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THE GERMAN CODE OF CRIMINAL PROCEDURE

StPO

Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette
[*Bundesgesetzblatt*] Part I p. 1074, 1319), as most recently amended by Article 3 of the Act
of 23 April 2014 (Federal Law Gazette Part I p. 410)

PART ONE GENERAL PROVISIONS

CHAPTER I SUBSTANTIVE JURISDICTION OF THE COURTS

Section 1 [Substantive Jurisdiction]

Substantive jurisdiction of the courts shall be determined by the Courts Constitution
Act.

Section 2 [Joinder and Severance of Connected Cases]

(1) Connected criminal cases, which individually would fall within the jurisdiction of
courts of different rank, may be tried jointly by the court of superior jurisdiction.
Connected criminal cases of which individual cases would fall within the jurisdiction
of particular criminal divisions pursuant to section 74 subsection (2) and
sections 74a and 74c of the Courts Constitution Act may be tried jointly by the
criminal division which enjoys precedence pursuant to section 74e of the Courts
Constitution Act.

(2) Such court may, by order, sever connected criminal cases on grounds of
expediency.

Section 3 [Definition of Connection]

Cases shall be deemed to be connected when one person is accused of more than
one criminal offence or if, in the case of one offence, more than one person is

charged as perpetrator, inciter, or accessory before, or after, the fact, or charged with obstruction of justice or handling stolen goods.

Section 4

[Subsequent Joinder or Severance]

(1) The court may, by order, direct the joinder of connected, or the severance of joint, criminal cases even after the opening of the main proceedings, upon application by the public prosecution office, the defendant or of its own motion.

(2) The court of higher rank to whose district the other courts belong shall be competent to issue the order. If there is no such court, the common superior court shall decide.

Section 5

[Jurisdiction over Connected Cases]

The time for which the proceedings shall be joined shall be determined by reference to the criminal case which falls within the jurisdiction of the court of higher rank.

Section 6

[Examination *Proprio Motu*]

At all stages of the proceedings the court shall, *proprio motu*, review its substantive jurisdiction.

Section 6a

[Jurisdiction of Particular Criminal Divisions]

Prior to the opening of the main proceedings the court shall, *proprio motu*, review whether particular criminal divisions have jurisdiction pursuant to the provisions of the Courts Constitution Act (section 74 subsection (2) and sections 74a and 74c of the Courts Constitution Act). Thereafter it may take account of its lack of jurisdiction only upon an objection being filed by the defendant. The defendant may file such an objection during the main hearing only prior to commencement of his examination on the charge.

CHAPTER II

VENUE

Section 7

[Place Where the Act Was Committed]

(1) Venue shall be deemed to be established in the court in whose district the criminal offence was committed.

(2) If essential elements of a criminal offence are established by the contents of a publication appearing within the territorial scope of this Federal statute, only the court in whose district the publication appeared shall be deemed to have jurisdiction pursuant to subsection (1). However, in defamation cases, where initiated by private prosecution, the court in whose district the publication was distributed shall also have jurisdiction if the defamed person has his domicile or ordinary place of residence in that district.

Section 8

[Domicile, Place of Residence]

(1) Venue shall also be deemed to be established in the court in whose district the indicted accused has his domicile at the time the charges are preferred.

(2) If the indicted accused has no domicile within the territorial scope of this Federal statute, venue shall also be determined by his ordinary place of residence and, if such place of residence is not known, by his last domicile.

Section 9

[Place of Apprehension]

Venue shall also be deemed to be established in the court in whose district the accused was apprehended.

Section 10

[Home Port]

(1) If the criminal offence was committed outside the territorial scope of this statute on a ship authorized to fly the Federal flag, the competent court shall be the court in whose district the ship's home port is located, or the port within the territorial scope of this statute first reached by the ship after commission of the offence.

(2) Subsection (1) shall apply *mutatis mutandis* to aircraft authorized to bear the nationality sign of the Federal Republic of Germany.

Section 10a

[Environmental Criminal Offences]

If no venue is established for a criminal offence committed at sea outside the territorial scope of this statute, the venue shall be Hamburg; the competent Local Court shall be Hamburg Local Court.

Section 11

[German Officials Abroad]

(1) In the case of Germans who enjoy the right of extraterritoriality, as well as of officials of the Federation or of a German *Land* employed abroad, venue shall be determined by the domicile which they had in Germany. If they had no such domicile, the seat of the Federal Government shall be considered their domicile.

(2) These provisions shall not apply to honorary consuls.

Section 11a

[Soldiers Abroad]

If a criminal offence is committed outside the territorial scope of this statute by soldiers of the Federal Armed Forces under special deployment abroad (section 62 subsection (1) of the Soldiers' Act), venue shall be deemed to be established in the court competent for the City of Kempten.

Section 12

[Concurrence of More than One Venue]

(1) If more than one court has jurisdiction pursuant to the provisions of Sections 7 to 11a and 13a, the court which first opened the investigation shall take precedence.

(2) The investigation and decision may, however, be transferred to one of the other competent courts by the common superior court.

Section 13

[Venue for Connected Cases]

(1) For connected criminal cases each of which, pursuant to the provisions of Sections 7 to 11, would be subject to the jurisdiction of different courts, venue shall be deemed to be established in each court having jurisdiction over one of the criminal cases.

(2) If more than one connected criminal case is pending in different courts, they may be joined in whole or in part in one of the courts, where such courts so agree upon application of the public prosecution office. If such agreement is not reached, the common superior court, upon application by the public prosecution office or an indicted accused, shall decide whether and in which court the cases shall be joined.

(3) Cases which have been joined may be severed in the same manner.

Section 13a

[Determination of the Competent Court by the Federal Court of Justice]

If venue cannot be established in any court within the territorial scope of this Federal statute, or if such court cannot be ascertained, the Federal Court of Justice shall decide which court shall be competent.

Section 14

[Dispute Regarding Jurisdiction]

If a dispute arises between courts as regards jurisdiction, the common superior court shall decide which court shall conduct the investigation and give the decision.

Section 15

[Impediment of the Competent Court]

If a competent court is, in an individual case, legally or factually hindered from exercising its judicial authority, or if it is feared that a hearing before such a court might endanger public security, the next superior court shall assign the investigation and decision to an equivalent court in another district.

Section 16

[Objection of Lack of Jurisdiction]

Prior to the opening of the main proceedings, the court shall, *proprio motu*, review its local jurisdiction. Thereafter it may declare its lack of jurisdiction only upon an objection being filed by the defendant. The defendant may file such an objection during the main hearing only prior to the commencement of his examination on the charge.

Sections 17 and 18 (Deleted)

Section 19

[Dispute Regarding Lack of Jurisdiction]

Where more than one court, one of which is competent, has stated in decisions that are no longer contestable that it lacks jurisdiction, the common superior court shall designate the competent court.

Section 20

[Individual Acts By a Court Lacking Jurisdiction]

Individual investigatory acts by a court lacking jurisdiction shall not be ineffective by virtue of that lack of jurisdiction alone.

Section 21

[Exigent Circumstances]

A court lacking jurisdiction shall, in exigent circumstances, conduct acts of investigation in its district.

CHAPTER III EXCLUSION AND CHALLENGE OF COURT PERSONNEL

Section 22
[Disqualification of a Judge]

A judge shall be barred by law from exercising his judicial office

1. if he himself was aggrieved by the criminal offence;
2. if he is or was the spouse, the civil partner, the guardian or the carer of the accused or of the aggrieved person;
3. if he is or was lineally related or related by marriage, collaterally related to the third degree or related by marriage to the second degree to the accused or to the aggrieved person;
4. if he has acted in the case as an official of the public prosecution office, as a police officer, as attorney of the aggrieved person or as defence counsel;
5. if he has been heard in the case as a witness or expert.

Section 23
[Disqualification of Judges Who Participated in Previous Proceedings]

- (1) A judge who was involved in reaching a decision contested by way of appellate remedy shall be barred by law from participating in the decision of the court of higher instance.
- (2) A judge who was involved in reaching a decision contested by application to reopen the proceedings shall be barred by law from participating in decisions related to proceedings to reopen the case. If the contested decision was taken by a court of higher instance, a judge who participated in the original decision of the court of lower instance shall also be barred. The first and second sentences shall apply *mutatis mutandis* to the participation in decisions to prepare the reopening of the proceedings.

Section 24
[Challenge of a Judge]

- (1) A judge may be challenged both where he has been barred by law from exercising judicial office and for fear of bias.
- (2) A challenge for fear of bias may be brought where there is reason to doubt the impartiality of a judge.
- (3) The public prosecution office, the private prosecutor and the accused may exercise the right of challenge. The court personnel appointed to participate in the decision shall be named upon the request of the parties entitled to exercise the right of challenge.

Section 25
[Final Date for Challenge]

- (1) The challenge on grounds of fear of bias of an adjudicating judge shall be admissible prior to commencement of examination of the first defendant as to the defendant's personal circumstances or, during the main hearing on the appeal on fact and law or the appeal on law, prior to commencement of the rapporteur's statement. All reasons for the challenge shall be stated at the same time.
- (2) Thereafter a judge may be challenged only if
 1. the circumstances on which the challenge is based occurred later or became known to the person entitled to challenge at a later date and

2. the right of challenge is asserted without delay.

After the defendant's last word a challenge shall no longer be admissible.

Section 26

[Procedure Concerning Challenge]

- (1) The motion for challenge shall be filed with the court of which the judge is a member; it may be made orally to be recorded by the court registry. Section 257a shall not apply.
- (2) The grounds for the challenge and in the cases referred to in Section 25 subsection (2) the fact that the request was submitted in time, must be substantiated. The taking of an oath to substantiate a challenge shall not be admissible. To substantiate a challenge, reference may be made to the testimony of the challenged judge.
- (3) The challenged judge shall make an official statement concerning the grounds for challenge.

Section 26a

[Inadmissible Challenge]

- (1) The challenge of a judge shall be rejected by the court as being inadmissible if
 1. the challenge is not made in time;
 2. there is no disclosure of the grounds for the challenge or of any means of substantiating the challenge; or
 3. it is obvious that the challenge is made merely to delay the proceedings or for purposes which are irrelevant to the proceedings.
- (2) The court shall reach a decision on a rejection pursuant to subsection (1) without excluding the challenged judge from the bench. In the case of subsection (1), number 3, a unanimous decision and disclosure of the circumstances constituting the grounds for rejection shall be required. If a commissioned or requested judge, a judge in preparatory proceedings or a criminal court judge is challenged, he shall decide himself whether the challenge shall be rejected as inadmissible.

Section 27

[Decision on the Challenge]

- (1) If the challenge is not rejected as inadmissible, the court of which the challenged person is a member shall decide on the motion of challenge without the challenged person's participation.
- (2) If a judge of the adjudicating criminal division is challenged, the criminal division, in the composition of the court prescribed for decisions made outside the main hearing, shall decide the issue.
- (3) If a judge at the Local Court is challenged, another judge of the same court shall decide. A decision shall not be required if the person challenged considers the motion of challenge to be well-founded.
- (4) If the court which is to give a decision lacks a quorum after exclusion of the challenged judge, the next superior court shall decide.

Section 28

[Appellate Remedy]

- (1) A ruling declaring a challenge to be well-founded shall not be contestable.

(2) An immediate complaint may be lodged against a ruling rejecting the challenge as inadmissible or unfounded. If the ruling concerns an adjudicating judge, it may only be contested together with the judgment.

Section 29

[Non-Deferrable Acts of the Challenged Person]

(1) Prior to conclusion of the motion for challenge a challenged judge shall perform only such acts as may not be deferred.

(2) If a judge is challenged during the main hearing and if the decision on the challenge (Sections 26a and 27) would require an interruption of the main hearing, the main hearing may be continued until such time as a decision on the challenge may be taken without delaying the main hearing; a decision on the challenge shall be taken no later than the beginning of the day following the next day of the hearing, and always prior to commencement of the closing speeches. If the challenge is declared well-founded and the main hearing thus need not be suspended, that part of the hearing completed after submission of the motion for challenge shall be repeated. This shall not apply to such acts as may not be deferred. After submission of the motion for challenge, decisions which may also be taken outside the main hearing may be taken with the participation of the challenged person only if they may not be deferred.

