch noch mal reflektieren, dass er/sie seine Rechte auf jeden Fall verstanden hat.” (Polizist\_in/Deutschland)*

*“It is not only read out, but in principle, questions are asked if one has the impression that he or she might not have understood it – because it is legal German after all. The colleagues are so well-versed and trained that they follow up and also reflect again whether he or she has understood his/her rights in any case.” (Police officer/Germany)*

That being said, the majority of the interviewed defence lawyers, some more than others, had experienced that the police regularly did not inform correctly or did not do it at all, in particular in case of ‘spontaneous’ statements. Two defence lawyers described this as follows:

*“[In der Akte] steht dann immer drin: „Nach Belehrung äußerte der/die Beschuldigte [...]“. Diese Belehrung findet aber nicht statt. Also da ist glaube ich so ein Defizit, gerade in der Situation vorläufige Festnahme auf der Straße, in so einer hektischen Situation, da finden regelhaft keine Belehrungen statt und werden nachher dazu gedichtet [Ob belehrt wurde oder nicht] lässt sich nicht mehr aufklären. Da würde sozusagen Aussage gegen Aussage stehen und die Gerichte glauben den Polizeibeamten in aller Regel.” (Strafverteidiger\_in/Deutschland)*

*“It always says in the file that the accused said something after being informed about his/her right to remain silent. But this information does not take place. I think there is a deficit, especially in the situation of temporary arrest on the street, in a hectic situation, there are usually no instructions and later they are claimed to have taken place. [...]. It can no longer be clarified, so there would be testimony against testimony, and the courts usually believe the police officers.” (Lawyer/Germany)*

*“Natürlich gibt es immer wieder Akten, die danach schreien, dass hätte belehrt werden müssen und nicht belehrt wurde. Es ist dann irgendwie von einer Spontanäußerung die Rede, obwohl*

*Polizisten in zivil bereits eine Beobachtung durchgeführt haben und dann die Person ansprechen [...] das scheint nicht plausibel zu sein.” (Strafverteidiger\_in/Deutschland)*

*“There are always files that cry out for it, that the police should have informed and did not inform. The files then speak of a spontaneous statement, although plain-clothes police officers had already observed the suspect before and then specifically addressed him [...] That does not seem plausible to me.” (Lawyer/Germany)*

All interviewed lawyers, public prosecutors and judges agreed in principle that it was inadmissible to use evidence if the suspects had not been informed about their right to remain silent before. Against the backdrop that this field of law is highly characterised by specific case law, some interviewees pointed out that they were not aware of all exact details (Prosecutor/Germany; Lawyer/Germany). One judge stated that it would be an absolute reason for appeal (*absoluter Revisionsgrund*) if a judge did not inform the accused in the courtroom, but added that she had never heard that this had happened before, as the recording clerk would also pay attention to this (Judge/Germany). This is also in line with the experiences of the other interviewees: As all of them stated that the right to remain silent was respected by the judges and that they always informed about it.

The majority of the lawyers explained that according to case law, it was inadmissible to use the evidence, but that the evidence still could be used for further investigations. For instance, if suspects were not informed about the right to remain silent and gave evidence, based on which their apartment was searched, the results of the apartment search could still be used as long as the apartment search itself was lawful (Lawyer/Germany; Lawyer/Germany). One of the lawyers stated that the inadmissibility of using the evidence often remained a theoretical right, as the police often claimed to have informed although this was not the case. S/He reported that s/he experienced this for instance, when s/he was present at an apartment search as a lawyer (Lawyer/Germany).

### c. Self-incrimination

All interviewees stated that the law did not prescribe instances in which accused persons were obliged to provide evidence that would incriminate themselves. One of the public prosecutors described that there were borderline cases such as unlocking mobile phones through iris scans or fingerprints, in which it was being discussed whether this presented an active (which would be illegal) or a passive participation of the suspect. He believed that fingerprints were allowed according to case law and that there was no case law on the iris scan but admitted that he was not entirely sure about this (Prosecutor/Germany; Police officer/Germany).

In addition, it is worth noting, that the vast majority of interviewees broadly discussed the way the police asked for passwords or PINs of mobile phones, computers or accounts in practice. According to all interviewees, the legal situation in Germany was that there was no obligation for suspects to provide their passwords or PINs. The police officers indicated that in practice, they would explain the suspects that they could either provide them with their PIN or password voluntarily or that they would forcibly unlock the device, which would take a significant longer period of time and would cost a considerable amount of money. The police officers described this in a very neutral manner as presenting them the advantages and disadvantages of either option and did not think that this would put pressure on the suspects, since the result would remain the same (Police officer/Germany; Police officer/Germany; Police officer/Germany; Police officer/Germany).

*“Dann werde ich ihm klarmachen, was es nach sich zieht, [...] dass er seine Sachen wahrscheinlich erst in fünf Jahren wieder sieht – übertrieben – weil einfach dann der Aufwand ja viel höher ist, um trotzdem an die Unterlagen zu kommen.” (Polizist\_in/Deutschland)*

*“Then I will make it clear to him what it entails [...] that he will probably not see his things again for another five years – exaggeratedly – because then the effort is simply much higher to get the documents.” (Police officer/Germany)*

However, this behaviour was perceived differently by most of the other interviewees. On the one hand, the public prosecutors were not really sure whether this behaviour was problematic but admitted that it could put pressure on the suspects (Prosecutor/Germany; Prosecutor/Germany).

On the other hand, the group of defence lawyers had gained a different impression of this practice, as most of them stated that the police often pretended as if the suspects were obliged to provide their passwords. One lawyer described the situation as follows:

*“Teilweise geben die einfach ihre PIN an, weil sie nicht wissen, dass sie das überhaupt nicht müssen [...] sondern es wird so abgefragt, wie das Geburtsdatum. Und ich glaube, dass es ein großes Problem.” (Strafverteidiger\_in/Deutschland)*

*“Sometimes, suspects provide their PIN, because they do not know that they are not at all obliged to do so [...] It is being asked for like the date of birth. I believe that this is a big problem.” (Lawyer/Germany)*

Likewise, two other defence lawyers reported, that the police would either withhold crucial information like this or claim things that were not true. They pointed out that the police would for instance falsely claim they would get a court order for a certain measure (Lawyer/Germany) or that they would make false promises about lower sentences in a potential trial (Lawyer/Germany). One interviewee concluded that these promises had a deceptive character, as the police officers had no influence on the court orders or the sentencing in the judgment and would therefore exploit the hopes of the suspects.

*“Das sind alles leere Versprechungen, und es passiert eigentlich glaube ich jeden Tag, dass die Polizei das verspricht und dadurch täuscht.” (Strafverteidiger\_in/Deutschland)*

*“These are all empty promises, and I believe that it actually happens every day that the police makes these promises and deceives the suspects.” (Lawyer/Germany)*

However, one of the police officers stated that he always communicated with the public prosecutor for reassurance before offering the suspect the prospect of a lower sentence (see next question) (Police officer/Germany).

Ultimately, one of the lawyers saw a particular problem in conjunction with pre-trial detention as his/her impression was that during this measure, suspects were generally pressured to give evidence.

*“U-Haft schafft Rechtskraft; weil die U-Haft Geständnisdruck schafft, weil die Leute einfach mürbe gemacht werden. Und da ist es glaube ich schon ein Problem.” (Strafverteidiger\_in/Deutschland)*

*“Pre-trial detention creates legal force; because detention puts so much pressure on the suspects to confess. I think that this is indeed a problem.” (Lawyer/Germany)*

#### d. Right to remain silent

All interviewees were of the opinion that the right to remain silent was respected by the courts. Hence it was not reported that the judges drew any negative conclusions from it. In addition, the

interviewees made generally no observations that public prosecutors did not respect the right to remain silent, with the exception of one judge who told that this occasionally happened:

*“Also nicht von uns Richtern [...] dass die Staatsanwaltschaft mal solche Töne klingen lässt im Verfolgungseifer, sehr wohl, aber [...] auf mich, da kann ich die Hand für ins Feuer legen, hat das überhaupt gar keinen Einfluss.”* (Richter\_in/Deutschland)

*“Not us judges [...] The public prosecutor’s office may occasionally do this, driven by its eagerness to prosecute, but [...] on me, hand on heart, this has no influence at all.”* (Judge/Germany)

One interviewee illustrated that remaining silent was quite normal in practice by saying that sh/e felt that judges might even be surprised if a defendant comprehensively gave evidence in a case that was not ‘hopeless’ (Lawyer/Germany).

Two lawyers argued that it generally was more disadvantageous to give evidence, as these statements would often be presented as implausible by the judges (Lawyer/Germany; Lawyer/Germany). One of them also described that partially giving evidence could be assessed negatively and lead to critical questions as the judges would wonder why the defendant did not want to talk about all accusations (Lawyer/Germany). Another lawyer added that it occurred to him/her that a judge pressured an accused person to give evidence, aiming at an acquittal, but s/he was sure that this would not happen if they referred to a conviction, as this would clearly be a reason for appeal (Lawyer/Germany).

