German Criminal Law

A Brief Introduction
Program for today

Part I: Basic concepts and terminology (a few selected characteristics)
- Civil law vs. Common law
- Sources of criminal law and hierarchy of norms
- Structure of the German Criminal Code (the StGB)
- Tripartite structure of offences

Part II: The role of lay judges („Schöffen“) in German criminal law
- Why do we have them?
- Where do we find them?
- Who can become a lay judge?

Part III: Questions and discussion
Basic Concepts and Terminology

Four key concepts to understand German criminal law

- Civil law approach
- Sources of Criminal Law and Hierarchy of norms
- The Tripartite Structure of Offences
- Structure of the German Criminal Code

Introduction to German Criminal Law
Lukas Huthmann | Research assistant (chair of Prof. Heger) | Mail: huthmann@rewi.hu-berlin.de
Basic Concepts and Terminology

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# Civil Law vs. Common Law Tradition

<table>
<thead>
<tr>
<th>Common Law Approach</th>
<th>Civil Law Approach</th>
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<tbody>
<tr>
<td>System of stare decisis</td>
<td>No system of stare decisis (lower courts are not legally bound by decisions of higher courts)</td>
</tr>
<tr>
<td>Case-law is of primary importance (although a trend has emerged to codify in the UK)</td>
<td>Codification is highly important</td>
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<tr>
<td>More inductive approach</td>
<td>More deductive approach</td>
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</table>
Inductive vs. Deductive

Civil law approach

What is meant by deductive and inductive?

Inductive (e.g. English criminal law)

Deductive (e.g. Germany)

Doctrine is developed on an abstract level and then applied to individual cases

Inductive (e.g. English criminal law)

Doctrine

individual cases „build“ the doctrine

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Grundgesetz (German Basic law)

Simple Federal Law

Other law (not adopted by the Parliament)

Judicial case law

(1) In the courts every person shall be entitled to a hearing in accordance with law.

(2) An act may be punished only if it was defined by a law as a criminal offence before the act was committed.

(3) No person may be punished for the same act more than once under the general criminal laws.
Sources of Criminal Law and Hierarchy

**Radbruch Formula** (translated):

*The conflict between justice and the reliability of the law should be solved in favour of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered "erroneous law". It is impossible to draw a sharper line of demarcation between cases of legal injustice and statutes that are applicable despite their erroneous content; however, another line of demarcation can be drawn with rigidity: Where justice is not even strived for, where equality, which is the core of justice, is renounced in the process of legislation, there a statute is not just 'erroneous law', in fact is not of legal nature at all. That is because law, also positive law, cannot be defined otherwise as a rule, that is precisely intended to serve justice.*
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**Allgemeiner and Besonderer Teil**

**General Part of the StGB (Allgemeiner Teil)**
- Fundamental principles applicable to all offences
- Concepts like attempt, complicity (participation and instigation) etc.
- Justificatory and excusatory defenses

**Special Part of the StGB (Besonderer Teil)**
- Single offences
- e.g. theft (§ 242 StGB), murder (§ 211 StGB), armed robbery (§§ 249, 250 StGB)
Basic Concepts and Terminology

Four key concepts to understand German criminal law

Civil law approach

Sources of Criminal Law and Hierarchy of norms

The Tripartite Structure of Offences

Structure of the German Criminal Code
Tatbestand, Rechtswidrigkeit and Schuld

The Tripartite Structure of Offences

- Offence description (Tatbestand)
  - Actus reus (objektiver Tatbestand)
  - Mens rea (subjektiver Tatbestand)

- General unlawfulness (Rechtswidrigkeit)
  - Absence of justificatory defenses

- Guilt (Schuld)
  - Absence of excusatory defenses
  - for juveniles: maturity

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The role of lay judges („Schöffen“)

Three questions:

- Why do we have them?
- Where do we find them?
- Who can become a lay judge?
The role of lay judges („Schöffen“)

Three questions:

Why do we have them?  
Where do we find them?  
Who can become a lay judge?
Why do we have them?

Reasons for including lay judges:

• Expression of people’s sovereignty
• Enhance trust in criminal justice (participation of ordinary citizens)
• Increase legitimacy
• Re-connect to the people and counter criticism that lawyers are aloof/unattached from the general public

Criticism:

• Really necessary and suitable to reach the aims?
• Selection of lay judges biased?
The role of lay judges („Schöffen“)

Three questions:

- Why do we have them?
- Where do we find them?
- Who can become a lay judge?
Where do we find them?

One specific form of participation of lay judges: *Schöffengerichte*

-> Courts Constitution Act (*Gerichtsverfassungsgesetz*): applies to criminal procedures

**Section 28**

Courts with lay judges (*Schöffengerichte*) shall be established at the Local Courts to hear and decide criminal matters falling under the jurisdiction of the Local Courts [...]

**Section 29**

(1) The bench *shall consist of a Local Court judge as presiding judge and two lay judges*. [...]

**Section 30**

(1) Except where the law provides for exceptions, during the main hearing the lay judges *shall exercise judicial office in full and with the same voting rights as the Local Court judges* and shall also participate in the decisions to be made in the course of a main hearing that are entirely unrelated to the delivery of the judgment and may be made without an oral hearing. [...]

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Where do we find them?

Two important court compositions with lay judges participating

1) Courts with lay judges („Schöffengerichte“)
   • At Local Court level (lowest instance mainly for minor offences)
   • Conviction only with a 2/3 majority
   • Lay judges can outvote professional (!)

2) Große Strafkammer (also Schwurgerichtskammer)
   • Conviction only with a 2/3 majority
   • At District Court level (middle instance, all crimes including murder)
The role of lay judges („Schöffen“)

Three questions:

Why do we have them?

Where do we find them?

Who can become a lay judge?
Who can become a lay judge?

Section 32
The following persons shall be ineligible for the office of lay judge:

1. persons who as a result of a judicial decision do not have the capacity to hold public office or who have been sentenced to imprisonment exceeding six months for an intentional act;

2. persons against whom investigation proceedings are pending for an offence that can result in loss of capacity to hold public office.

Section 33
The following persons should not be appointed to the office of lay judge:

1. persons who would not yet have attained the age of twenty-five by the beginning of the term of office; [...]
Questions