Section 30

[Self-Disqualification; *Ex Officio* Challenge]

The court competent to decide on a motion for challenge shall also decide where no such motion has been filed but a judge reports circumstances which might justify his being challenged, or when for other reasons doubts arise as to whether a judge is barred by law.

Section 31

[Lay Judges and Registry Clerks]

(1) The provisions of this Chapter shall apply *mutatis mutandis* to lay judges as well as to registry clerks and to other persons assisting as recording clerks.

(2) The presiding judge shall decide. In the grand criminal division and the criminal division with lay judges, the judicial members of the bench shall decide. If a recording clerk has been assigned to a judge, the latter shall decide on his challenge or disqualification.

Section 32

(Deleted)

CHAPTER IV

COURT DECISIONS AND COMMUNICATION BETWEEN THE PARTICIPANTS

Section 33

[Hearing the Participants]

(1) A decision of the court rendered in the course of the main hearing shall be taken after hearing the participants.

(2) A decision of the court rendered outside a main hearing shall be taken after a written or oral declaration by the public prosecution office.

(3) If a decision has been taken pursuant to subsection (2), another participant shall be heard before facts or evidentiary conclusions in respect of which he has not yet been heard are used to his detriment.

(4) If remand detention, seizure or other measures have been ordered, subsection (3) shall not apply where the prior hearing would endanger the purpose of such an order. Special provisions governing the hearing of the participants shall not be affected by subsection (3).

Section 33a

[Subsequent Hearing]

If, in a ruling, the court violates the right of a participant to be heard in a manner which might affect the outcome of the case and if such participant has no right to lodge a complaint nor any other legal remedy against this ruling, then as far as the detriment still exists the court shall make an order either *proprio motu* or on application reverting the proceedings to the situation before the decision in question was given. Section 47 shall apply *mutatis mutandis*.

Section 34

[Reasons for the Decision]

Decisions which may be contested by appellate remedy, as well as those refusing an application, shall include reasons.

Section 34a

[Entry into Force by Virtue of an Order]

If, after an appellate remedy has been sought in time, the contested decision immediately enters into force by virtue of an order, it shall be deemed to have entered into force at the end of the day on which the order was given.

Section 35

[Notification of the Decision]

- (1) Decisions which are delivered in the presence of the person to whom they refer shall be notified to him orally. Upon request he shall be given a copy.
- (2) Other decisions shall be notified by service thereof. Where notification of the decision does not start time running in respect of a time limit, the decision may be notified informally.
- (3) Documents served on individuals deprived of their liberty shall be read out to them upon request.

Section 35a

[Instructions on Appellate Remedy]

Upon notification of a decision which is contestable by way of appellate remedy within a given time limit, the person concerned shall be informed of the options for contesting such decision and of the relevant time limits and the procedures prescribed. Where an appeal on fact and law may be filed against the judgment, the defendant shall also be informed of the legal consequences arising out of Section 40 subsection (3) and Sections 329 and 330. Where a negotiated agreement (Section 257c) has preceded a judgment, the person concerned shall also be informed that he is in any case free in his decision to seek an appellate remedy.

Section 36

[Service and Execution of Decisions]

- (1) The presiding judge shall order service of the decisions. The court registry shall ensure that service is effected.
- (2) Decisions requiring execution shall be submitted to the public prosecution office which shall take any necessary action. This shall not apply to decisions concerning order during the sittings.

Section 37
[Procedure Concerning Service]

- (1) The provisions of the Code of Civil Procedure shall apply *mutatis mutandis* to the procedure for service.
- (2) Where documents addressed to a participant are served on several persons authorized to receive them, time limits shall be calculated from the date on which the last person was served.
- (3) If a translation of the judgment is to be made available to a participant in the proceedings pursuant to section 187 subsections (1) and (2) of the Courts Constitution Act, the judgment shall be served together with the translation. In such cases service on the other participants in the proceedings shall be effected at the same time as service pursuant to the first sentence.

Section 38
[Direct Summons]

Persons participating in criminal proceedings who have the authority to summon witnesses and experts directly shall charge the court bailiff with service of the summons.

Section 39
(Deleted)

Section 40
[Service by Publication]

- (1) If service on an accused upon whom a summons to the main hearing has not yet been served cannot be effected in Germany in the prescribed manner, and if compliance with the provisions for service abroad appears impracticable or will presumably be unsuccessful, service by publication shall be admissible. Service shall be considered effected if two weeks have elapsed since the notice was displayed.
- (2) If the summons to the main hearing has previously been served upon the defendant, then service on him by publication shall be admissible if it cannot be effected in Germany in the prescribed manner.
- (3) In proceedings concerning an appeal on fact and law filed by the defendant, service by publication shall already be admissible if it is not possible to serve documents at an address at which documents were last served or which the defendant last provided.

Section 41
[Service on the Public Prosecution Office]

Service on the public prosecution office shall be made by producing the original copy of the document to be served. Where a time limit begins to run upon service, the public prosecution office shall note the day of production on the original.

Section 41a
[Electronic Document]

- (1) Declarations, applications or reasons given in support thereof, which are addressed to the court or the public prosecution office and are expressly required by this statute to be in writing or signed, may be submitted in electronic form if they bear a qualified electronic signature in accordance with the Digital Signatures Act and are suitable for processing by the court or public prosecution office. In addition to the qualified electronic signature, a statutory instrument pursuant to subsection

(2) may provide for the admissibility of a further secure procedure which guarantees the authenticity and the integrity of the electronic document transmitted. An electronic document shall be deemed to have been received as soon as such department of the court or public prosecution office as is designated for receipt has made a record thereof. If the electronic document transmitted is not suitable for processing, the sender is to be notified and informed of the applicable technical requirements without delay. A file copy of the electronic document is to be printed out without delay.

(2) The Federal Government and the governments of the *Länder* shall designate by statutory instrument the time after which electronic documents may be submitted to the courts and public prosecution offices within their area of competence as well as the appropriate format for the processing of the documents. The governments of the *Länder* may, by statutory instrument, transfer this authorization to the *Land* departments of justice. The admissibility of electronic documents may be restricted to individual courts or public prosecution offices or proceedings.

CHAPTER V

TIME LIMITS AND RESTORATION OF THE *STATUS QUO ANTE*

Section 42

[Time Limits Determined in Days]

In calculating a time limit determined in days, the day on which the moment in time or the event determining the beginning of the time limit falls shall not be counted.

Section 43

[Time Limits Determined in Weeks and Months]

(1) A time limit determined in weeks or months shall expire at the end of the day of the last week or the last month, whose name or number corresponds to the day on which the time limit began; where the last month lacks such day, the time limit shall expire at the end of the last day of that month.

(2) If the end of a time limit falls on a Sunday, a public holiday or a Saturday, the time limit shall expire at the end of the next working day.

Section 44

[Restoration of the *Status Quo Ante*]

If a person was prevented from observing a time limit through no fault of his own, he shall be granted restoration of the *status quo ante* upon application. Failure to observe the time limit for filing an appellate remedy shall not be considered a fault if instructions pursuant to Section 35a, first and second sentences, Section 319 subsection (2), third sentence, or Section 346 subsection (2), third sentence, have not been given.

Section 45

[Application for Restoration of the *Status Quo Ante*]

(1) The application for restoration of the *status quo ante* shall be filed with the court where the time limit should have been observed within one week after the reason for non-compliance no longer applies. To observe the time limit, it shall be sufficient for the application to be filed in time with the court which is to decide on the application.

(2) The facts justifying the application shall be substantiated at the time the application is filed, or during the proceedings concerning the application. The omitted act shall subsequently be undertaken within the time limit for filing the

application. Where this is done, restoration may also be granted without an application being filed.

Section 46

[Decision and Appellate Remedy]

- (1) The decision on the application shall be taken by the court which would have been competent to decide on the facts of the case if the act concerned had been completed on time.
- (2) A decision granting the application shall not be contestable.
- (3) An immediate complaint may be lodged against a decision refusing an application.

Section 47

[No Suspension of Execution]

- (1) The application for restoration of the *status quo ante* shall not suspend execution of a court decision.
- (2) The court may, however, order that execution be postponed.
- (3) If restoration of the *status quo ante* annuls the legal effect of a court decision, then warrants of arrest or placement orders, as well as other orders which were in force at the time the court decision took effect, shall become effective again. In the case of a warrant of arrest or a placement order, the court granting restoration of the *status quo ante* shall make an order revoking such warrant of arrest or placement order if it is evident that the requirements therefor are no longer met. If this is not the case, the court competent pursuant to Section 126 subsection (2) shall review the detention without delay.

CHAPTER VI WITNESSES

Section 48

[Summons of Witnesses]

- (1) Witnesses shall be obliged to appear before the judge on the date set down for their examination. They shall have the duty to testify if no exception admissible by statute applies.
- (2) A witness summons shall specify procedural requirements serving the interests of the witness, the forms of assistance available to witnesses, as well as the legal consequences of failure to appear.

Section 49

[Examination of the Federal President]

The Federal President shall be examined in his residence. He shall not be summoned to the main hearing. The record of his examination by the court shall be read out at the main hearing.

Section 50

[Examination of Members of Parliament or Government Ministers]

- (1) Members of the Federal Parliament, of the Federal Council, of a *Land* parliament or of a second chamber shall be examined at their place of assembly while present.
- (2) Members of the Federal Government or of a *Land* government shall be examined at their government office or, if they are not there, at the place where they are.
- (3) Any deviation from the foregoing provisions shall require,

in the case of members of a body mentioned in subsection (1), the approval of that body,

in the case of members of the Federal Government, the approval of the Federal Government,

in the case of members of a *Land* government, the approval of the *Land* government.

(4) Members of the legislative bodies mentioned in subsection (1) and members of the Federal Government or of a *Land* government, if examined outside the main hearing, shall not be summoned to such hearing. The record of their judicial examination shall be read out at the main hearing.

Section 51

[Consequences of Non-Appearance]

(1) A witness who has been properly summoned yet fails to appear shall be charged with the costs attributable to his failure to appear. At the same time, a coercive fine shall be imposed on him and coercive detention ordered if the coercive fine cannot be collected. A witness may also be brought before the court by force; Section 135 shall apply *mutatis mutandis*. In the case of repeated non-appearance the coercive measure may be imposed a second time.

(2) Costs shall not be charged nor any coercive measure be imposed if the witness provides a sufficient and timely excuse for his non-appearance. If such excuse is not provided in time pursuant to the first sentence, the charging of costs and the imposition of a coercive measure shall be dispensed with only if it is demonstrated that the delayed excuse is not the witness' fault. If the witness is sufficiently excused thereafter, the orders made shall be revoked subject to the conditions set out in the second sentence.

(3) Authority to order such measures shall also be vested in the judge in the preliminary proceedings as well as in a commissioned and requested judge.

Section 52

[Right to Refuse Testimony on Personal Grounds]

(1) The following persons may refuse to testify:

1. the fiancé(e) of the accused or the person to whom the accused has made a promise to enter into a civil partnership;
2. the spouse of the accused, even if the marriage no longer exists;
- 2a. the civil partner of the accused, even if the civil partnership no longer exists;
3. a person who is or was lineally related or related by marriage, collaterally related to the third degree or related by marriage to the second degree to the accused.

(2) If minors for want of intellectual maturity, or minors or persons placed in care due to mental illness or mental or emotional deficiency have no sufficient understanding of the importance of their right of refusal to testify, testimony may be taken from such persons only if they are willing to testify and if their statutory representative also agrees to their examination. If the statutory representative is accused himself, he may not decide on the exercise of the right of refusal to testify; if both parents are entitled to act as statutory representative, the same shall apply to the parent who is not accused.

(3) Persons who are entitled to refuse to testify, and in the cases referred to in subsection (2) also their representatives authorized to decide on the exercise of the right of refusal to testify, shall be instructed concerning their right prior to each examination. They may revoke the waiver of this right during the examination.