Several interviewees described that the general effects of remaining silent on the proceedings were that the proceedings took longer, were more complicated, needed more resources and were more unpredictable (Prosecutor/Germany; Prosecutor/Germany; Lawyer/Germany). One public prosecutor also explained that the sentence might be higher if an accused person remained silent, as there was no confession. He pointed out though, that this had nothing to do with the presumption of innocence, as it did not refer to the question whether the defendant was guilty or innocent, but only to the sentencing (Prosecutor/Germany).

As far as the police is concerned, one lawyer stated that his clients were pressured to give evidence by them all the time (Lawyer/Germany). The police officers claimed that they would not do so (Police officer/Germany; Police officer/Germany; Police officer/Germany; Police officer/Germany), but one of them admitted that some of his colleagues indeed did not understand the right to remain silent in its entirety and pressured suspects to give evidence:

*“Es gibt natürlich Kollegen, die es da vielleicht nicht gleich verstehen und sagen: „Ja, Mann, jetzt rede doch mal!“* (Polizistin\_in/Deutschland)

*“Of course, there are also colleagues who do not immediately understand the right to remain silent and say: ‘Come on, man, talk to me!’”* (Police officer/Germany)

The police officer described that he would explain his colleagues that the suspect did not have to say anything if he witnessed this. A high-ranking police officer stated that he could not completely rule out the possibility of his colleagues pressuring suspects, but hoped that this would not happen:

*“Ich kann es nicht ausschließen. Ich hoffe, dass es nicht so ist. Es ist immer die Frage genau dieser inneren Haltung, auf die ich bis ins kleinste Detail nicht einwirken kann. Und da ist das ganz kleine Restrisiko. [...] Wir als Gesellschaft in diesem Rechtsstaat müssen vertrauen, dass die Menschen, die mit diesen Aufgaben betraut werden, so in ihrer inneren Haltung rechtlich*



*gefestigt sind, moralisch und ethisch, dass sie das nicht tun. Und dann hoffe ich, da die ja in der Regel immer zu zweit sind, dass der andere, der dabei ist, aufsteht und sagt, das ist falsch.”* (Polizistin\_in/Deutschland)

*“I cannot rule it out. I hope that it is not the case. It is always exactly the question of this inner attitude, which I cannot influence in all details. And there remains a very small residual risk. [...] We as a society in this state under the rule of law must trust that the people who are entrusted with these tasks are so stable in their inner attitude, legally, morally and ethically, that they do not behave that way. And then I hope, since there are usually always two officers, that the other person stands up and says that [pressuring a suspect] is wrong.”* (Police officer/Germany)

A smaller group of interviewees and one lawyer in particular, indicated that during the trial, instead of threatening with a conviction, pressure was rather exercised by promising rewards for breaking the silence, often within the framework of a plea bargain (see above, chapter C.4, section b.) (Lawyer/Germany).

S/He reflected on how s/he perceived the pressure within the context of a ‘deal’:

*“Viele Verfahren mit so ein bisschen größeren Vorwürfen werden letztendlich gedealt. Und [...] die Voraussetzung für so einen Deal ist, dass ein Geständnis abgegeben wird und wenn kein Geständnis abgegeben wird, dann kommt der Deal nicht zustande. Also insofern machen die Gerichte ein Angebot und sagen: Für den Fall, dass du ein Geständnis abgibst, werden wir dich sehr viel niedriger bestrafen als für den Fall, dass du kein Geständnis abgibst und wir den Schuldnachweis trotzdem führen, also das ist eher so die erpresserische Situation.”* (Strafverteidiger\_in/Deutschland)

*“Many proceedings with slightly bigger accusations are eventually settled by a deal. And [...] the condition for such a deal is that a confession is made, and if no confession is made, the deal does not happen. So in this respect, the courts make an offer and say: In case you make a confession, we will punish you much less than in case you do not make a confession and we still prove your guilt, so this is more of a ‘blackmail’ situation.”* (Lawyer/Germany)

A judge and a lawyer pointed out that the ‘deal’ was a strictly formalised procedure, based on concrete legal provisions, prescribing for instance that a confession within this deal still had to be reviewed for plausibility (see above, chapter C.4, section b.). (Judge/Germany; Lawyer/Germany)

A public prosecutor and a police officer agreed also that it occurred that lower sentences were offered to the defendants as rewards for giving evidence. The police officer stressed that he always asked the public prosecutor about this, so that he could make sure that it was not an ‘empty promise’ (see above, section c.). (Police officer/Germany)

#### e. Discussion of findings

The legal requirements for the right to remain silent and freedom from self-incrimination are met in Germany. However, the collected data indicate that there are some challenges in implementing the rights in practice. First of all, it should be noted that the interviews do not provide any evidence that judges do not respect the right to silence and the right not to incriminate themselves. Instead, the interviews showed that they always inform correctly and do not draw any negative conclusions from the silence.

With regard to the police, however, the interviews revealed a different picture. One group of interviewees, mainly defence lawyers, claimed that the right to remain silent was regularly not implemented correctly by the police. According to them, police officers did not inform the suspects about it, particularly in hectic situations, for example in case of a temporary arrest on the street. Still, the police officers stated that they would always inform. However, one police officer also admitted that some of his colleagues did not understand what the right to remain silent was about and that they tried to get suspects to talk. Overall, the data collected thus suggests that there are a number of challenges in the practical implementation of these rights in relation to the police.

The interviewees agreed that it was not legally permissible to use evidence obtained in violation of the right to silence (or self-incrimination). In this context, a practical challenge can be seen in documenting the provision of information to suspects, as it may often not be possible to prove in retrospect whether information was provided correctly or not.

Moreover, several interviewees described problems with the police with regard to freedom from self-incrimination. Among other things, there was criticism of the fact that the police officers often pretended that suspects were obliged to provide passwords, although this is not legally the case. It was also stated that police officers made false allegations, such as that they would allegedly receive a court order for a certain measure, or that they would make false promises of lower penalties in return for self-incrimination. On the other hand, the police officers said that they would not engage in such practices.

Whether these are structural problems or rather individual cases cannot be said with certainty on the basis of the limited data collection. However, the statements of the lawyers, as well as the statements of the public prosecutors that they have at least heard of these problems, could indicate that these are more than individual cases.

## **C.6 The right to be present at the trial and to have a new trial**

This chapter discusses the right to be present at the trial and to have a new trial. After a brief overview of the legal situation in Germany in relation to this topic, a description of the interviewees' experiences of consequences for non-appearance at the trial follows. Furthermore, the interviewees' understanding of 'effective participation' at the trial is discussed in this chapter. In addition, the interviewees' reflections on the participation of vulnerable groups at the trial, are displayed. The chapter ends with a discussion of the findings.

### **Legal overview**

Section 230 (1) of the Code of Criminal Procedure (*StPO*) establishes the principle that the accused has to be present at the trial. This is intended to serve ascertaining the truth and at the same time to give the accused an optimal hearing and the possibility of a comprehensive and unrestricted defence.<sup>40</sup> Furthermore, the judge should be given a direct impression of the person of the accused, their appearance and their statements.<sup>41</sup> According to section 230 (2) Code of Criminal Procedure (*StPO*) the presence can be enforced by presentation or arrest warrant. Section 338 No. 5 Code of Criminal Procedure (*StPO*) says that an absolute reason for appeal (*absoluter Revisionsgrund*) – and hence the right to a new trial before the Court of Appeal – is given if the main hearing took place in the absence of a person whose presence is prescribed by law.

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<sup>40</sup> Germany, Federal Court of Justice (Bundesgerichtshof), Karlsruhe/GSSt 1/09, 21 April 2010, available at [www.hrr-strafrecht.de/hrr/5/09/gsst-1-09.php](http://www.hrr-strafrecht.de/hrr/5/09/gsst-1-09.php).

<sup>41</sup> Germany, Federal Court of Justice (Bundesgerichtshof), Karlsruhe/1 StR 643/09, 28 July 2010, available at [www.hrr-strafrecht.de/hrr/1/09/1-643-09.php](http://www.hrr-strafrecht.de/hrr/1/09/1-643-09.php).

There are several exceptions to the necessary presence of the accused, which are regulated by law in the Code of Criminal Procedure (*StPO*). However, it needs to be pointed out, that these exceptions do not intend to exclude accused persons from the trial who would like to be present, but rather to enable the continuation of the trial when the accused have already exercised their rights. An example of this is section 231 (2) Code of Criminal Procedure (*StPO*). Pursuant to this provision, the hearing can be concluded in the absence of the accused if they have already been heard about the accusations, the court does not consider their presence to be necessary and they have been informed in the summons that the hearing in these cases can be concluded in their absence.

According to case law, the accused are not considered to be present at the trial if they are unable to stand trial. If a substantial part of the main hearing takes place while the accused – without their fault – are unable to stand trial, a reason to appeal pursuant to section 338 No. 5 Code of Criminal Procedure (*StPO*) is given.<sup>42</sup> If it turns out that the accused did not stay away from the trial on their own authority, the part of the proceedings that was held in their absence must be repeated in their presence. If this does not happen, the court creates a reason to appeal pursuant to section 338 No. 5 Code of Criminal Procedure (*StPO*).<sup>43</sup> On the contrary, absence in the case of insignificant parts of the main hearing does not constitute a reason to appeal.<sup>44</sup>

In the course of the implementation<sup>45</sup> of Directive (EU) No. 2016/343, some minor changes were made to the Code of Criminal Procedure (*StPO*) concerning the right to be present at the trial. For example, section 231 (2) Code of Criminal Procedure (*StPO*) now contains an obligation to inform about the consequences of non-attendance. From now on, the law also provides the possibility for the defendant in detention to be present at the main appeal hearing (*Revisionshauptverhandlung*).<sup>46</sup> In addition, section 356a sentence 4 Code of Criminal Procedure (*StPO*) now contains an obligation to inform about a legal remedy if the defendant was not present at the main appeal hearing, which corresponds to Article 9, 10 of the Directive (EU) No. 2016/343.<sup>47</sup> The reason for the different regulation concerning the presence at the appeal hearing is that in the appeal, a pure examination of legal errors is made, but the defendant cannot present new facts at this instance.<sup>48</sup>

#### a. Consequences of non-appearance

Interviewees gave different answers regarding the degree of interest accused persons had in their own trial and hence, whether they generally wanted to appear or not. This seems to be due to the fact that the group of people facing criminal accusations is largely heterogenous, so that numerous factors influenced their appearance or non-appearance. As an example, a lawyer that had rather high-profile clients in the area of white collar-crime stated that his/her clients almost always appeared at the trial

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<sup>42</sup> Germany, Federal Court of Justice (Bundesgerichtshof), Karlsruhe/2 StR 551/87, 8 January 1988.

<sup>43</sup> Germany, Federal Court of Justice (Bundesgerichtshof), Karlsruhe/2 StR 182/57, 26 June 1957.

<sup>44</sup> Gmel, D. (2019), 'StPO § 230 recital 4, Ausbleiben des Angeklagten' in: Hannich, R. *et al* (eds.), *Karlsruher Kommentar zur Strafprozessordnung*, Munich, C. H. Beck

<sup>45</sup> Act for Strengthening the Right of the Accused to be Present at the Trial (*Gesetz zur Stärkung des Rechts des Angeklagten auf Anwesenheit in der Verhandlung*), available at [www.bmfv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BGBl\\_Gesetz\\_Staerkung\\_Angeklagten\\_Anwesenheit\\_Verhandlung.pdf;jsessionid=73D56C9AC3411517982D38BFB4BE1FEC.2\\_cid334? blob=publicationFile&v=2](http://www.bmfv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BGBl_Gesetz_Staerkung_Angeklagten_Anwesenheit_Verhandlung.pdf;jsessionid=73D56C9AC3411517982D38BFB4BE1FEC.2_cid334?blob=publicationFile&v=2).

<sup>46</sup> Gericke, J (2019), 'StPO § 350 recital 9 Hauptverhandlung' in: Hannich, R. *et al* (eds.), *Karlsruher Kommentar zur Strafprozessordnung*, Munich, C. H. Beck.

<sup>47</sup> Gericke, J (2019), 'StPO § 356a recital 9 Urteilsverkündung' in: Hannich, R. *et al* (eds.), *Karlsruher Kommentar zur Strafprozessordnung*, Munich, C.H. Beck.

<sup>48</sup> Gericke, J. (2019), 'StPO § 350 recital 9 Hauptverhandlung' in: Hannich, R. *et al* (eds.), *Karlsruher Kommentar zur Strafprozessordnung*, Munich, C. H. Beck.

and had a strong interest in it (Lawyer/Germany), whereas a public prosecutor explained that young people often did not appear (Prosecutor/Germany).

The most common consequences of non-appearance pointed out by the vast majority of interviewees were the issuance of arrest warrants (*Hauptverhandlungshaftbefehl*) and warrants for appearance (*Vorführungsbefehl*). A judge and a defence lawyer further pointed out that in cases of rather minor accusations, it was possible to transfer the trial into a penalty order proceeding (*Strafbefehlsverfahren*), if the legally prescribed requirements for this were fulfilled (Judge/Germany; Lawyer/Germany). In addition, one judge gave more details on the issue of non-appearance at the later stages of a trial. She explained that according to the Code of Criminal Procedure, a trial could be continued without the accused persons if the main hearing had already taken place and the accused persons had already been able to comment on the accusations. She described that she informed them about this each time after the end of the main hearing. She added that at the appeal hearing, the accused persons did not have to be present anymore and could let themselves be represented by their defence lawyers (Judge/Germany).

Almost all of the interviewees indicated that the accused were informed about the consequences of non-appearance by means of the summons. However, a few interviewees were not entirely aware what kind of information the summons exactly included on this matter. One judge pointed out that the accused persons received several pages of information with their summons and that it was paid attention that it was duly served (Judge/Germany). Still, three of the defence lawyers stated that in their view, the efforts made by the state authorities were not sufficient (Lawyer/Germany; Lawyer/Germany; Lawyer/Germany). Their major criticism was pointed at the fact that the summons was not translated (see below, section c.).

#### b. What has been understood as “effective participation”?

On an abstract level, one defence lawyer summarised that for her, effective participation would mean that defendants were

*“als Subjekt des Verfahrens wahrgenommen [...], nicht als Spielball oder Objekt. Es gibt zwei Aspekte: den passiven Schutz der Rechte und die aktive Teilnahme.”*  
(Strafverteider\_in/Deutschland)

*“perceived as the subject of proceedings, rather than as a ‘plaything’ or object. [...] There are two components: The passive protection of rights and the active participation.”*  
(Lawyer/Germany)

The group of judges and public prosecutors was rather of the opinion that the current provisions enabled the accused persons to participate effectively in the proceedings, mentioning that they had all the rights they needed, that these rights were even further strengthened and that it was paid attention to the fact that the accused was able to stand trial (Judge/Germany; Prosecutor/Germany; Prosecutor/Germany). One judge pointed out, which rights were particularly important in her eyes to enable effective participation:

*“Dass Beschuldigte und Angeklagte in ihrer Rolle die gleichen Rechte und Pflichten haben, wie zum Beispiel auch der Verteidiger, so dass es nicht davon abhängig ist, dass man einen guten Anwalt hat [...] Unter anderem volles Beweisantragsrecht, Äußerungsrecht [...] dass man zwischendurch die Möglichkeit hat, noch Geständnisse abzugeben [...], dass man Zeugen befragen kann.”* (Richter\_in/Deutschland)

*“That the defendants have the same rights and duties as for example, the defence lawyer, so that it does not depend on having a good lawyer [...] Among other things, the full right to request evidence, [...] that one has the opportunity to make confessions, [...] that one can question witnesses.” (Judge/Germany)*

Within the group of defence lawyers, two issues were particularly emphasised, namely access to the file without a lawyer, and further extension of mandatory defence, also to cases of minor accusations. Two lawyers described that full knowledge of the file was an indispensable condition for effective participation of the defendant. According to them, the Code of Criminal Procedure even prescribed in section 147 that defendants without a lawyer had access to the file (Lawyer/Germany; Lawyer/Germany). However, both of them experienced in practice that the courts reacted to this with reluctance or even ignored the defendants. In their view, this right should be emphasised more strongly to ensure that the courts would take it seriously.

*“Also das ist [...] ein Kernproblem der Betroffenen, dass sie ohne Anwalt eigentlich nicht an die Akte kommen.” (Strafverteidiger\_in/Deutschland)*

*“It is a core problem of the defendants that they practically have no access to the file unless they have a lawyer.” (Lawyer/Germany)*

Another requirement for effective participation brought up by one of the defence lawyers was that s/he would prefer if there were stronger instruments in place for dealing with violations of the law by the authorities, which would for instance prescribe the inadmissibility of evidence (Lawyer/Germany).

### c. Vulnerable groups

As indicated above, the summons includes information on the consequences of non-appearance, but according to the group of interviewed defence lawyers, this information was not translated. One defence lawyer guessed that there might be additional information in other languages than German, but at the same time, s/he was certain, that the document itself was not translated (Lawyer/Germany). Another defence lawyer mentioned that according to case law, it was permissible not to translate the summons, but s/he still considered this to be a major problem, as in his/her view, there were no sufficient safeguards for people who did not speak German (Lawyer/Germany). As a possible safeguard, a smaller group of interviewees explained that it was possible to equip the defence lawyer with the authority to receive the summons, so that the defence lawyer had to ensure that the client was aware of the trial (Judge/Germany; Lawyer/Germany). One defence lawyer reported that s/he had for instance just done this in the case of a Moroccan client who lived in a home for asylum-seekers (Lawyer/Germany). However, this safeguard evidently only applies to suspects who have a defence lawyer.