Section 53

[Right to Refuse Testimony on Professional Grounds]

(1) The following persons may also refuse to testify:

1. clergymen, concerning the information that was entrusted to them or became known to them in their capacity as spiritual advisers;
2. defence counsel of the accused, concerning the information that was entrusted to them or became known to them in this capacity;
3. attorneys, patent attorneys, notaries, certified public accountants, sworn auditors, tax consultants and tax representatives, doctors, dentists, psychological psychotherapists, psychotherapists specializing in the treatment of children and juveniles, pharmacists and midwives, concerning the information that was entrusted to them or became known to them in this capacity. In this respect other members of a Bar Association shall be deemed to be attorneys;
- 3a. members or representatives of a recognized counselling agency pursuant to sections 3 and 8 of the Act on Pregnancies in Conflict Situations, concerning the information that was entrusted to them or became known to them in this capacity;
- 3b. drugs dependency counsellors in a counselling agency recognized or set up by an authority, a body, an institution or a foundation under public law, concerning the information that was entrusted to them or became known to them in this capacity;
4. members of the Federal Parliament, of the Federal Convention, of the European Parliament from the Federal Republic of Germany or of a *Land* parliament, concerning persons who have confided certain facts to them in their capacity as members of these bodies, or to whom they have confided facts in this particular capacity, as well as concerning the facts themselves;
5. individuals who are or have been professionally involved in the preparation, production or dissemination of periodically printed matter, radio broadcasts, film documentaries or in the information and communication services involved in instruction or in the formation of opinion.

The persons named in number 5 of the first sentence may refuse to testify concerning the author or contributor of comments and documents, or concerning any other informant or the information communicated to them in their professional capacity including its content, as well as concerning the content of materials which they have produced themselves and matters which have received their professional attention. This shall apply only insofar as this concerns contributions, documentation, information and materials for the editorial element of their activity, or information and communication services which have been editorially reviewed.

(2) The persons designated in subsection (1), first sentence, numbers 2 to 3b, may not refuse to testify if they have been released from their obligation of secrecy. The right of the persons named in subsection (1), first sentence, number 5, to refuse to testify concerning the content of materials which they have produced themselves and matters which have received their professional attention shall lapse if the testimony is required to assist in clearing up a felony, or if the object of the investigation is

1. a crime against peace and of endangering the democratic state based on the rule of law, or of treason and of endangering external security (sections 80a, 85, 87, 88, 95, also in conjunction with sections 97b, 97a, 98 to 100a of the Criminal Code),
2. a crime against sexual self-determination pursuant to sections 174 to 176 and section 179 of the Criminal Code, or
3. money-laundering or concealment of unlawfully acquired assets pursuant to section 261 subsections (1) to (4) of the Criminal Code,

and an enquiry into the facts and circumstances or an investigation as to the whereabouts of the accused would otherwise offer no prospect of success or be much more difficult. The witness may refuse to testify even in such cases, however, where testimony would result in disclosure of the identity of the author or contributor of comments and documents, or of any other informant, or of the information communicated to him in his professional capacity pursuant to subsection (1), first sentence, number 5, or of the content of such communication.

Section 53a

[Right of Professional Assistants to Refuse Testimony]

(1) Persons assisting, and persons involved in the professional activities of those listed in Section 53 subsection (1), numbers 1 to 4, as part of their training, shall be considered equivalent to such persons. The decision as to whether or not such assistants shall exercise their right to refuse to testify shall be taken by the persons listed in Section 53 subsection (1), numbers 1 to 4, unless such a decision cannot be obtained within a foreseeable time.

(2) A release from the obligation of secrecy (Section 53 subsection (2), first sentence) shall apply equally to the assistants.

Section 54

[Authorization for Judges and Officials to Testify]

(1) The special provisions of the law concerning public officials shall apply to the examination of judges, officials, and other persons in the public service as witnesses concerning circumstances covered by their official obligation of secrecy, as well as to permission to testify.

(2) Members of the Federal Parliament, of a *Land* parliament, of the Federal Government or of a *Land* government, as well as employees of a Federal or *Land* parliamentary group, shall be subject to the special provisions applicable to them.

(3) The Federal President may refuse to testify if his testimony would be detrimental to the welfare of the Federation or of a German *Land*.

(4) These provisions shall also apply where the persons referred to above are no longer members of the public service or employees of a parliamentary group or if

their terms of office have expired, insofar as the events concerned occurred, or became known to them, during their terms of service, employment or office.

Section 55

[Refusal of Information]

- (1) Any witness may refuse to answer any questions the reply to which would subject him, or one of the relatives specified in Section 52 subsection (1), to the risk of being prosecuted for a criminal offence or a regulatory offence.
- (2) The witness shall be instructed as to his right to refuse to answer.

Section 56

[Substantiation of the Grounds for Refusal to Testify]

The fact on which the witness bases his refusal to testify in the cases referred to in Sections 52, 53 and 55 shall be substantiated upon request. A sworn affirmation by the witness shall be sufficient.

Section 57

[Instruction Regarding Oath]

Before examination, witnesses shall be admonished to tell the truth and instructed as to the criminal law consequences of incorrect or incomplete statements. They shall be informed of the possibility that they may be placed under oath. If they are placed under oath, they shall be instructed on the importance of the oath and on the fact that the oath may be taken with or without religious affirmation.

Section 58

[Examination; Confrontation]

- (1) Witnesses shall be examined individually and in the absence of the witnesses who are to be heard subsequently.
- (2) A confrontation with other witnesses or with the accused in the preliminary proceedings shall be admissible if this appears necessary for the further proceedings.

Section 58a

[Examination by Audio-Visual Medium]

- (1) The examination of a witness may be recorded on an audio-visual medium. The examination shall, after evaluation of the relevant circumstances, be recorded and conducted as a judicial examination if
 1. the interests meriting protection of persons of less than 18 years of age as well as of persons who as children or juveniles have been aggrieved as a result of one of the criminal offences designated under Section 255a subsection (2) can thus be better safeguarded; or
 2. there is a concern that it will not be possible to examine the witness during the main hearing and the recording is required in order to establish the truth.
- (2) Use of the audio-visual recording shall be admissible only for the purposes of the criminal prosecution and only insofar as it is required in order to establish the truth. Section 101 subsection (8) shall apply *mutatis mutandis*. Sections 147 and 406e shall apply *mutatis mutandis* subject to the proviso that copies of the recording may be made available to persons entitled to inspect the files. The copies may not be duplicated nor may they be passed on. They are to be returned to the public prosecution office as soon as there is no further legitimate interest in using them.

The transfer of the recording or the release of copies to persons other than those aforementioned shall be subject to the consent of the witness.

(3) If the witness does not consent to a copy of the recording of his examination as a witness being made available pursuant to subsection (2), third sentence, then instead a written transcript of the recording shall be released to the persons entitled to inspect the files in accordance with Sections 147 and 406e. The person who produces the transcript shall sign with the addendum that he confirms the accuracy of the transcript. The right to view the recording pursuant to Sections 147 and 406e shall remain unaffected. The witness is to be informed of the right to refuse his consent pursuant to the first sentence.

Section 58b

[Examination Outside the Main Hearing]

The examination of a witness outside the main hearing can be effected in such a way that the witness is located in another place than the person being examined and the examination is simultaneously transmitted audio-visually to the place where the witness is located and to the examination room.

Section 59

[Oath]

(1) Witnesses shall not be placed under oath unless the court, at its discretion, deems it necessary because of the decisive importance of the statement, or in order to obtain a true statement. The reason why the witness is placed under oath need not be specified in the record unless the witness is examined outside the main hearing.

(2) Witnesses shall be placed under oath individually after they have been examined. Except as otherwise provided, the oath shall be taken at the main hearing.

Section 60

[Prohibition of Oath]

An oath shall not be administered

1. to persons who at the time of the examination are still under the age of 18, or who have no sufficient understanding of the nature and importance of the oath due to their deficient intellectual maturity or mental illness or mental or emotional deficiency;
2. to persons who are suspected of having committed the offence which forms the subject of the investigation, or of having participated in it, or who are suspected of accessoryship after the fact, obstruction of justice or handling stolen goods, or who have already been sentenced in respect thereof.

Section 61

[Right to Refuse to Give Testimony under Oath]

The relatives of the accused specified in Section 52 subsection (1) shall have the right to refuse to give testimony under oath. They are to be instructed accordingly.

Section 62

[Oath in Preparatory Proceedings]

Administration of an oath in the preparatory proceedings shall be admissible

1. in exigent circumstances; or

2. if the witness is expected to be unavailable at the main hearing and the conditions set out in Section 59 subsection (1) apply.

Section 63

[Oath on Examination by Commission]

If the witness is examined by a commissioned or requested judge, an oath shall be administered where admissible, if so demanded in the commission or request from the court.

Section 64

[Form of Oath]

(1) An oath with religious affirmation shall be administered in such a way that the judge addresses the following words to the witness:

“You swear by God the Almighty and Omniscient that, to the best of your knowledge, you have told the pure truth and have not concealed anything”,
whereupon the witness says the words:

“I swear, so help me God”.

(2) The oath without religious affirmation shall be administered in such a way that the judge addresses the following words to the witness:

“You swear that, to the best of your knowledge, you have told the pure truth and have not concealed anything”,
whereupon the witness says the words:

“I swear”.

(3) If a witness indicates that as a member of a religious denomination or of a community professing a creed he wants to use a formula of affirmation used by such denomination or community, he may add it to the oath.

(4) The person swearing the oath shall raise his right hand when taking the oath.

Section 65

[Affirmation Equivalent to an Oath]

(1) If a witness states that he does not wish to swear an oath for reasons of faith or conscience he shall affirm the truth of his testimony. The affirmation shall be equivalent to an oath; the witness shall be informed of this fact.

(2) The truth of the statement shall be affirmed in such a way that the judge addresses the following words to the witness:

“You are aware of your responsibility before the court and affirm that, to the best of your knowledge you have told the pure truth and have not concealed anything”,

whereupon the witness says:

“Yes”.

(3) Section 64 subsection (3) shall apply *mutatis mutandis*.

Section 66

[Hearing or Speech Impaired Persons]

(1) Hearing or speech impaired persons may choose to take the oath by repeating the form of oath, or by writing down and signing the form of oath or with the help of a person who facilitates communication to be appointed by the court. The court shall provide appropriate technical aids. The hearing or speech impaired person is to be instructed as to his right to choose.

(2) The court may require that the oath be taken in written form or order the attendance of a person who facilitates communication if the hearing or speech impaired person has not exercised his right to choose pursuant to subsection (1) or if it is not possible, or only with disproportionate effort, to take the oath in the manner chosen pursuant to subsection (1).

(3) Sections 64 and 65 shall apply *mutatis mutandis*.

Section 67

[Reliance on the Prior Oath]

If a witness, after having been examined under oath, is examined a second time in the same preliminary proceedings or in the same main proceedings, the judge, instead of administering a second oath, may have the witness confirm the accuracy of his statement by reference to the oath previously taken.

Section 68

[Examination as to Witness' Identity]

(1) The hearing shall begin with the witness being asked to state his first name, last name, name at birth, age, occupation and place of residence. A witness who has made observations in his official capacity may state his place of work instead of his place of residence.

(2) A witness shall furthermore be permitted to state his business address or place of work or another address at which documents can be served instead of stating his place of residence if there is well-founded reason to fear that legally protected interests of the witness or of another person might be endangered or that witnesses or another person might be improperly influenced by the witness stating his place of residence. If the conditions set out in the first sentence obtain at the main hearing, the presiding judge shall permit the witness not to state his place of residence.

(3) If there is well-founded reason to fear that revealing the identity or the place of residence or whereabouts of the witness would endanger the witness' or another person's life, limb or liberty, the witness may be permitted not to provide personal identification data or to provide such data only in respect of an earlier identity. However, if so asked at the main hearing, he shall be required to state in what capacity the facts he is indicating became known to him.

(4) If there are sufficient indications that the conditions set out in subsections (2) or (3) obtain, the witness is to be advised of the rights provided thereunder. In the case of subsection (2), the witness shall be assisted in specifying an address at which documents can be served. Documents establishing the witness' place of residence or identity shall be kept by the public prosecution office. They shall only be included in the files when the fear of danger ceases.

(5) Subsections (2) to (4) shall also apply after conclusion of the examination of the witness. Insofar as the witness was permitted not to provide data, it must be ensured in the course of provision of information from or inspection of files that this data is not made known to other persons, unless a danger within the meaning of subsections (2) and (3) appears to be ruled out.

Section 68a

[Questions Concerning Degrading Facts and Previous Convictions]

(1) Questions concerning facts which might dishonour the witness or a person who is his relative within the meaning of Section 52 subsection (1) or which concern their personal sphere of life are to be asked only if they cannot be dispensed with.

(2) Questions concerning circumstances justifying the witness' credibility in the case at hand, particularly concerning his relationship with the accused or the aggrieved person, are to be asked so far as this is necessary. A witness is to be asked about his previous convictions only if their establishment is necessary in order to decide whether the conditions of Section 60, number 2 have been met, or to determine his credibility.

Section 68b

[Assignment of Legal Counsel]

(1) Witnesses may avail themselves of the assistance of legal counsel. Legal counsel appearing at the examination of the witness shall be permitted to be present. He may be barred from the examination if certain facts justify the assumption that his presence would not only negligibly hinder the orderly taking of evidence. As a rule, this shall be the case if, on the basis of certain facts, it can be assumed that

1. counsel participated in the offence to be investigated or in accessoryship after the fact, obstruction of justice or handling of stolen goods connected therewith;
2. the testimony of the witness will be influenced by the fact that counsel appears committed not only to the interests of the witness; or
3. counsel will use information obtained during the examination for tampering with evidence within the meaning of Section 112 subsection (2), number 3, or pass on such information in a manner detrimental to the purpose of the investigation.

(2) A witness who does not have the assistance of legal counsel at his examination and whose interests meriting protection cannot be taken into account in another way shall be assigned such counsel for the duration of the examination if special circumstances obtain from which it is evident that the witness is unable to exercise his rights himself at his examination. Section 142 subsection (1) shall apply *mutatis mutandis*.

(3) Decisions pursuant to subsection (1), third sentence, and subsection (2), first sentence, shall not be contestable. The grounds therefor shall be documented, insofar as this does not endanger the purpose of the investigation.

Section 69

[Examination as to Subject Matter]

(1) The witness shall be directed to state coherently all he knows about the subject of his examination. The subject of the investigation and the name of the accused, if there is an accused, shall be indicated to the witness before the examination.

(2) If so required, further questions shall be asked in order to clarify and complete the statement, as well as to establish the grounds on which the witness' knowledge is based. Witnesses who have been aggrieved by the criminal offence shall in particular be given an opportunity to make submissions concerning the effects that the offence had on them.

(3) The provisions in Section 136a shall apply *mutatis mutandis* to the examination of a witness.

Section 70

[Refusal Without Reason to Testify or Take the Oath]

- (1) A witness who without a legal reason refuses to testify or to take an oath shall be charged with the costs caused by this refusal. At the same time a coercive fine shall be imposed on him and if the fine cannot be collected, coercive detention shall be ordered.
- (2) Detention may also be ordered to force a witness to testify; such detention shall not, however, extend beyond the termination of those particular proceedings, nor beyond a period of six months.
- (3) The judge in the preliminary proceedings and any commissioned or requested judge shall also have the authority to order such measures.
- (4) Where these measures have been exhausted they may not be repeated in the same proceedings or in other proceedings, if the same offence is the subject of the proceedings.

Section 71
[Witness' Expenses]

The witness shall be compensated pursuant to the Judicial Remuneration and Compensation Act.

CHAPTER VII
EXPERTS AND INSPECTION

Section 72
[Application of Provisions Concerning Witnesses]

Chapter VI concerning witnesses shall apply *mutatis mutandis* to experts, except as otherwise provided by the following sections.

Section 73
[Selection of Experts]

- (1) The judge shall select the experts to be consulted and shall determine their number. He shall agree with them on a time limit within which their opinions may be rendered.
- (2) If experts are publicly appointed for certain kinds of opinions, other persons are to be selected only if this is required by special circumstances.

Section 74
[Challenge]

- (1) An expert may be challenged for the same reasons that a judge may be challenged. The fact, however, that the expert was examined as a witness shall not be a reason for challenge.
- (2) The public prosecution office, the private prosecutor and the accused shall have a right of challenge. The appointed experts shall be made known to the persons entitled to challenge unless special circumstances present an obstacle thereto.
- (3) The ground for challenge shall be substantiated; the taking of an oath to substantiate a challenge shall be precluded.

Section 75
[Duty to Render Opinion]

- (1) The person appointed as an expert must comply with the appointment if he has been publicly appointed to render opinions of the required kind, or if he publicly and commercially practises the science, art, or trade, the knowledge of which is a prerequisite for rendering an opinion, or if he has been publicly appointed or authorized to practise such profession.

(2) The obligation to render an opinion shall also be incumbent upon a person who has stated his willingness to do so before the court.

Section 76

[Privilege of Refusing to Render Opinion]

(1) An expert may refuse to render an opinion for the same reasons for which a witness may refuse to testify. An expert may also be released for other reasons from his obligation to render an opinion.

(2) The special provisions of the law concerning public officials shall apply to the examination of judges, officials and other persons in the public service as experts. Members of the Federal Government or of a *Land* government shall be subject to the special provisions applicable to them.

Section 77

[Consequences of Non-Appearance or Refusal]

(1) In the case of non-appearance or refusal of an expert obliged to render an opinion he shall be charged with the costs caused by his non-appearance or refusal. At the same time a coercive fine shall be imposed on him. In the case of repeated disobedience the coercive fine may be assessed a second time in addition to the costs.

(2) If an expert obliged to render the opinion refuses to agree upon a reasonable time limit pursuant to Section 73 subsection (1), second sentence, or if he fails to observe the time limit agreed upon, a coercive fine may be imposed on him. The assessment of a coercive fine must be preceded by an admonition setting an extension of the time limit. In the case of repeated failure to observe the time limit the coercive fine may be assessed again.

Section 78

[Judicial Direction]

The judge shall guide the experts' participation, so far as he deems this necessary.

Section 79

[Oath Administered to an Expert]

(1) An expert may be placed under oath at the discretion of the court.

(2) The oath shall be taken after the opinion has been rendered; it shall contain the assurance that the expert has rendered his opinion impartially and to the best of his knowledge and belief.

(3) If the expert has been sworn generally to render opinions of the kind concerned, a reference to his oath shall be sufficient.

Section 80

[Preparation of an Opinion]

(1) The expert may, at his request, be given further details for the preparation of his opinion by examining witnesses or the accused.

(2) For the same purpose, he may be permitted to inspect the file, to be present at the examination of witnesses or of the accused, and to address questions to them directly.

Section 80a

[Consultations During the Preliminary Proceedings]

An expert shall already be given the opportunity during the preliminary proceedings to prepare the opinion to be rendered at the main hearing if it is expected that the

placement of the accused in a psychiatric hospital, to an institution for withdrawal treatment or to preventive detention will be ordered.

Section 81

[Placement for Observation of the Accused]

- (1) For the preparation of an opinion on the accused's mental condition the court may, after hearing an expert and defence counsel, order that the accused be brought to a public psychiatric hospital and be held under observation there.
- (2) The court shall make the order pursuant to subsection (1) only if the accused is strongly suspected of the offence. The court may not make this order if it is disproportionate to the importance of the matter or to the penalty or measure of reform and prevention to be expected.
- (3) In the preparatory proceedings the court which would be competent to open the main proceedings shall decide.
- (4) An immediate complaint against the order shall be admissible. It shall have suspensive effect.
- (5) Placement in a psychiatric hospital pursuant to subsection (1) may not exceed a total period of six weeks.

Section 81a

[Physical Examination; Blood Test]

- (1) A physical examination of the accused may be ordered for the purposes of establishing facts which are of importance for the proceedings. For this purpose, the taking of blood samples and other bodily intrusions which are effected by a physician in accordance with the rules of medical science for the purpose of examination shall be admissible without the consent of the accused, provided no detriment to his health is to be expected.
- (2) The authority to give such order shall be vested in the judge and, if a delay would endanger the success of the examination, also in the public prosecution office including the officials assisting it (section 152 of the Courts Constitution Act).
- (3) Blood samples or other body cells taken from the accused may be used only for the purposes of the criminal proceedings for which they were taken or in other criminal proceedings pending; they shall be destroyed without delay as soon as they are no longer required for such purposes.

Section 81b

[Photographs and Fingerprints]

Photographs and fingerprints of the accused may be taken, even against his will, and measurements may be made of him and other similar measures taken with regard to him insofar as is required for the purposes of conducting the criminal proceedings or of the police records department.

Section 81c

[Examination of Other Persons]

- (1) Persons other than the accused, who might be considered called as witnesses, may be examined without their consent only insofar as establishing the truth involves ascertaining whether their body shows a particular trace or consequence of a criminal offence.
- (2) Examinations to ascertain descent and the taking of blood samples from persons other than the accused shall be admissible without such persons' consent provided no detriment to their health is to be expected and the measure is indispensable for

establishing the truth. The examinations and the taking of blood samples may only ever be carried out by a physician.

(3) Examinations or the taking of blood samples may be refused for the same reasons as testimony may be refused. Where minors lack intellectual maturity or where minors or persons placed in care due to mental illness or mental or emotional deficiency have no sufficient understanding of the importance of their right of refusal, their statutory representative shall decide; Section 52 subsection (2), second sentence, and subsection (3) shall apply *mutatis mutandis*. If the statutory representative is precluded from taking a decision (Section 52 subsection (2), second sentence) or is prevented from taking a decision in time for other reasons, and the immediate examination or taking of blood samples appears necessary to secure evidence, such measures shall be admissible only upon special order by the court and, where the court cannot be reached in time, by the public prosecution office. The decision ordering the measures shall not be contestable. The evidence furnished pursuant to the third sentence may be used in further proceedings only with the consent of the statutory representative authorized to give such consent.

(4) Measures pursuant to subsections (1) and (2) shall be inadmissible if on evaluation of the circumstances as a whole the person concerned cannot reasonably be expected to undergo such measures.

(5) The authority to give such order shall be vested in the court and, if a delay would endanger the success of the examination, also in the public prosecution office including the officials assisting it (section 152 of the Courts Constitution Act). Subsection (3), third sentence, shall remain unaffected. Section 81a subsection (3) shall apply *mutatis mutandis*.

(6) The provisions in Section 70 shall apply *mutatis mutandis* to cases where the person concerned refuses to undergo an examination. Direct force may be used only upon special order of the judge. The order shall presuppose either that the person concerned insists upon the refusal despite the imposition of a coercive fine or that there are exigent circumstances.

Section 81d **[Physical Examination]**

(1) If the physical examination may violate the sense of shame of the person to be examined, it shall be carried out by a person of the same sex or by a female or male physician. Where there is a legitimate interest, a request that a physician of a particular gender be appointed to perform the examination shall be granted. Upon the request of the person concerned, a trusted person is to be admitted. The person concerned is to be instructed as to the provisions of the second and third sentences.

(2) This provision shall also be applicable where the person concerned consents to the examination.

Section 81e **[Molecular and Genetic Examinations]**

(1) Material obtained by measures pursuant to Section 81a subsection (1) may also be subjected to molecular and genetic examinations, insofar as such measures are necessary to establish descent or to ascertain whether traces found originate from the accused or the aggrieved person; in so doing the gender of the person may also be determined by examination. Examinations pursuant to the first sentence shall also be admissible to obtain similar findings on material obtained by measures

pursuant to Section 81c. Findings on facts other than those referred to in the first sentence shall not be made; examinations designed to establish such facts shall be inadmissible.

(2) Examinations admissible pursuant to subsection (1) may also be carried out on trace materials which have been found, secured or seized. Subsection (1), third sentence, and Section 81a subsection (3), first part of the sentence, shall apply *mutatis mutandis*.