A group of two lawyers pointed out that the defendants have the right to have the indictment – unlike the summons – translated (Lawyer/Germany; Lawyer/Germany). One of them remarked that s/he had experienced some difficulties with this in practice, though:

*“Man hat mittlerweile einen Anspruch darauf, dass die Anklage übersetzt wird. Meine Erfahrung ist, dass das jedenfalls in Berlin fast nie stattfindet, und dass man, wenn man das als Verteidiger versucht durchzusetzen, fast eine Art Querulant ist für das Gericht. Obwohl das eigentlich europäischer Standard sein sollte, dass die Anklage übersetzt ist.” (Strafverteidiger\_in/Deutschland)*

*“One has a claim now for the indictment to be translated. My experience is that this almost never happens, at least in Berlin. And if you try to enforce this as a defence lawyer, you are*

*almost a kind of troublemaker for the court. Although it should actually be a European standard.” (Lawyer/Germany)*

Two interviewees stressed that for illiterate clients, even a translation of the written summons or indictment would not be helpful (Lawyer/Germany; Lawyer/Germany). They made the observation that it often remained completely unnoticed that accused people were not able to read and concluded that there were no safeguards in place to inform these people. One lawyer described the problems illiterate people were facing when trying to access the file:

*“Die müssten [...] sich irgendwie die Ermittlungsakte besorgen. Diesen Antrag könnten sie schriftlich schon gar nicht verfassen. Sie müssten dann einen Dolmetscher suchen, mit diesem Dokument dahingehen, sich alles übersetzen lassen und sich dann alles merken, um letztlich in der Hauptverhandlung zum Beispiel Zeugen befragen zu können. Das ist eigentlich nicht leistbar [...] Um wirklich eine effektive Teilnahme und eine Subjektstellung in der Hauptverhandlung zu ermöglichen, müsste die Beweislage [...] den Angeklagten in einer Sprache, die für sie verständlich ist, zur Verfügung gestellt werden.” (Strafverteidiger\_in/Deutschland)*

*“They would have to get the investigation file somehow. They could not even submit the request for that in writing. They would then have to find an interpreter, go there with the file, have everything translated and then memorise everything in order to be able to question witnesses in the main hearing. Well, that is actually not feasible [...] In order to really enable effective participation and a subject status in the main trial, the evidence [...] would have to be made available to the defendants in a language they could understand.” (Lawyer/Germany)*

In addition, the lawyer emphasised that s/he saw a particular risk for illiterate people in the penalty order (*Strafbefehl*), thus a written procedure, at the end of which the penalty order becomes final if the accused does not lodge an objection against it:

*“Die können das nicht verstehen. [...] Die bekommen [...] einen schriftlichen Strafbefehl, die wissen gar nicht, was da drinsteht. Ich habe ganz viele Mandanten, die dann zwei Jahre später auf einmal verhaftet und ins Gefängnis gesteckt werden, weil sie gar nicht verstanden haben, was eigentlich passiert ist und dass sie verurteilt wurden. Das ist schon ein großes Problem. Das [...] sind besonders Schutzbedürftige, weil die einfach gar nicht der Schriftsprache mächtig sind, also weder der deutschen noch irgendeiner anderen. Für die gibt es eigentlich keine Sicherheitsvorkehrungen.” (Strafverteidiger\_in/Deutschland)*

*“They cannot understand it. They get a written penalty order, they do not even know what it says. I have a lot of clients who are suddenly arrested and sent to prison two years later, because they do not understand what actually happened, that they were convicted. That is a big problem. They [...] are particularly vulnerable, because they simply do not know the written language, neither German nor any other language. There are actually no safeguards for them.” (Lawyer/Germany)*

In this context, another interviewee pointed out that as a private initiative, the Berlin Association of Defence Lawyers offered free legal advice on penalty orders where they translated what the penalty order was about and whether an objection against it would be worthwhile. S/He admitted that this was sometimes a difficult matter, though, because one just knew what the penalty order said, but did not know the file (Lawyer/Germany).

One public prosecutor mentioned that during trial, defendants who did not speak German, would be assigned an interpreter. He added that there were also cases, in which sign language interpreters were used (Prosecutor/Germany). A group of interviewees stated that in (the now extended numbers of) cases, in which public defenders were assigned to the defendants, they tried to ensure that their clients were present at the trial and were able to understand what the trial was about.

Interviewees made largely differing experiences concerning the question whether defendants understood the legal proceedings. To some extent, this can, among others, be attributed to the different educational and social backgrounds of the respective defendants. A larger group stated that they had the impression that accused persons sometimes would not be fully aware of what was going on during trial, with two defence lawyers even saying that this happened as a rule (Lawyer/Germany; Lawyer/Germany). One interviewee had made contrary experiences (Lawyer/Germany) and one public prosecutor was sure that many defendants would at least understand that they had done something 'evil' (Prosecutor/Germany).

*“Da kommt gar nichts an. Das Verfahren findet dann praktisch als Film statt, dem nicht gefolgt werden kann. Das ist leider oft so.”* (Strafverteidiger\_in/Deutschland)

*“They do not understand anything, so that the trial takes place as movie that cannot be followed. Unfortunately, this is often the case.”* (Lawyer/Germany)

*“Ich glaube schon, dass es viele Angeklagte gibt, die kognitiv einfach überfordert sind, dieses Ping Pong zwischen Staatsanwaltschaft, Gericht und Verteidiger zu verstehen. [...] Aber den Kern, was sie gemacht haben sollen, Böses, [...] das verstehen die Leute in der Regel schon.”* (Staatsanwält\_in/Deutschland)

*“I do believe that there are many defendants who are cognitively simply overwhelmed to understand this 'ping-pong' between prosecution, court and defence lawyer. [...] But the core of what they are supposed to have done – evil – [...] people usually understand that.”* (Prosecutor/Germany)

In this context, several interviewees discussed the issue of people with mental disabilities who were accused of a crime. One judge pointed out that disability in itself did not necessarily prevent punishment, but only when someone was incapable of guilt during the time they committed the crime, which was regulated by law as well as case law (Judge/Germany). One of the judges talked about procedures against people who were incapable of guilt and stated her observations that these people did not understand what the trial was about, but as these cases do not refer to punishment, but to placement in a psychiatric hospital, this will not be analysed in detail here.

One interviewed public prosecutor explained that in case of serious crimes, such as murder, there would be experts to make sure that the accused person was capable of guilt. He stressed that otherwise, it was rather unlikely that the mental state of the accused was examined, so that this would only be the case if there were concrete indications (Prosecutor/Germany). A lawyer raised the concern that one would often not know whether a person might be incapable of guilt. S/he saw the structural problem that there were generally no psychologists or experts present at the trial, so that nobody would notice as long as it was not totally obvious that the accused was not capable of guilt (Lawyer/Germany).

Apart from these cases, several interviewees mentioned that there were also cases in which the defendants might be capable of guilt but restricted by drugs and therefore not able to stand trial.

According to an interviewed defence lawyer, there would be no trial taking place in this case, even if the situation was self-inflicted, because this would be reason for appeal (Lawyer/Germany).

#### d. Discussion of findings

The defendants' rights to be present at the trial, as provided for in the EU/2016/343 Directive, are largely fulfilled. The legal framework in Germany provides for the right of presence and allows exceptions to this right only in cases regulated by law. Furthermore, in the course of the implementation of the Directive in Germany, some changes were made to the Code of Criminal Procedure, for example with regard to information duties regarding the consequences of non-appearance.

The interviews showed that the practical implementation of information on the consequences of non-appearance worked in principle. However, there was criticism on several occasions that the summons – which included the information - were not translated, posing a problem for people who do not speak German. However, one defence lawyer pointed out that this was permissible according to case law. In this context, there was also some criticism that (in Berlin) one would practically never get a translation of the bill of indictment, although there was a legal claim to this. Even if it cannot be said, on the basis of the small amount of data collected, whether this is the case throughout Germany, this represents a considerable problem, as it hinders defendants from understanding what they are accused of. In this context, illiterate people are a particularly affected vulnerable group.

Furthermore, one may draw the conclusion from the interviews that the Code of Criminal Procedure provides in principle for a whole range of rights that serve to achieve 'effective participation' of defendants in the trial. Nevertheless, the interviews also provided indications for improvements. Firstly, it was mentioned more frequently that mandatory defence should be further extended, including to cases of minor charges, in order to ensure the effective protection of the rights of the accused.

In addition, several interviewees had experienced that defendants could only have access to the file with the help of a lawyer, although the Code of Criminal Procedure even provided that defendants without a lawyer must have access to the file. This poses a problem because defendants can only participate effectively in the trial if they are fully aware of the file. If this depends on having a lawyer, this right is restricted. Hence, there is a discrepancy between the legal situation and practical implementation that should be addressed in the future.

### **C.7 Challenges and improvements**

This chapter encompasses the interviewees' impressions on challenges with regard to the presumption of innocence, as well as their views on improvements in relation to defendants' rights since the implementation of the Directive. Furthermore, it discusses the interviewees' suggestions in order to further implement and protect the right to be presumed innocent in Germany.

#### a. Challenges

A group of interviewees, including two police officers, a public prosecutor and a judge, did not really see any serious challenges in relation to the criminal procedure itself, but rather in relation to the media (Judge/Germany; Prosecutor/Germany; Police officer/Germany;). The judge with experience in public relations saw the biggest challenge for instance in balancing the right of information of the public and the defendants' rights.