Section 81f

[Ordering and Carrying Out Molecular and Genetic Examinations]

(1) Without the written consent of the person concerned, examinations pursuant to Section 81e subsection (1) may be ordered only by the court and, in exigent circumstances, by the public prosecution office including the officials assisting it (section 152 of the Courts Constitution Act). A person who consents is to be instructed as to the purpose for which the data to be obtained will be used.

(2) In the written order only experts who are publicly appointed, who are obliged under the Obligations Act or who hold public office and who are not members of the authority conducting the investigation, or belong to an organizational unit of such authority which, both in terms of its organization and its area of work, is separate from the official agency conducting the investigation, shall be appointed to carry out the examinations pursuant to Section 81e. The experts shall take technical and organizational steps to ensure that no inadmissible molecular and genetic examinations can be carried out and that no unauthorized third parties have access to information concerning the examinations. The material to be examined shall be given to the expert with no indication of the name, address or date or month of birth of the individual concerned. Where the expert is not a public agency, section 38 of the Federal Data Protection Act shall apply subject to the proviso that the supervisory authority shall also monitor compliance with data protection rules even if it has no sufficient indication that such rules are being violated and the expert is not processing personal data in data files.

Section 81g

[DNA Analysis]

(1) If the accused person is suspected of a criminal offence of substantial significance or of a crime against sexual self-determination then, for the purposes of establishing identity in future criminal proceedings, cell tissue may be collected from him and subjected to molecular and genetic examination for the purposes of establishing the DNA profile or the gender if the nature of the offence or the way it was committed, the personality of the accused or other information provide grounds for assuming that criminal proceedings will be conducted against him in future in respect of a criminal offence of substantial significance. If the person concerned habitually commits other criminal offences, this may be deemed to be equivalent to a criminal offence of substantial significance by reference to the level of the injustice done.

(2) The cell tissue collected may be used only for the molecular and genetic examination referred to in subsection (1); it shall be destroyed without delay once it is no longer required for that purpose. Information other than that required in order to establish the DNA profile or the gender may not be ascertained during the examination; tests to establish such information shall be inadmissible.

(3) Without the written consent of the person concerned, the collection of cell tissue may be ordered only by the court and, in exigent circumstances, by the public prosecution office including the officials assisting it (section 152 of the Courts Constitution Act). Without the written consent of the person concerned, the molecular and genetic examination of cell tissue may be ordered only by the court. Persons who have consented are to be instructed as to the purpose for which the data to be obtained will be used. Section 81f subsection (2) shall apply *mutatis mutandis*. In its written reasons the court shall specify in relation to the particular case concerned

1. the determining facts relevant to ascertaining the seriousness of the criminal offence,
2. the information giving rise to the assumption that the accused will be the subject of criminal proceedings in the future, as well as
3. an evaluation of the relevant circumstances in each case.

(4) Subsections (1) to (3) shall apply *mutatis mutandis* if the person concerned has been convicted of the offence with binding effect or was not convicted merely on the grounds that

1. lack of criminal responsibility has been proven or cannot be ruled out,
2. he is unfit to stand trial on the grounds of insanity, or
3. lack of criminal responsibility has been proven or cannot be ruled out (section 3 of the Youth Courts Act)

and the corresponding entry in the Federal Central Criminal Register or the Youth Register has not yet expired or been deleted.

(5) The data collected may be stored at the Federal Criminal Police Office and used in accordance with the Federal Criminal Police Office Act. The same shall apply

1. subject to the conditions listed in subsection (1), to the data obtained pursuant to Section 81e subsection (1), in respect of an accused person, as well as
2. to the data obtained pursuant to Section 81e subsection (2).

The data may be transmitted only for the purposes of criminal proceedings, for threat prevention and for international mutual legal assistance in respect thereof. In the case of number 1 of the second sentence, the accused is to be informed without delay that the data has been stored, and is to be instructed that he may apply for a court decision.

Section 81h

[Serial Molecular and Genetic Examination]

(1) Where certain facts give rise to the suspicion that a felony against life, physical integrity, personal freedom or sexual self-determination has been committed, then with their written consent, persons who manifest certain significant features which may be assumed to apply to the perpetrator

1. may have cell tissue collected from them which will be

2. subjected to a molecular and genetic examination to establish gender and the DNA profile, and
3. the DNA profiles established automatically matched against the DNA profiles of trace materials,

insofar as this is necessary in order to ascertain whether the trace material(s) originated from such persons and the measure is not disproportionate to the gravity of the offence, particularly in view of the number of persons affected by the measure.

(2) Any measure pursuant to subsection (1) shall require a court order. This order shall be issued in writing. The order shall designate the persons concerned by reference to specified significant features and shall give reasons. A prior examination of the persons concerned shall not be required. The decision ordering the measure shall not be contestable.

(3) Sections 81f subsection (2) and Section 81g subsection (2) shall apply *mutatis mutandis* to the implementation of the measure. Insofar as the data relating to the DNA profiles established by the measure is no longer necessary for clearing up the felony it shall be deleted without delay. The fact of the deletion shall be documented.

(4) The persons concerned are to be instructed in writing that the measure may only be implemented with their consent. They are also to be instructed that

1. the cell tissue collected shall be used exclusively for the molecular and genetic examination pursuant to subsection (1) and shall be destroyed without delay once they are no longer required for this purpose, and
2. that the DNA profiles established shall not be stored by the Federal Criminal Police Office for the purposes of establishing identity in future criminal proceedings.

Section 82

[Rendering Opinion in Preliminary Proceedings]

In preliminary proceedings the judge shall decide whether the experts shall render their opinion in writing or orally.

Section 83

[Rendering a New Opinion]

(1) The judge may order that a new opinion be rendered by the same or by other experts if he considers the opinion insufficient.

(2) The judge may order that an opinion be rendered by another expert if the first expert was successfully challenged after rendering his opinion.

(3) In important cases the opinion of a specialist authority may be obtained.

Section 84

[Fees for Experts]

The expert shall be compensated pursuant to the Judicial Remuneration and Compensation Act.

Section 85

[Expert Witnesses]

The provisions concerning evidence by witnesses shall apply if experienced persons have to be examined to prove past facts or conditions the observation of which required special professional knowledge.

Section 86
[Judicial Inspection]

If a judicial inspection takes place, the facts as found shall be stated in the record and such record shall include information regarding any missing traces or signs whose presence could have been expected, given the special nature of the case.

Section 87
[Post Mortem Examination; Autopsy]

(1) The post mortem examination shall be carried out with the assistance of a physician by the public prosecution office and, upon application by the public prosecution office, also by the judge. The physician shall not be called in if this is evidently unnecessary for clarification of the facts.

(2) The autopsy shall be performed by two physicians. One of them must be a court physician or the head of a public forensic or pathology institute or a physician of the institute entrusted with this task and having specialist knowledge of forensic medicine. The autopsy shall not be performed by the physician who treated the deceased person during his illness directly preceding his death. However, that physician may be asked to attend the autopsy to give information relating to the medical history. The public prosecution office may attend the autopsy. Upon application by the public prosecution office the autopsy shall be carried out in the judge's presence.

(3) For the purpose of examination or autopsy, it shall be admissible to exhume a corpse that has been interred.

(4) The autopsy and exhumation of an interred corpse shall be ordered by the judge; the public prosecution office shall be authorized to order such action if a delay would endanger the success of the investigation. Where exhumation is ordered, notification of a relative of the deceased person shall be ordered at the same time if the relative can be located without particular difficulty and such notification does not endanger the purpose of the investigation.

Section 88
[Identification]

(1) The identity of the deceased person shall be established before the autopsy. In particular, persons who knew the deceased person may be questioned to this end and measures of forensic identification applied. In order to establish identity and gender, cell tissue may be removed and subjected to a molecular and genetic examination. Section 81f subsection (2) shall apply *mutatis mutandis* to the molecular and genetic examination.

(2) If there is an accused, the corpse shall be shown to him for the purpose of identification.

Section 89
[Extent of Autopsies]

To the extent that the condition of the corpse permits, the autopsy shall always include the opening of the head, the chest cavity and the abdomen.

Section 90
[Autopsies of New-Born Children]

Where an autopsy is performed on a new-born child, the examination shall be directed in particular to the question whether it was alive after or during birth, and whether it was mature or at least capable of continuing its life outside the womb.

Section 91
[Suspected Poisoning]

- (1) Where poisoning is suspected, the suspicious substance(s) found in the corpse or elsewhere shall be examined by a chemist or by a specialist authority appointed for such examination.
- (2) It may be ordered that this examination be performed with the assistance, or under the direction, of a physician.

Section 92
[Opinions in Counterfeiting Cases]

- (1) Where counterfeiting money or official stamps is suspected, the money or official stamps shall, if necessary, be submitted to the authority which brings genuine money or genuine official stamps of that kind into circulation. The opinion of this authority shall be obtained as to the falsity or adulteration, as well as concerning the probable method of counterfeiting.
- (2) If money or official stamps of a foreign currency are involved, the opinion of a German authority may be sought in lieu of an opinion by the respective foreign authority.

Section 93
[Handwriting Analysis]

To ascertain the authenticity or falsity of a document, as well as to ascertain its author, a handwriting comparison may be conducted with the assistance of experts.

CHAPTER VIII
SEIZURE, INTERCEPTION OF TELECOMMUNICATIONS, COMPUTER-ASSISTED SEARCH, USE OF TECHNICAL DEVICES, USE OF UNDERCOVER INVESTIGATORS AND SEARCH

Section 94
[Objects Which May Be Seized]

- (1) Objects which may be of importance as evidence for the investigation shall be impounded or otherwise secured.
- (2) Such objects shall be seized if in the custody of a person and not surrendered voluntarily.
- (3) Subsections (1) and (2) shall also apply to driver's licences which are subject to confiscation.

Section 95
[Obligation to Surrender]

- (1) A person who has an object of the above-mentioned kind in his custody shall be obliged to produce it and to surrender it upon request.
- (2) In the case of non-compliance, the regulatory and coercive measures set out in Section 70 may be used against such person. This shall not apply to persons who are entitled to refuse to testify.

Section 96
[Official Documents]

Submission or surrender of files or other documents officially impounded by authorities or public officials may not be requested if their highest superior authority declares that publication of the content of these files or documents would be detrimental to the welfare of the Federation or of a German *Land*. The first sentence

shall apply *mutatis mutandis* to files and other documents held in the custody of a Member of the Federal Parliament or of a *Land* parliament or of an employee of a Federal or *Land* parliamentary group where the agency responsible for authorizing testimony has made a corresponding declaration.

Section 97

[Objects Not Subject to Seizure]

(1) The following objects shall not be subject to seizure:

1. written correspondence between the accused and the persons who, according to Section 52 or Section 53 subsection (1), first sentence, numbers 1 to 3b, may refuse to testify;
2. notes made by the persons specified in Section 53 subsection (1), first sentence, numbers 1 to 3b, concerning confidential information entrusted to them by the accused or concerning other circumstances covered by the right of refusal to testify;
3. other objects, including the findings of medical examinations, which are covered by the right of the persons mentioned in Section 53 subsection (1), first sentence, numbers 1 to 3b, to refuse to testify.

(2) These restrictions shall apply only if these objects are in the custody of a person entitled to refuse to testify unless the object concerned is an electronic health card as defined in section 291a of Part Five of the Social Code. Objects covered by the right of physicians, dentists, psychological psychotherapists, psychotherapists specializing in the treatment of children and juveniles, pharmacists and midwives to refuse to testify shall not be subject to seizure either if they are in the custody of a hospital or a service provider which collects, processes or uses personal data for the persons listed, nor shall objects to which the right of the persons mentioned in Section 53 subsection (1), first sentence, numbers 3a and 3b, to refuse to testify extends, be subject to seizure if they are in the custody of the counselling agency referred to in that provision. The restrictions on seizure shall not apply if certain facts substantiate the suspicion that the person entitled to refuse to testify participated in the criminal offence, or in accessoryship after the fact, obstruction of justice or handling stolen goods, or where the objects concerned have been obtained by means of a criminal offence or have been used or are intended for use in perpetrating a criminal offence, or where they emanate from a criminal offence.