*“Die größte Herausforderung [bei der Zusammenarbeit mit den Medien] ist, die Informationen so zu vermitteln, dass die Öffentlichkeit immer gut informiert ist und trotzdem die Unschuldsvermutung eingehalten wird und keine mediale Vorverurteilung erfolgt.”* (Richter\_in/Deutschland)

*“The biggest challenge [when liaising with the media] is to convey the information in such a way that the public is always well informed and yet the presumption of innocence is upheld and there is no media prejudice.”* (Judge/Germany)

Another interviewee with experience in this field pointed out that it was a major task to prevent the violation of the presumption of innocence by the media (Prosecutor/Germany). A police officer stated that the media should focus more on explaining certain procedural measures, such as why a person was tied up, because he thought that the public would often not understand that these were security measures and therefore assume that the person was guilty. Apart from that, he thought that there were no systemic challenges, but rather individual cases (Police officer/Germany). Similarly, another police officer supported the idea of more objective reporting:

*“Ich würde mir viel öfter eine objektivere Berichterstattung wünschen, auch eine erklärende. Aber das ist [...] ein gesellschaftliches Problem. Die Medien berichten eigentlich nur dem Bedarf nach. Und der Bedarf ist immer so, dass man gerne was Reißerisches hört. Derjenige, der [...] eine sehr dezente und objektive Berichterstattung macht, wird nicht immer so ganz gerne genommen.”* (Polizist\_in/Deutschland)

*“I would often wish for more objective and explanatory reporting. But this is [...] a societal problem. The media only report as demanded. And the demand is always to hear something sensational. The one who [...] makes very discreet and objective reporting is not always so well received.”* (Police officer/Germany)

A group of defence lawyers named the systematic issues of the criminal procedure, particularly in relation with the intermediate proceedings as a challenge (see above, chapter C.4, section a.) (Lawyer/Germany; Lawyer/Germany; Lawyer/Germany) and one of them added the extension of mandatory defence, even to minor accusations, as another challenge (Lawyer/Germany). One of the lawyers stressed particularly the importance of taking influence on the police to ensure that the presumption of innocence was granted more effectively at the earliest stage of proceedings. S/He therefore referred to his/her remarks that suspects were regularly driven into self-incrimination by completely untrue promises from the side of the police, which would lead to false confessions (see above, chapter C.5, section c.) (Lawyer/Germany)

On top of these systematic or institutional challenges, several interviewees saw the biggest challenges lying within the professionals working in the system. Hence, one of the defence lawyers stated that in his/her view,

*“die größte Herausforderung psychologischer Natur ist; dass wir uns alle total von vielen Faktoren unbewusst beeinflussen lassen und gerade ein Richter sich durch eine öffentliche Meinung beeinflussen lässt.”* (Strafverteidiger\_in/Deutschland)

*“the biggest challenge is of psychological nature, as we are all subconsciously influenced by many factors and judges are also influenced by the public opinion.”* (Lawyer/Germany)

S/He added that it was extremely difficult to make an objective judgment, to apply the presumption of innocence and to stay unbiased. S/He further stated that it was a challenge for the judges to be able to stand the fact that they might have the feeling that the accused might perhaps be the perpetrator, but that they still had to acquit him or her if they could not prove it. Similarly, one of the judges believed that the greatest challenge was within the persons involved in the criminal procedure. She described this as follows:

*“Die größte Herausforderung ist, dass man nicht den leichten Weg geht und sagt [dass jemand, der] einmal verurteilt worden ist, auch beim zweiten Mal verurteilt wird. Oder dass man nicht sagt der Polizeibeamte hat einmal gesagt, er ist beschuldigt, dann bleibt er auch beschuldigt. [Man sollte] immer den Blick bewahren darauf, dass sich Sachen auch anders darstellen können, wenn man die Beweise von einem anderen [...] Blickwinkel aus sieht.”* (Richter\_in/Deutschland)

*“The biggest challenge is not to take the easy way out and say [that someone who] has been convicted once will be convicted the second time. Or that you do not say that if the police officer once said that a person was accused then he remains accused. [You should always] keep in mind that things can also appear differently when you look at the evidence from another [...] angle.”* (Judge/Germany)

Similarly, one of the police officers argued that that the successful implementation of the presumption of innocence already began with the selection of personnel. He described that the police needed people, who were aware of the value of human rights and their character as rights of defence against the state (Police officer/Germany).

A public prosecutor considered the biggest challenge to be to prevent that all professional participants in a criminal procedure collectively reinforced each other's (preliminary) assumptions which could lead to miscarriages of justice in the worst case. He saw this as a great challenge in particular in cases where there was no 'hard' evidence, but only witnesses that might be believed too early, such as in cases of accused murder or sexual offences (Prosecutor/Germany).

#### b. Improvements

The majority of interviewees stated that the rights of the accused persons had been strengthened through the extension of mandatory defence (*notwendige Verteidigung*) (Prosecutor/Germany; Prosecutor/Germany; Lawyer/Germany; Lawyer/Germany; Police officer/Germany).

A smaller group of interviewees had the impression that the rights remained the same or did not really know whether there were any improvements (Judge/Germany; Lawyer/Germany; Police officer/Germany). One interviewee amongst this group, a police officer, referred to the increased amount of bureaucracy in relation to informing the suspects about their rights, but concluded that the rationale behind this was rather ensuring legal certainty for the proceedings than protecting the rights of suspects (Police officer/Germany). Furthermore, two police officers pointed out that the audio-visual recording of the suspects' interrogations was included in the StPO this year (Police officer/Germany; Police officer/Germany)<sup>49</sup>:

*“Ganz grundsätzlich sind [...] nicht allzu viele Änderungen vollzogen worden. Ich glaube aber, dass es auch mit einer gewissen Vereinheitlichung, [...] aus dem EU-Bereich [...] zu einer Verbesserung gekommen ist. [Insbesondere die] Beschuldigtenvernehmungen per Audio oder per Video [...] Das ist ins deutsche Gesetz Anfang des Jahres aufgenommen worden und wird*

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<sup>49</sup> Section 136 para. 4 Code of Criminal Procedure (StPO).

*umgesetzt, zumindest bei Beschuldigtenvernehmungen, wenn es um Kapitalverbrechen, etwa Tötungsdelikte, geht.” (Polizist\_in/Deutschland)*

*“In general terms, [...] not too many changes have been made. But I believe that there has been improvement within the course of a certain degree of harmonisation, [...] by EU law [...]. In particular the audio-visual recording of suspects’ interrogations [...] This was included in German law at the beginning of the year and is being implemented, at least in cases of serious crimes, such as homicides.” (Police officer/Germany)*

A larger group of interviewees claimed that defendants’ rights had been weakened apart from the extension of mandatory defence, but not all of them could name in what respect (Prosecutor/Germany; Lawyer/Germany; Lawyer/Germany; Lawyer/Germany). In this context, one defence lawyer mentioned the reform of confiscation rules, which interfered strongly with the presumption of innocence in his view, as the law now allowed confiscation of assets without the proof of concrete evidence of an illegal act. Instead, a suspicion that the assets originated from a criminal offence was sufficient (see above, chapter C.4, section a.) (Lawyer/Germany).

Another defence lawyer complained that the rights of defendants had been considerably weakened at many points in the Code of Criminal Procedure. S/He was concerned that this happened usually for the same reason, which s/he described as follows:

*“Ich sehe das grundlegende Problem, dass die Beschuldigtenrechte extrem geschwächt wurden an ganz vielen Punkten in der StPO, unter dem Schlagwort „wir müssen die Hauptverhandlung effektiver machen“.” (Strafverteidiger\_in/Deutschland)*

*“I see the fundamental problem that the defendants’ rights were weakened extremely on many instances in the Code of Criminal Procedure, all under the slogan ‘we must make the main trial more effective’.” (Lawyer/Germany)*

As an example, s/he described that the defence had been significantly restricted in its right to submit applications for evidence (Lawyer/Germany). This was affirmed by another interviewee, a public prosecutor, who evaluated the law change differently, though, by stressing that in his view, it would be in the interest of everybody involved – including the accused persons – to streamline the procedures to some extent. He illustrated his opinion by means of a recently finished main trial that lasted for five and a half years due to ‘excessive use’ of the right to submit applications for evidence despite the fact that according to him, the case was relatively clear.

*“Wenn die Hauptverhandlung fast sechs Jahre dauert, dann muss man sich schon die Frage stellen, inwieweit sich überhaupt noch jemand an die Tat erinnern kann.” (Staatsanwält\_in/Deutschland)*

*“When the main trial lasts for almost six years, then you have to ask yourself to what extent anyone can even remember the crime.” (Prosecutor/Germany)*

The lawyer named more law changes, which weakened the defendants’ rights in his/her view, such as the extension of the deadlines for interruption of the trial, as well as law changes in the right of bias. According to her, due to this law change, courts could continue working for a longer period of time, until the judge who had been charged with bias had to resign eventually. The interviewee’s conclusion was that everything that was done to make the trial more effective, was to the disadvantage of the accused, as in his/her view, the way the legislator interpreted effectiveness of criminal proceedings usually limited the defendants’ rights (Lawyer/Germany).

### c. Suggestions

A larger group of interviewees, consisting of defence lawyers and a judge, referred to systematic issues they identified within the criminal procedure. As indicated above (see chapter C.4, section a.), some of the most important issues from their point of view were related to the design of the intermediate proceedings (*Zwischenverfahren*).

The interviewees stated that there was a risk of biased judgments and low acquittal rates, because the judge who decided in the intermediate proceedings whether a conviction in a main trial would be likely, would later on be in charge of the main trial and review his or her own decision. Another strongly interlinked issue they mentioned was that the judge in the intermediate proceedings would get the indictment including the files but look at the indictment first and then search for clues that confirmed the investigative hypothesis of the indictment. According to the interviewees, this psychological effect, the so-called *inertia* effect, was scientifically proven, but the Code of Criminal Procedure would not include institutional safeguards to limit the effect and just 'ignore' its existence.

Therefore, the interviewees suggested that the intermediate proceedings should be reformed. An idea mentioned by several interviewees, including a judge, was to have two different courts dealing with the intermediate proceedings and the main trial (Judge/Germany; Lawyer/Germany; Lawyer/Germany). This way, according to them, the second court could conduct an unbiased main hearing, for instance hear witnesses without prejudice, which would not be possible if the court of the main hearing had already been working on the case before. A defence lawyer further added that it would also help if the judges did not get the indictment along with the files, so that they had to get their own impression of the files first.

*“Allein die Trennung zum Beispiel zwischen dem Richter des Zwischenverfahrens und dem Richter des Hauptverfahrens, das wäre Gold wert; oder dass der Richter die Anklage nicht mit zur Akte dazu bekommt.”* (Strafverteidiger\_in/Deutschland)

*“Just the separation between the judge in the intermediate proceedings and the judge in the main proceedings would be ‘worth its weight in gold’; or that the judge does not get the indictment together with the file.”* (Lawyer/Germany)

However, s/he raised concerns that these reforms might cost too much money, because one would need additional judges for the main trial and because the judges would actually have to read the files during the intermediate proceedings instead of just looking at the significantly shorter indictment (Lawyer/Germany). A judge described the positive effect a separation of courts for the different proceedings could have by means of an observation she made during her own work:

*“[Wenn man als] Richter die einfach mal so locker in eine Vertretung geworfen wird, [...] die Akten nicht kennt und nur weiß, welche Zeugen kommen und ungefähr wie der Sachverhalt ist[...] Dann schöpfst du aus dem Inbegriff der Hauptverhandlung, das ist das Einzige, was du machen kannst [...] Das führt dazu, dass du vollkommen unvoreingenommen bist [...] Das heißt du hörst dir die Zeugen vollkommen neutral an, weil du gar nicht weißt, dass die mal was anderes gesagt haben, du weißt auch nicht, dass das in Widerspruch zu irgendwas anderem steht. Das sind Verfahren, wo du hinterher mit einem relativ guten Gefühl raus gehst, weil du sagst: Das ist das was ich in der Hauptverhandlung erfahren habe, das ist auch das was die Öffentlichkeit, wenn sie hinten drin säße mitbekommen würde, und wonach die entscheiden würden.”* (Richter\_in/Deutschland)

*“If you as a judge substitute a colleague in a trial, [...] you do not know the files and only know which witnesses are coming and roughly what the facts are like [...] Then you base your entire legal assessment on what is happening in the main trial, that is the only thing you can do [...] This leads to the fact that you are completely unbiased [...] That means you listen to the witnesses in a completely neutral manner, because you do not know that they have said something different before, you do not know that it might contradict anything else. These are proceedings that you leave with a relatively good feeling, because you say: That is what I experienced in the main trial, that is what the public would hear if they were sitting in the back, and upon what they would base their decision afterwards.” (Judge/Germany)*

A larger group of interviewees praised that mandatory defence had recently been extended (Prosecutor/Germany; Prosecutor/Germany; Lawyer/Germany; Lawyer/Germany). Yet, some interviewees suggested that mandatory defence should still be further extended to minor accusations, as this would be the only way to effectively protect the rights of all accused persons (Lawyer/Germany; Lawyer/Germany). In this context, one of the lawyers shared the observations of trials without lawyers s/he had made several years ago as a trainee lawyer (*Rechtsreferendar*). From his/her experience, back then, the defendants were put under a lot of pressure, despite minor accusations, and were not able to defend themselves effectively (Lawyer/Germany).

One defence lawyer stressed the importance of several, predominantly technical, reforms that would in his/her view strengthen the defendants’ rights significantly, such as recordings, video interrogations or minutes of the main hearing, so that one would objectively know what was said. S/He further demanded that interrogations by police officers should be recorded so that the effect of subjective psychological effects, which tended to distort the result, could be minimised. As these reforms were not about to be implemented anytime soon according to her, s/he concluded that as far as technical progress in the main trial was concerned, the German criminal procedure was ‘stuck in the century before last’ (Lawyer/Germany).

One interviewee, a defence lawyer, expressly suggested that the EU should consider a mandatory anti-racist training for police and prosecution staff. S/He explained the need for this demand by the negative experiences s/he had made with some of his non-German clients. For instance, s/he described that s/he had a homeless Albanian client who was not released from pre-trial detention for several months although according to him/her, it had been already clear at a relatively early stage of proceedings that s/he would be acquitted later, which eventually was the case:

*“Der war einfach mal so drei Monate im Gefängnis. Wenn man das ernst genommen hätte, wenn man den behandelt hätte wie einen weißen Deutschen und nicht wie einen wohnsitzlosen Albaner, dann hätte man Mitte Dezember als Staatsanwalt sagen müssen: Ich beantrage den Haftbefehl aufzuheben, DNA negativ. Das würde glaube ich guttun, dass man einfach sagen würde: Behandelt bitte alle Menschen gleich.” (Strafverteidiger\_in/Deutschland)*

*“He was in prison for three months, just like that. If you had taken this seriously, if you had treated him like a white German and not like a homeless Albanian, then you would have had to say as a public prosecutor in mid-December: I ask for the warrant to be revoked. DNA negative. I think it would be good to simply say: Please treat all people equally.” (Lawyer/Germany)*

## PART D. GENERAL ASSESSMENT

**The presumption of innocence in general:** The presumption of innocence plays an important role for all the professional groups interviewed. However, a mixed picture emerges regarding the question of whether the presumption of innocence applies equally to all suspects. On the one hand, defence lawyers in particular stated that a number of interlinked factors such as for instance location or milieu of the crime, age, skin colour and ethnic or national origin of the suspects can have an influence on guaranteeing the presumption of innocence. On the other hand, public prosecutors, judges and police officers generally believed that the presumption of innocence applied equally to everyone and that the factors mentioned were at most individual cases.

**Public references to guilt:** The data suggest that authorities are generally reluctant to disclose information about suspects and try not to reveal identifying details about suspects during the investigation process. Thus, public relations work is usually conducted through their respective press offices. The legal framework of this work is somewhat fragmented, since the respective federal states have their own press laws and there are some guidelines and regulations as well. Some interviewees indicated that details about suspects or about investigative measures were sometimes nevertheless made public, either through officials breaching official secrets or through journalists' own research. Media coverage itself cannot be attributed to the authorities and was perceived by the majority of interviewees as rather disadvantageous to the accused. In particular, interviewees widely criticised the sensational, prejudicial and identifying style of reporting, frequent playing with clichés, and the journalists' lack of legal education.

**The presentation of suspects and accused persons:** According to most interviewees, measures to physically restrain suspects were used in a relatively discrete manner in Berlin. For instance, they reported that handcuffs were generally removed in the courtroom as long as there were no concrete indications for risk of flight or physical harm. Moreover, they described that accused persons were led from the detention centre to the courtroom through a corridor under the exclusion of the public. Police officers also reported that it was at least conceivable to cover handcuffs or to lead arrested persons out the back door. However, some lawyers reported some individual cases, in which handcuffs or more severe means (shackles or glass cases) were ordered unjustifiably in their view. As several interviewees believed that these measures could have a stigmatising effect, despite their sole actual purpose as a security measure, it could be deemed a challenge to keep using them discretely and checking for their necessity in each individual case.

**Burden of proof:** The interviewees did not mention any legally prescribed exceptions to the presumption of innocence. The main challenges were seen in systematic issues of the criminal procedure in Germany. In brief, several interviewees criticised that the criminal procedure was designed in such a way that it could potentially lead to biased decisions by judges, e.g. because judges had to review their own previous decisions on guilt or innocence of an accused, or because judges were allowed to look at the indictment first and then at the file, which could potentially lead to them just unconsciously searching for clues confirming the accusations in the file later on. As far as confessions were concerned, the interviewees indicated that confessions always had to be reviewed by judges, so that it was generally not considered possible to be convicted based on a confession that did not fit with the rest of the case at all. However, several interviewees noted that confessions generally shortened proceedings significantly and were not always checked from all sides. Another issue indicated by some interviewees was that accused persons could be pressured to make (false) confessions within the framework of plea bargaining.