(3) Insofar as the assistants (Section 53a) of the persons mentioned in Section 53a subsection (1), first sentence, numbers 1 to 3b, have a right to refuse to testify, subsections (1) and (2) shall apply *mutatis mutandis*.

(4) The seizure of objects shall be inadmissible insofar as they are covered by the right of the persons mentioned in Section 53 subsection (1), first sentence, number 4, to refuse to testify. This protection from seizure shall also extend to objects which the persons mentioned in Section 53 subsection (1), first sentence, number 4, have entrusted to their assistants (Section 53a). The first sentence shall apply *mutatis mutandis* insofar as the assistants (Section 53a) of the persons mentioned in Section 53 subsection (1), first sentence, number 4, have a right to refuse to testify.

(5) The seizure of documents, sound, image and data media, illustrations and other images in the custody of persons referred to in Section 53 subsection (1), first sentence, number 5, or of the editorial office, the publishing house, the printing works or the broadcasting company, shall be inadmissible insofar as they are

covered by the right of such persons to refuse to testify. Subsection (2), third sentence, and Section 160a subsection (4), second sentence, shall apply *mutatis mutandis*, the participation provision of subsection (2), third sentence, however, only where the particular facts substantiate strong suspicion of participation; in these cases, too, seizure shall only be admissible, however, where it is not disproportionate to the importance of the case having regard to the basic rights arising out of Article 5 paragraph (1), second sentence, of the Basic Law, and the investigation of the factual circumstances or the establishment of the whereabouts of the perpetrator would otherwise offer no prospect of success or be much more difficult.

Section 98 **[Order of Seizure]**

(1) Seizure may be ordered only by the court and, in exigent circumstances, by the public prosecution office and the officials assisting it (section 152 of the Courts Constitution Act). Seizure pursuant to Section 97 subsection (5), second sentence, in the premises of an editorial office, publishing house, printing works or broadcasting company may be ordered only by the court.

(2) An official who has seized an object without a court order shall apply for court confirmation within three days if neither the person concerned nor an adult relative was present at the time of seizure, or if the person concerned and, if he was absent, an adult relative of that person expressly objected to the seizure. The person concerned may at any time apply for a court decision. The competence of the court shall be determined by Section 162. The person concerned may also submit the application to the Local Court in whose district the seizure took place, which shall then forward the application to the competent court. The person concerned shall be instructed as to his rights.

(3) Where after public charges have been preferred, the public prosecution office or one of the officials assisting has effected seizure, the court shall be notified of the seizure within three days; the objects seized shall be put at its disposal.

(4) If it is necessary to effect seizure in an official building or an installation of the Federal Armed Forces which is not open to the general public, the superior official agency of the Federal Armed Forces shall be requested to carry out such seizure. The agency making the request shall be entitled to participate. No such request shall be necessary if the seizure is to be made in places which are inhabited exclusively by persons other than members of the Federal Armed Forces.

Section 98a **[Automated Comparison and Transmission of Personal Data]**

(1) Notwithstanding Sections 94, 110 and 161, where there are sufficient factual indications to show that a criminal offence of substantial significance has been committed

1. relating to the illegal trade in narcotics or weapons or the counterfeiting of money or official stamps,
2. relating to national security (sections 74a, 120 of the Courts Constitution Act),
3. relating to offences which pose a danger to the general public,

4. relating to endangerment of life and limb, sexual self-determination or personal liberty,
5. on a commercial or habitual basis, or
6. by a member of a gang or in some other organized way,

personal data relating to individuals who manifest certain significant features which may be presumed to apply to the perpetrator may be automatically matched against other data in order to exclude individuals who are not under suspicion or to identify individuals who manifest other significant characteristics relevant to the investigations. This measure may be ordered only where other means of establishing the facts or determining the perpetrator's whereabouts would offer much less prospect of success or be much more difficult.

(2) For the purposes of subsection (1), the storing agency shall extract from the database the data required for matching purposes and transmit it to the criminal prosecuting authorities.

(3) Insofar as isolating the data for transmission from other data requires disproportionate effort, the other data shall, upon order, also be transmitted. Their use shall not be admissible.

(4) Upon request by the public prosecution office, the storing agency shall assist the agency effecting the comparison.

(5) Section 95 subsection (2) shall apply *mutatis mutandis*.

Section 98b

[Competence; Return and Deletion of Data]

(1) Matching and transmission of data may be ordered only by the court and, in exigent circumstances, also by the public prosecution office. Where the public prosecution office has made the order, it shall request court confirmation without delay. The order shall become ineffective if it is not confirmed by the court within three working days. The order shall be made in writing. It shall name the person obliged to transmit the data and shall be limited to the data and comparison characteristics required for the particular case. The transmission of data may not be ordered where special rules on use, being provisions under Federal law or under the corresponding *Land* law, present an obstacle to their use. Sections 96 and 97, and Section 98 subsection (1), second sentence, shall apply *mutatis mutandis*.

(2) Regulatory and coercive measures (Section 95 subsection (2)) may be ordered only by the court and, in exigent circumstances, also by the public prosecution office; the imposition of detention shall be reserved to the court.

(3) Where data was transmitted on data media these shall be returned without delay once matching has been completed. Personal data transferred to other data media shall be deleted without delay once it is no longer required for the criminal proceedings.

(4) Upon completion of a measure pursuant to Section 98a, the agency responsible for monitoring compliance with data protection rules by public bodies shall be notified.

Section 98c

[Comparison of Data to Clear Up a Criminal Offence]

In order to clear up a criminal offence or to determine the whereabouts of a person sought in connection with criminal proceedings, personal data from criminal

proceedings may be automatically matched with other data stored for the purposes of criminal prosecution or execution of sentence, or in order to avert danger. Special rules on use presenting an obstacle thereto, being provisions under Federal law or under the corresponding *Land* law, shall remain unaffected.

Section 99

[Seizure of Postal Items]

Seizure of postal items and telegrams addressed to the accused which are held in the custody of persons or enterprises providing, or collaborating in the provision of, postal or telecommunications services on a commercial basis shall be admissible. Seizure of postal items and telegrams shall also be admissible where known facts support the conclusion that they originate from the accused or are intended for him and that their content is of relevance to the investigation.

Section 100

[Jurisdiction]

(1) Only the court and, in exigent circumstances the public prosecution office, shall be authorized to implement seizure (Section 99).

(2) A seizure ordered by the public prosecution office, even if it has not yet resulted in a delivery, shall become ineffective if it is not confirmed by the court within three working days.

(3) The court shall have the authority to open the delivered post. The court may transfer this authority to the public prosecution office insofar as this is necessary so as not to endanger the success of the investigation by delay. The transfer shall not be contestable; it may be revoked at any time. So long as no order has been made pursuant to the second sentence, the public prosecution office shall immediately forward the delivered postal items to the court, leaving any unopened postal items sealed.

(4) The court competent pursuant to Section 98 shall decide on a seizure ordered by the public prosecution office. The court which ordered or confirmed the seizure shall decide whether to open an item that has been delivered.

(5) Postal items in respect of which no order to open them has been made are to be forwarded to the intended recipient without delay. The same shall apply insofar as there is no necessity to retain the postal items once opened.

(6) Such part of a retained postal item as does not appear expedient to withhold for the purposes of the investigation is to be transmitted to the intended recipient in the form of a copy.

Section 100a

[Conditions Regarding Interception of Telecommunications]

(1) Telecommunications may be intercepted and recorded also without the knowledge of the persons concerned if

1. certain facts give rise to the suspicion that a person, either as perpetrator or as inciter or accessory, has committed a serious criminal offence referred to in subsection (2) or, in cases where there is criminal liability for attempt, has attempted to commit such an offence or has prepared such an offence by committing a criminal offence; and
2. the offence is one of particular gravity in the individual case as well; and

3. other means of establishing the facts or determining the accused's whereabouts would be much more difficult or offer no prospect of success.
- (2) Serious criminal offences for the purposes of subsection (1), number 1, shall be:
1. pursuant to the Criminal Code:
 - a) crimes against peace, high treason, endangering the democratic state based on the rule of law, treason and endangering external security pursuant to sections 80 to 82, 84 to 86, 87 to 89a and 94 to 100a;
 - b) taking of bribes by, and offering of bribes to, mandate holders pursuant to section 108e;
 - c) crimes against the national defence pursuant to sections 109d to 109h;
 - d) crimes against public order pursuant to sections 129 to 130;
 - e) counterfeiting money and official stamps pursuant to sections 146 and 151, in each case also in conjunction with section 152, as well as section 152a subsection (3) and section 152b subsections (1) to (4);
 - f) crimes against sexual self-determination in the cases referred to in sections 176a, 176b, 177 subsection (2), number 2, and section 179 subsection (5), number 2;
 - g) dissemination, purchase and possession of pornographic writings involving children and involving juveniles, pursuant to section 184b subsections (1) to (3), section 184c subsection (3);
 - h) murder and manslaughter pursuant to sections 211 and 212;
 - i) crimes against personal liberty pursuant to sections 232 to 233a, 234, 234a, 239a and 239b;
 - j) gang theft pursuant to section 244 subsection (1), number 2, and aggravated gang theft pursuant to section 244a;
 - k) crimes of robbery or extortion pursuant to sections 249 to 255;
 - l) commercial handling of stolen goods, gang handling of stolen goods and commercial gang handling of stolen goods pursuant to sections 260 and 260a;
 - m) money laundering or concealment of unlawfully acquired assets pursuant to section 261 subsections (1), (2) and (4);
 - n) fraud and computer fraud subject to the conditions set out in section 263 subsection (3), second sentence, and in the case of section 263 subsection (5), each also in conjunction with section 263a subsection (2);
 - o) subsidy fraud subject to the conditions set out in section 264 subsection (2), second sentence, and in the case of section 264 subsection (3), in conjunction with section 263 subsection (5);
 - p) criminal offences involving falsification of documents under the conditions set out in section 267 subsection (3), second sentence, and in the case of

section 267 subsection (4), in each case also in conjunction with section 268 subsection (5) or section 269 subsection (3), as well as pursuant to sections 275 subsection (2) and section 276 subsection (2);

- q) bankruptcy subject to the conditions set out in section 283a, second sentence;
 - r) crimes against competition pursuant to section 298 and, subject to the conditions set out in section 300, second sentence, pursuant to section 299;
 - s) crimes endangering public safety in the cases referred to in sections 306 to 306c, section 307 subsections (1) to (3), section 308 subsections (1) to (3), section 309 subsections (1) to (4), section 310 subsection (1), sections 313, 314, 315 subsection (3), section 315b subsection (3), as well as sections 361a and 361c;
 - t) taking and offering a bribe pursuant to sections 332 and 334;
2. pursuant to the Fiscal Code:
- a) tax evasion under the conditions set out in section 370 subsection (3), second sentence, number 5;
 - b) commercial, violent and gang smuggling pursuant to section 373;
 - c) handling tax-evaded property as defined in section 374 subsection (2);
3. pursuant to the Pharmaceutical Products Act:
- criminal offences pursuant to section 95 subsection (1), number 2a, subject to the conditions set out in section 95 subsection (3), second sentence, number 2, letter b;
4. pursuant to the Asylum Procedure Act:
- a) inducing an abusive application for asylum pursuant to section 84 subsection (3);
 - b) commercial and gang inducement to make an abusive application for asylum pursuant to section 84a;
5. pursuant to the Residence Act:
- a) smuggling of aliens pursuant to section 96 subsection (2);
 - b) smuggling resulting in death and commercial and gang smuggling pursuant to section 97;
6. pursuant to the Foreign Trade and Payments Act:
- wilful criminal offences pursuant to sections 17 and 18 of the Foreign Trade and Payments Act;
7. pursuant to the Narcotics Act:

- a) criminal offences pursuant to one of the provisions referred to in section 29 subsection (3), second sentence, number 1, subject to the conditions set out therein;
 - b) criminal offences pursuant to section 29a, section 30 subsection (1), numbers 1, 2 and 4, as well as sections 30a and 30b;
8. pursuant to the Precursors Control Act:
criminal offences pursuant to section 19 subsection (1), subject to the conditions set out in section 19 subsection (3), second sentence;
9. pursuant to the War Weapons Control Act:
- a) criminal offences pursuant to section 19 subsections (1) to (3) and section 20 subsections (1) and (2), as well as section 20a subsections (1) to (3), each also in conjunction with section 21;
 - b) criminal offences pursuant to section 22a subsections (1) to (3);
10. pursuant to the Code of Crimes against International Law:
- a) genocide pursuant to section 6;
 - b) crimes against humanity pursuant to section 7;
 - c) war crimes pursuant to sections 8 to 12;
11. pursuant to the Weapons Act:
- a) criminal offences pursuant to section 51 subsections (1) to (3);
 - b) criminal offences pursuant to section 52 subsection (1), number 1 and number 2, letters c and d, as well as section 52 subsections (5) and (6).
- (3) Such order may be made only against the accused or against persons in respect of whom it may be assumed, on the basis of certain facts, that they are receiving or transmitting messages intended for, or transmitted by, the accused, or that the accused is using their telephone connection.
- (4) If there are factual indications for assuming that only information concerning the core area of the private conduct of life would be acquired through a measure pursuant to subsection (1), the measure shall be inadmissible. Information concerning the core area of the private conduct of life which is acquired during a measure pursuant to subsection (1) shall not be used. Any records thereof shall be deleted without delay. The fact that they were obtained and deleted shall be documented.