**The right to remain silent and not to incriminate oneself:** The implementation of the right to silence by the courts did not cause any problems according to the interviews. In the eyes of a larger group of interviewees, the greatest challenge was its implementation by the police. The majority of defence

lawyers reported that the police regularly failed to inform suspects about their rights, particularly during hectic situations like an arrest on the street. However, they claimed that in these cases, the file still showed that they had informed the suspects about their rights. Furthermore, they described frequent pressuring, false allegations and deception by the police with the aim of driving the suspects to self-incrimination. However, the police officers generally claimed that they would always inform suspects and not use any methods like pressuring or making false promises.

**The right to be present at the trial and to have a new trial:** The biggest challenge interviewees mentioned in relation to informing defendants about appearance at the trial, was that according to them, the summons were not translated. In addition, some interviewees pointed out that defendants could only 'participate effectively' in criminal proceedings, if they had full access to a file. The biggest challenge in this respect was in their eyes that it was very difficult to access the file for defendants without a lawyer, despite the fact that they have a right to it according to the Code of Criminal Procedure. Ultimately, interviewees saw an important challenge in the further extension of mandatory defence (*notwendige Verteidigung*), even to minor offences, to guarantee the protection of the rights of all defendants.

## PART E. CONCLUSIONS

This study discussed the implementation of procedural rights in criminal proceedings from the perspective of a sample of judges, public prosecutors, police officers, mainly in the area of Berlin. While the small sample size does not allow general conclusions, the study can give an impression on themes and recurring issues addressed and discussed by the interviewees.

First of all, it has to be pointed out that the implementation of Directive No. 2016/343/EU only consisted of law changes in relation to the presence at the trial, as the federal legislator considered the existing legal system to be in accordance with all other requirements of the Directive. This shows in general that a European standard of procedural rights of suspects and accused persons is guaranteed for formally. As far as the practical implementation of the rights prescribed in Directive No. 2016/343/EU is concerned, the interviewees' reflections suggested that they were fulfilled in many cases, but that there was room for improvement in several areas as well. At this point, it needs to be noted that in several instances, the interviewee's perceptions of certain issues differed vastly, often correlating with their respective professions. A pattern that could be observed throughout the majority of the issues discussed in this study was that defence lawyers tended to have the impression that defendants' rights were paid not enough attention to, whilst judges, public prosecutors and in particular police officers were rather of the opinion that the implementation of their rights was fulfilled.

According to the interviewees, the presumption of innocence, a right of constitutional rank, played an important role in their daily work. Legally speaking, the presumption of innocence should apply equally to all persons. However, the interviewees partly gave contradictory statements as to whether this was the case or whether guaranteeing the presumption of innocence was influenced by various factors (such as ethnic and social background, previous conviction). The rather small sample size of this study does not allow to make any reliable statements on this. However, the descriptions of the defence lawyers, substantiated with examples from their practice, suggest that there seem to be at least problematic tendencies which should be further explored by sociological studies. In this respect, it is to be welcomed that racist tendencies in the police are currently being discussed in Germany, even though a study on racial profiling in the police force was for the moment refused by the Ministry of the Interior.<sup>50</sup>

In principle, the press work of the criminal justice authorities themselves does not pose any significant problems. Against the background of the fragmented legal framework in this area (press laws of the federal states, guidelines, etc.), a clearer regulation of the rights and duties of the police and the public prosecutor's office with regard to public relations could help to achieve a better balance between the personal rights of the accused, the right of the authorities to conduct criminal proceedings and the freedom of the media. For this reason, continuing the legal policy discussion on the integration of a section on the public prosecutor's office's press work into the Code of Criminal Procedure, which has at least been initiated by a draft, would be beneficial. In addition, the often sensationalist and prejudicial media coverage cannot be attributed to the work of the authorities. In addition to the civil law remedies that the defendants can raise against this, authorities should therefore continue to counter false or misleading reports through their press offices.

The data collected from the interviews showed that handcuffs and other measures were generally applied in accordance with the legally prescribed principle of proportionality, both in the preliminary proceedings and in the further course of the criminal proceedings. Apart from a few negative examples mentioned by the interviewees, the data does not indicate any immediate need for a change in the

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<sup>50</sup> [www.tagesschau.de/inland/racial-profiling-studie-101.html](http://www.tagesschau.de/inland/racial-profiling-studie-101.html).



law or similar measures. However, the currently burgeoning discussion about (racist) police violence in Germany also shows that there appears to be a disproportionate use of these measures on several occasions.<sup>51</sup> In this respect, further developments must be awaited.

Even though the legal framework provided by the Code of Criminal Procedure does not provide for any exceptions to the presumption of innocence, it must be taken into account that a larger group of interviewees - citing empirical studies - saw a potential danger to the presumption of innocence in design of the criminal proceedings. The criminal procedure requires that judges have to review their own hypothesis in the main trial, which they previously established during the intermediate proceedings. Several interviewees saw the risk that judges would overestimate evidence that supported their hypothesis (e.g. 'XY is the perpetrator') and therefore find it difficult to deviate from it. As a result, the accused may potentially be put in a situation in which he or she has to refute the accusations rather than the other way around. Although there is currently no reform of the criminal procedure planned (e.g. different courts for intermediate and main proceedings) – these psychological aspects of criminal procedure should nevertheless be taken seriously and discussed further in view of the immense importance of finding the truth in criminal proceedings.

With regard to confessions, the legal framework and its practical implementation ensure that confessions must always be reviewed for plausibility and consistency with other evidence. Therefore, an accused person does not have to fear being convicted on the basis of a completely contradictory confession. The greatest need for discussion seems to lie in the area of plea bargaining (Verständigung im Strafverfahren). According to some interviewees, the option of a reduced sentence in return for a confession carried the risk that accused persons may feel pressured to confess crimes they have not committed. Here again, the data collected alone does not allow for a conclusive evaluation of the real extent of this problem. However, empirical studies could be carried out to determine the extent to which the rights of the accused can be sufficiently guaranteed by this legal instrument. For instance, an evaluation of the implementation of the law on plea bargaining was commissioned by the Federal Ministry of Justice in 2017. However, the results have not yet been published.<sup>52</sup>

The role of the police and their implementation of defendants' rights was also an important point of discussion with regard to the right to silence and freedom from self-incrimination. Again, the information provided by the police and defence lawyers differs from each other, so that it is not possible to say with certainty, on the basis of the data collected, to what extent the behaviour the police was accused of by several interviewees (withholding information, making false statements, putting pressure on accused persons) poses a structural problem. There is therefore need for further research.

Finally, the legal and practical conditions for effective participation in the trial are largely fulfilled. However, an issue pointed out by several interviewees was that the summons was not translated. Moreover, the interviews suggest that persons without a lawyer have difficulties accessing the file. Since they have a right to do so pursuant to the Code of Criminal Procedure, there is an implementation problem which should be solved accordingly. Only in this way, the rights of undefended suspects can be protected effectively.

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<sup>51</sup> [www.zeit.de/gesellschaft/zeitgeschehen/2020-08/polizeigewalt-einsatz-hamburg-kritik](http://www.zeit.de/gesellschaft/zeitgeschehen/2020-08/polizeigewalt-einsatz-hamburg-kritik)

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[www.bmju.de/DE/Ministerium/ForschungUndWissenschaft/EvaluierungVerstaendigungStrafverfahren/EvaluierungVerstaendigungStrafverfahren\\_node.html](http://www.bmju.de/DE/Ministerium/ForschungUndWissenschaft/EvaluierungVerstaendigungStrafverfahren/EvaluierungVerstaendigungStrafverfahren_node.html)

## ANNEX

### Case study 1

#### Germany case study/ media coverage #1

- 1 Reference details/Name/Title** (please indicate here how the case has been publicly referred to) Stabbing in Chemnitz (file reference 1 Ks 210 Js 27835/18)
- 2 Brief description of the case** At a city festival, there was a physical confrontation, in which two men were injured and a German-Cuban died as a result of a knife wound. There were two main suspects, both of them were refugees. One of them, an Iraqi, managed to escape. The other, a Syrian, was arrested and convicted for manslaughter (*Totschlag*) and grievous bodily harm (*Gefährliche Körperverletzung*).
- 3 Timeline of events** (briefly outline major events in order to capture the nature of the case)
  - 26-27 August 2018:** Date of the crime. An arrest warrant is issued for the two suspects. Several media report of riots of right-wing extremists in reaction to the crime, people doing the Nazi salute and journalists and foreign-looking people being attacked.
  - 28 August 2019:** Right-wing extremists spread a picture of the arrest warrant on the internet with details of the suspects and witnesses. The document was leaked by a prison officer who was able to take a picture of it and disseminate it to the right-wing groups. He is later sentenced to 11 months probation for breach of official secrecy (*Verletzung von Dienstgeheimnissen*).
  - September:** The case has reached a major political dimension. There are different opinions between high-ranking politicians and officials about the riots: For example, Chancellor Merkel condemns the 'hunts on foreigners' (*Hetzjagden*), while the Prime Minister of Saxony – the Federal State where Chemnitz is located – thinks that there were no hunts on foreigners, no mob and no pogroms etc. (Him and Merkel are both in the same political party). He is widely criticised for this view, but also receives support. For instance, Hans-Georg Maaßen, the (at the time) president of the Office for the Protection

of the Constitution (*Verfassungsschutz*) – who often drew attention through right-wing populist statements – questions the authenticity of the media reports on the violence. Violence by extreme right-wing self-appointed vigilante groups continues.