Section 100b

[Order to Intercept Telecommunications]

(1) Measures pursuant to Section 100a may be ordered by the court only upon application by the public prosecution office. In exigent circumstances, the public prosecution office may also issue an order. An order issued by the public prosecution office shall become ineffective if it is not confirmed by the court within three working days. The order shall be limited to a maximum duration of three months. An extension by not more than three months each time shall be admissible

if the conditions for the order continue to exist, taking into account the information acquired during the investigation.

(2) The order shall be given in writing. The operative part of the order shall indicate

1. where known, the name and address of the person against whom the measure is directed;
2. the telephone number or other code of the telephone connection or terminal equipment to be intercepted, insofar as there are no particular facts indicating that they are not at the same time assigned to another piece of terminal equipment;
3. the type, extent and duration of the measure specifying the time at which it will be concluded.

(3) On the basis of this order all persons providing, or contributing to the provision of, telecommunications services on a commercial basis shall enable the court, the public prosecution office and officials working in the police force to assist it (section 152 of the Courts Constitution Act), to implement measures pursuant to Section 100a and shall provide the required information without delay. Whether and to what extent measures are to be taken in this respect shall follow from the Telecommunications Act and from the Telecommunications Interception Ordinance issued thereunder. Section 95 subsection (2) shall apply *mutatis mutandis*.

(4) If the conditions for making the order no longer prevail, the measures implemented on the basis of the order shall be terminated without delay. Upon termination of the measure, the court which issued the order shall be notified of the results thereof.

(5) The *Länder* and the Federal Public Prosecutor General shall submit a report to the Federal Office of Justice every calendar year by the 30th June of the year following the reporting year, concerning measures ordered pursuant to Section 100a within their area of competence. The Federal Office of Justice shall produce a summary of the measures ordered nationwide during the reporting year and shall publish it on the Internet.

(6) The reports pursuant to subsection (5) shall indicate:

1. the number of proceedings in which measures were ordered pursuant to Section 100a subsection (1);
2. the number of orders to intercept telecommunications pursuant to Section 100a subsection (1), distinguishing between
 - a) initial and follow-up orders, as well as
 - b) fixed, mobile and Internet telecommunication;
3. in each case the underlying criminal offence by reference to the categories listed in Section 100a subsection (2).

Official note: The Internet address of the Federal Office of Justice is:
www.bundesjustizamt.de

Section 100c
[Measures Implemented Without the Knowledge of the Person Concerned]

(1) Private speech on private premises may be intercepted and recorded using technical means also without the knowledge of the person concerned if

1. certain facts give rise to the suspicion that a person, either as perpetrator or as inciter or accessory, has committed a particularly serious criminal offence referred to in subsection (2) or, in cases where there is criminal liability for attempt, has attempted to commit such an offence; and
2. the offence is one of particular gravity in the individual case as well; and
3. on the basis of factual indications it may be assumed that the surveillance will result in the recording of statements by the accused which would be of significance in establishing the facts or determining the whereabouts of a co-accused; and
4. other means of establishing the facts or determining a co-accused's whereabouts would be disproportionately more difficult or offer no prospect of success.

(2) Particularly serious criminal offences for the purposes of subsection (1), number 1, shall be:

1. pursuant to the Criminal Code:
 - a) crimes against peace, high treason, endangering the democratic state based on the rule of law, treason, and endangering external security pursuant to sections 80, 81, 82, 89a, pursuant to section 94, section 95 subsection (3) and section 96 subsection (1), in each case also in conjunction with section 97b, as well as pursuant to section 97a, section 98 subsection (1), second sentence, section 99 subsection (2), section 100 and section 100a subsection (4);
 - b) formation of criminal groups pursuant to section 129 subsection (1) in conjunction with subsection (4), second part of the sentence, and formation of terrorist groups pursuant to section 129a subsections (1), (2), (4) and subsection (5) first sentence, first alternative, in each case also in conjunction with section 129b subsection (1);
 - c) counterfeiting money and official stamps pursuant to sections 146 and 151, in each case also in conjunction with section 152, as well as pursuant to section 152a subsection (3) and section 152b subsections (1) to (4);
 - d) crimes against sexual self-determination in the cases referred to in section 176a subsection (2), number 2, or subsection (3), section 177 subsection (2), number 2, or section 179 subsection (5), number 2;
 - e) distribution, acquisition and possession of pornographic writings involving children in the cases referred to in section 184b subsection (3);
 - f) murder and manslaughter pursuant to sections 211 and 212;
 - g) crimes against personal liberty pursuant to section 234, section 234a subsections (1) and (2), sections 239a and 239b, and trafficking in human beings for the purpose of sexual exploitation and for the purpose of

exploitation of labour pursuant to section 232 subsection (3), subsection (4) or subsection (5), section 233 subsection (3), in each case to the extent that it concerns a felony;

- h) gang theft pursuant to section 244 subsection (1), number 2, and aggravated gang theft pursuant to section 244a;
 - i) aggravated robbery and robbery resulting in death pursuant to section 250 subsection (1) or subsection (2), section 251;
 - j) extortion resembling robbery pursuant to section 255 and a particularly serious case of extortion pursuant to section 253 under the conditions set out in section 253 subsection (4), second sentence;
 - k) commercial handling of stolen goods or gang handling of stolen goods or commercial gang handling of stolen goods pursuant to sections 260 and 260a;
 - l) a particularly serious case of money laundering or concealment of unlawfully acquired assets pursuant to section 261 under the conditions set out in section 261 subsection (4), second sentence;
 - m) a particularly serious case of taking and offering bribes pursuant to section 335 subsection (1) under the conditions set out in section 335 subsection (2), numbers 1 to 3;
2. pursuant to the Asylum Procedure Act:
- a) inducing an abusive application for asylum pursuant to section 84 subsection (3);
 - b) commercial or gang inducement of an abusive application for asylum pursuant to section 84a subsection (1);
3. pursuant to the Residence Act:
- a) smuggling of aliens pursuant to section 96 subsection (2);
 - b) smuggling resulting in death and commercial and gang smuggling pursuant to section 97;
4. pursuant to the Narcotics Act:
- a) a particularly serious case of a criminal offence pursuant to section 29 subsection (1), first sentence, numbers 1, 5, 6, 10, 11 or 13, subsection (3) subject to the requirements of section 29 subsection (3), second sentence, number 1;
 - b) a criminal offence pursuant to section 29a, section 30 subsection (1), numbers 1, 2, and 4, or section 30a;
5. pursuant to the War Weapons Control Act:
- a) a criminal offence pursuant to section 19 subsection (2), or to section 20 subsection (1), in each case also in conjunction with section 21;

- b) a particularly serious case of a criminal offence pursuant to section 22a subsection (1) in conjunction with subsection (2);
 - 6. pursuant to the Code of Crimes against International Law:
 - a) genocide pursuant to section 6;
 - b) crimes against humanity pursuant to section 7;
 - c) war crimes pursuant to sections 8 to 12;
 - 7. pursuant to the Weapons Act:
 - a) a particularly serious case of a criminal offence pursuant to section 51 subsection (1) in conjunction with subsection (2);
 - b) a particularly serious case of a criminal offence pursuant to section 52 subsection (1), number 1, in conjunction with subsection (5).
- (3) The measure may be directed only against the accused and may be implemented only on the private premises of the accused. The measure shall be admissible on the private premises of other persons only if it can be assumed on the basis of certain facts that
- 1. the accused named in the order pursuant to Section 100d subsection (2) is present on those premises; and that
 - 2. applying the measure on the accused's premises alone will not lead to the establishment of the facts or the determination of a co-accused person's whereabouts.

The measures may be implemented even if they unavoidably affect third persons.

(4) The measure may be ordered only if on the basis of factual indications, in particular concerning the type of premises to be kept under surveillance and the relationship between the persons to be kept under surveillance, it may be assumed that statements concerning the core area of the private conduct of life will not be covered by the surveillance. Conversations on operational or commercial premises are not generally to be considered part of the core area of the private conduct of life. The same shall apply to conversations concerning criminal offences which have been committed and statements by means of which a criminal offence is committed.

(5) The interception and recording is to be interrupted without delay if during the surveillance indications arise that statements concerning the core area of the private conduct of life are being recorded. Recordings of such statements are to be deleted without delay. Information acquired by means of such statements may not be used. The fact that the data was obtained and deleted is to be documented. If a measure pursuant to the first sentence has been interrupted, it may be re-continued subject to the conditions set out in subsection (4). If in doubt, a court decision on the interruption or continuation of the measures should be sought without delay; Section 100d subsection (4) shall apply *mutatis mutandis*.

(6) In the cases referred to in Section 53 a measure pursuant to subsection (1) shall be inadmissible; if during or after implementation of the measure it becomes apparent that a case referred to in Section 53 is applicable, subsection (5), second to fourth sentences, shall apply *mutatis mutandis*. In the cases referred to in Sections 52 and 53a, information acquired through a measure pursuant to

subsection (1) may only be used if, taking into consideration the significance of the underlying relationship of trust, this is not disproportionate to the interest in establishing the facts or determining the whereabouts of an accused person.

Section 160a subsection (4) shall apply *mutatis mutandis*.

(7) Insofar as a prohibition on use pursuant to subsection (5) is conceivable, the public prosecution office shall obtain a decision without delay from the court which made the order, as to whether the information acquired may be used. Insofar as the court does not approve such use, the decision shall be binding for the further proceedings.

Section 100d **[Jurisdiction]**

(1) Measures pursuant to Section 100c may be ordered only upon the application of the public prosecution office by the division of the Regional Court stipulated in section 74a subsection (4) of the Courts Constitution Act in the district where the public prosecution office is located. In exigent circumstances the order may also be issued by the presiding judge. His order shall become ineffective unless confirmed by the criminal division within three working days. The order shall be limited to a maximum duration of one month. An extension of the measure for subsequent periods of up to one month shall be admissible providing the conditions for the measure continue to exist, taking into account the information acquired during the investigation. If the duration of the order has been extended for a total period of six months, the Higher Regional Court shall decide on any further extension orders.

(2) The order shall be in writing specifying

1. where known, the name and address of the accused against whom the measure is directed;
2. the alleged offence, on the basis of which the measure is being ordered;
3. the private premises or rooms to be kept under surveillance;
4. the type, extent and duration of the measure;
5. the type of information to be acquired by the measures and their significance for the proceedings.

(3) In its reasons the order or extension order shall specify the requirements and main considerations underlying the decision. In particular, it shall state in relation to each individual case

1. the particular facts on which the suspicion is based;
2. the essential considerations concerning the necessity and proportionality of the measure;
3. the factual indications as stated in section 100c subsection (4), first sentence.