**18 September:** Another suspect, who was arrested in the meantime, is released from pre-trial detention because there is no evidence against him.

**8 January 2019:** The Syrian suspect is accused of manslaughter (*Totschlag*) and grievous bodily harm (*gefährliche Körperverletzung*). The other suspect is still wanted under international arrest warrant.

**22 August 2019:** The Syrian defendant is sentenced to nine and a half years in prison. The Iraqi suspect is still wanted. The judgment is widely criticised (see below).

4 **Media coverage** (how did the media refer to the suspects? How were the suspects presented, e.g. handcuffed, in prison clothes? Did law enforcement authorities or other actors inform about the case, e.g. in a press conference? Please include references, including links where possible)

- The media referred to the Syrian suspect as suspect, alleged perpetrator or accused, in tabloids like Bild, however, also as ‘knife-killer’ (see Bild-link below).
- The first names of the suspects and the first letter of their last names were published by all media reporting on the case.
- The accused was shown in civilian clothes. Most pictures of his face were pixelated/blurred or a black bar was put over his face. In some pictures, however, his face was visible.
- During the trial, he was not handcuffed, but he was when he was led into the courtroom. Several media published pictures of him handcuffed and guarded by policemen.
- Pictures of the accused were published
- A (clear) picture of the wanted Iraqi’s face was published.
- The police and the public prosecutor’s office held press conferences to inform about the case. There were several issues with fake news, which were spread on social media and by right-wing populist politicians (e.g. about an alleged second fatality or about sexual harassment during the night of the crime). However, the police and (quality) media pointed out that these rumours were not true.

5 **Key issues** (e.g. major allegations of guilt in the media; where the presumption of innocence was concerned, reactions of persons involved and the media)

- The violence had triggered a series of racist demonstrations and violent riots by right-wing extremists in Chemnitz.
- In addition, political pressure also came from Chemnitz's SPD (Social Democratic Party) mayor who described a possible acquittal of the accused Syrian as 'difficult' for her city. She said that she hoped for a conviction so that the relatives of the victim could 'find peace'.
- In this context, it is important to know that a large part of the population in Chemnitz sympathises with right-wing extremists/populists: 24.3 percent of the Chemnitz population voted for the right-wing populist and in parts right-wing radical party AfD in the last Federal election.
- State elections in Saxony (the federal state in which Chemnitz is located) were about to take place in the same year and some people expressed concern that an acquittal of the Syrian would give the right-wing populists further arguments against alleged 'criminal refugees'.
- Throughout the course of the trial, the defendant remained silent. Two days before the sentence was pronounced, he expressed his view on the accusations via the media in a telephone interview on ZDF, a major television channel. There, he affirmed his innocence, but did not repeat his statements in court. At the end of the trial, he only affirmed his innocence and said that he hoped for a fair sentence and that the truth would come to light. The testimony from the telephone interview was not taken into account in the judgment, as only the evidence given in the main trial (*Hauptverhandlung*) can be used in the judgment.
- His personal reasons for acting like this are not really clear.

6 **Key consequences or implications of the case with regard to the presumption of innocence** (with a focus on public reaction to publications in the media which might lead to a public debate)

- Several media reported on the 'numerous' previous convictions of the Iraqi suspect, who was released from pre-trial detention after a short time (18 September, see timeline above), and mixed the reporting with questions of residence law ('The Iraqi suspect should already have been deported two years ago')
- On several occasions, subjective and incorrect legal assessments were included in the reporting (e.g. the act was called a 'murder' (*Mord*) instead of 'manslaughter' (*Totschlag*). Under German criminal

law, however, this would require additional criteria (such as malice (*Heimtücke*) for instance), which was not the case.

- Another point that potentially touched upon the presumption of innocence were the public statements by the mayor before the trial, that she was hoping for a conviction (see above).
- Riots, right-wing demonstrations, left-wing counter-demonstrations, the nationwide political discussion about this and the daily, detailed and often subjective reporting by the media built up a lot of pressure and carried the risk to affect the objectivity of the trial.

In case the case brought before a court or a non-judicial mechanism – the following questions would also need to be answered

7 What was the decision of the case (summarize briefly and indicate reference details of the case)? How did media report on the decision?

- Due to the heated atmosphere caused by right-wing extremist violence, the trial took place in the Higher Regional Court Dresden for safety purposes, although the actual court was Chemnitz District Court.
- The court sentenced the accused Syrian to 9 years and 6 months imprisonment because it was convinced that the testimonies of the witnesses were credible, and that the accused was the perpetrator. Thus, the court largely followed the indictment of the public prosecutor's office, which had demanded 10 years imprisonment.
- The defendant's testimony in the telephone interview with the television station was not taken into account in the judgment, as only the evidence given in the main trial (*Hauptverhandlung*) can be used in the judgment.

The judgment was publicly criticised by the media for several reasons:

- Criticism of a politically motivated judgment in view of the right-wing uprisings, the upcoming elections and the pressure the mayor had put on the court.
- In addition, the defence lawyers stated that the court would not have been allowed to convict the defendant because there were doubts that he was the perpetrator due to the lack of clear evidence: There were no DNA traces of him on the murder weapon (knife) or on the victim and the defendant

had no injuries which could indicate a physical confrontation with the victim. Furthermore, they claimed that the prosecution's main witness entangled himself in several contradictions.

- The defence's criticism and the doubts about the judgment were taken up by many newspapers and it was questioned whether an innocent person had been convicted.
- An appeal (*Revision*) against the judgment was lodged with the Federal Court of Justice (BGH). However, the appeal was unsuccessful, so that the judgment became final in May 2020.

## Case study 2

### Member State case study/ media coverage #1

1 **Reference details/Name/Title** (please indicate here how the case has been publicly referred to)

Missing girl from Berlin

2 **Brief description of the case**

A 15-year old girl from Berlin disappeared in February 2019 and is missing until today. The main suspect is her brother-in-law in whose house she was last seen.

3 **Timeline of events** (briefly outline major events in order to capture the nature of the case)

18 February 2019: The 15-year old girl disappears from the house of her older sister and her brother-in-law.

23 February 2019: The police announces that a homicide department takes over the case.

28 February 2019: The police arrest the girl's brother-in-law.

29 February 2019: The brother-in-law is released from pre-trial detention but is arrested again on 4 March 2019.

22 March 2019: The arrest warrant against the brother-in-law is revoked.

The brother-in-law remains the main suspect, but there is no significant evidence proving his guilt in the house where they stayed or elsewhere (e.g. bloodstains or traces of a fight). Until today, the girl was not found.

4 **Media coverage** (how did the media refer to the suspects? How were the suspects presented, e.g. handcuffed, in prison clothes? Did law enforcement authorities or other actors inform about the case, e.g. in a press conference? Please include references, including links where possible)

- There was a lot of media coverage, in particular in tabloids such as Bild or B.Z.
- The coverage was prejudging and focused on the brother-in-law as the main suspect, quickly after the girl disappeared, and despite the fact that there was a lot of speculation rather than evidence.
- It was almost real-time-reporting with new articles and headlines every day.
- The suspect was identified by the media. Non-blurred pictures of his face alongside his first name and the first letter of his last name were published.
- The style of the reports, and the headlines in particular, was mostly sensational and speculative
- When reporting on his arrest, some newspapers stated that he was handcuffed, but there were no pictures available of him in this situation.
- The public prosecutor's office informed about the case in several press conferences and on social media, presenting the progress of investigations.

5 **Key issues** (e.g. major allegations of guilt in the media; where the presumption of innocence was concerned, reactions of persons involved and the media)

- One of the key issues besides the style and content of the media coverage is that reportedly, results of investigations (already at a very early stage of the investigations) have been leaked by the police to the media. This allows the public to participate in information, which is not intended for them, hinders the investigations and the ascertainment of the truth and thus also poses a threat to the presumption of innocence.

6 **Key consequences or implications of the case with regard to the presumption of innocence** (with a focus on public reaction to publications in the media which might lead to a public debate)

- As the case is not brought to court yet, one can only speculate about the possible implications on a judgment.
- But even if there will be no indictment, the suspect may still face multiple difficulties related to the way to authorities and the media treated his case: He was identified and pictures of him were published, alongside media coverage suggesting his guilt. There may be the danger that many people remember the images and headlines and will still consider him to be guilty, which can have a strong effect on his daily life. This is not compatible with the presumption of innocence.

In case the case brought before a court or a non-judicial mechanism – the following questions would also need to be answered

7 What was the decision of the case (summarize briefly and indicate reference details of the case)? How did media report on the decision?

The case was not brought before a court (yet).