(4) The court making the order shall be informed as to the progress and results of the measure. If the conditions for the order no longer exist, the court shall order the termination of the measures, unless termination has already been initiated by the public prosecution office. Termination of the measure may also be ordered by the presiding judge.

(5) Personal data obtained by means of acoustic surveillance of private premises may be used for other purposes subject to the following conditions:

1. The usable personal data obtained through a measure pursuant to Section 100c may be used in other criminal proceedings without the consent of the persons being monitored only for the purposes of resolving a criminal offence in respect of which measures pursuant to Section 100c could have been ordered, or to establish the whereabouts of a person accused of such a criminal offence.
2. The use of personal data obtained through a measure pursuant to Section 100c, even such data as is acquired pursuant to Section 100c subsection (6), first sentence, second part of the sentence, for the purposes of averting danger is only admissible to avert an existing danger of death in an individual case or to avert an imminent danger to the life or liberty of a person or to objects of significant value which serve to supply the population, are of culturally outstanding value, or are referred to in section 305 of the Criminal Code. The usable personal data obtained through a measure pursuant to Section 100c may also be used to avert an imminent danger to other significant assets in individual cases. If the data is no longer required for the purposes of averting the danger or for a pre-judicial or court examination of the measures implemented to avert the danger, recordings of such data are to be deleted without delay by the institution responsible for averting the danger. The fact of deletion is to be documented. Insofar as deletion is postponed merely for an eventual pre-judicial or court examination, the data may be used solely for this purpose; access is to be denied for any use for other purposes.
3. Insofar as usable personal data has been obtained by means of a respective police measure, such data may not be used in criminal proceedings without the consent of the person under surveillance by virtue of such measure, except for the purpose of clearing up a criminal offence in respect of which the measure pursuant to Section 100c could have been ordered, or to determine the whereabouts of a person accused of such criminal offence.

Section 100e
[Duty to Report]

(1) Section 100b subsection (5) shall apply *mutatis mutandis* to measures ordered pursuant to Section 100c. Prior to publication on the Internet the Federal Government shall inform the Federal Parliament each year of measures ordered pursuant to Section 100c in the preceding calendar year.

(2) The reports pursuant to subsection (1) shall specify

1. the number of proceedings in which measures pursuant to Section 100c subsection (1) were ordered;
2. in each case the underlying criminal offence by reference to the categories listed in Section 100c subsection (2);
3. whether the proceedings are related to the prosecution of organized crime;
4. the number of premises under surveillance in each of the proceedings, distinguishing between private premises and other premises, as well as

between premises belonging to the accused and premises belonging to third parties;

5. the number of persons under surveillance in the respective proceedings, indicating whether or not they were accused persons;
6. the duration of each individual surveillance measure, indicating the duration of the order, the duration of the extension of the order, and the duration of the interception;
7. how frequently a measure pursuant to Section 100c subsection (5) and Section 100d subsection (4) was interrupted or terminated;
8. whether the persons concerned were informed (Section 101 subsections (4) to (6)) or if not, the grounds for refraining from informing such persons;
9. whether the surveillance produced results that are, or may be expected to be, of relevance to the proceedings;
10. whether the surveillance produced results that are, or may be expected to be, of relevance to other criminal proceedings;
11. where the surveillance failed to produce any relevant results: the reasons for this, distinguishing between technical and other grounds;
12. the costs of the measure, distinguishing between costs in respect of translation services and other costs.

Section 100f

[Use of Technical Means]

(1) Words spoken in a non-public context outside private premises may be intercepted and recorded by technical means also without the knowledge of the persons concerned if certain facts give rise to the suspicion that a person, either as perpetrator or as inciter or accessory, has committed a criminal offence referred to in Section 100a subsection (2), being a criminal offence of particular gravity in the individual case as well, or, in cases where there is criminal liability for attempt, has attempted to commit such an offence, and other means of establishing the facts or determining the accused's whereabouts would offer no prospect of success or be much more difficult.

(2) The measure may only be directed against an accused person. Such a measure may only be ordered against other persons if it is to be assumed, on the basis of certain facts, that they are in contact with an accused or that such contact will be established, the measure will result in the establishment of the facts or the determination of an accused's whereabouts, and other means of establishing the facts or determining an accused's whereabouts would offer no prospect of success or be much more difficult.

(3) The measure may be implemented even if it unavoidably affects third persons.

(4) Section 100b subsection (1) and subsection (4), first sentence, as well as Section 100d subsection (2) shall apply *mutatis mutandis*.

Section 100g

[Information on Telecommunications Connections]

(1) If certain facts give rise to the suspicion that a person, either as perpetrator or as inciter or accessory,

1. has committed a criminal offence of substantial significance in the individual case as well, particularly one of the offences referred to in Section 100a subsection (2), or, in cases where there is criminal liability for attempt, has attempted to commit such an offence or has prepared such an offence by committing a criminal offence, or

2. has committed a criminal offence by means of telecommunication, then, to the extent that this is necessary to establish the facts or determine the accused's whereabouts, telecommunications traffic data (section 96 subsection (1), section 113a of the Telecommunications Act) may be obtained also without the knowledge of the person concerned. In the case referred to in the first sentence, number 2, the measure shall be admissible only where other means of establishing the facts or determining the accused's whereabouts would offer no prospect of success and if the acquisition of the data is proportionate to the importance of the case. The acquisition of location data in real time shall be admissible only in the case of the first sentence, number 1.

(2) Section 100a subsection (3) and Section 100b subsections (1) to (4), first sentence, shall apply *mutatis mutandis*. Unlike Section 100b subsection (2), second sentence, number 2, in the case of a criminal offence of substantial significance, a sufficiently precise spatial and temporal description of the telecommunication shall suffice where other means of establishing the facts or determining the accused's whereabouts would offer no prospect of success or be much more difficult.

(3) If the telecommunications traffic data is not acquired by the telecommunications services provider, the general provisions shall apply after conclusion of the communication process.

(4) In accordance with Section 100b subsection (5) an annual report shall be produced in respect of measures pursuant to subsection (1), specifying

1. the number of proceedings during which measures were implemented pursuant to subsection (1);
2. the number of measures ordered pursuant to subsection (1) distinguishing between initial orders and subsequent extension orders;
3. in each case the underlying criminal offence, distinguishing between numbers 1 and 2 of subsection (1), first sentence;
4. the number of months elapsed during which telecommunications traffic data was intercepted, measured from the time the order was made;
5. the number of measures which produced no results because the data intercepted was wholly or partially unavailable.

Section 100h

[Taking of Photographs; Technical Devices for Surveillance]

(1) Also without the knowledge of the persons concerned

1. photographs may be taken or

2. other special technical devices intended specifically for surveillance purposes may be used

outside private premises where other means of establishing the facts or determining an accused's whereabouts would offer less prospect of success or be more difficult. A measure pursuant to the first sentence, number 2, shall be admissible only if the object of the enquiry is a criminal offence of substantial significance.

(2) The measures may only be directed against an accused person. In respect of other persons,

1. measures pursuant to subsection (1), number 1, shall be admissible only where other means of establishing the facts or determining an accused's whereabouts would offer much less prospect of success or be much more difficult;
2. measures pursuant to subsection (1), number 2, shall only be admissible if it is to be assumed, on the basis of certain facts, that they are in contact with an accused person or that such contact will be established, the measure will result in the establishment of the facts or the determination of an accused's whereabouts, and other means would offer no prospect of success or be much more difficult.

(3) The measure may be implemented even if it unavoidably affects third persons.

Section 100i **[IMS I-Catcher]**

(1) If certain facts give rise to the suspicion that a person, either as perpetrator or as inciter or accessory, has committed a criminal offence of substantial significance, in the individual case as well, particularly one of the offences referred to in Section 100a subsection (2), or, in cases where there is criminal liability for attempt has attempted to commit such an offence or has prepared such an offence by committing a criminal offence, then technical means may be used to determine

1. the device ID of a mobile end terminal and the card number of the card used therein, as well as
2. the location of a mobile end terminal,

insofar as this is necessary to establish the facts or determine the whereabouts of the accused person.

(2) Personal data concerning third persons may be acquired in the course of such measures only if, for technical reasons, this is unavoidable to fulfill the objectives of subsection (1). Such data may not be used for any purpose beyond the comparison of data in order to locate the device ID and card number sought, and the data is to be deleted without delay once the measure has been completed.

(3) Section 100a subsection (3) and Section 100b subsection (1), first to third sentences, as well as subsection (2), first sentence, and subsection (4), first sentence, shall apply *mutatis mutandis*. The order shall be limited to a maximum period of six months. An extension of not more than six months in each case shall be admissible if the conditions set out in subsection (1) continue to exist.

Section 100j **[Request for Information]**

(1) Insofar as necessary to establish the facts or determine the whereabouts of an accused person, information on data collected pursuant to sections 95 and 111 of the Telecommunications Act may be requested from any person providing or collaborating in the provision of telecommunications services on a commercial basis (section 113 subsection (1), first sentence, of the Telecommunications Act). If the request for information pursuant to the first sentence refers to data by means of which access to terminal equipment, or to storage media installed in such terminal equipment or physically separate therefrom, is protected (section 113 subsection (1), second sentence, of the Telecommunications Act), information may only be requested if the statutory requirements for the use of such data have been met.

(2) The information pursuant to subsection (1) may also be requested by reference to an Internet Protocol address assigned to a specific time (section 113 subsection (1), third sentence, of the Telecommunications Act).

(3) Requests for information pursuant to subsection (1), second sentence, may be ordered by the court only upon application by the public prosecution office. In exigent circumstances the order may also be issued by the public prosecution office or by the officials assisting it (section 152 of the Courts Constitution Act). In this case a court decision is to be sought without delay. The first to third sentences shall not apply if the person concerned already has or must have knowledge of the request for information or if the use of the data has already been permitted by a court decision. The fulfilment of the conditions pursuant to the fourth sentence shall be documented.

(4) In the cases referred to in subsection (1), second sentence, and subsection (2), the person concerned shall be notified of the request for information. Notification shall take place insofar as and as soon as this can be effected without thwarting the purpose of the information. It shall be dispensed with where overriding interests meriting protection of third parties or of the person concerned himself constitute an obstacle thereto. Where notification is deferred pursuant to the second sentence or dispensed with pursuant to the third sentence, the reasons therefor shall be documented.

(5) On the basis of a request for information pursuant to subsection (1) or (2), any person providing or collaborating in the provision of telecommunications services on a commercial basis shall transmit without delay the data required for the provision of the information. Section 95 subsection (2) shall apply *mutatis mutandis*.

Section 101 **[Notification]**

(1) Unless otherwise provided, measures pursuant to Sections 98a, 99, 100a, 100c to 100i, 110a and 163d to 163f shall be subject to the following conditions.

(2) Decisions and other documents concerning measures pursuant to Sections 100c, 100f, 100h subsection (1), number 2, and Section 110a shall be deposited at the public prosecution office. They shall be added to the files only if the requirements for a notification pursuant to subsection (5) have been met.

(3) Personal data which was acquired by means of measures pursuant to subsection (1) is to be labelled accordingly. Following a transfer of the data to another agency, the labelling is to be maintained by such agency.

(4) The following persons shall be notified of measures pursuant to subsection (1):

1. in the case of Section 98a, the persons concerned, in respect of whom further investigations were carried out following evaluation of the data;

2. in the case of Section 99, the sender and the addressee of the postal item;
3. in the case of Section 100a, the participants in the telecommunication under surveillance;
4. in the case of Section 100c,
 - a) the accused person, against whom the measure was directed;
 - b) other persons under surveillance;
 - c) persons who owned or lived in the private premises under surveillance at the time the measure was effected;
5. in the case of Section 100f, the person targeted and other persons significantly affected thereby;
6. in the case of Section 100g, the participants in the telecommunication concerned;
7. in the case of Section 100h subsection (1), the person targeted and other persons significantly affected thereby;
8. in the case of Section 100i, the person targeted;
9. in the case of Section 110a,
 - a) the person targeted;
 - b) persons significantly affected thereby;
 - c) persons whose private premises which are not generally accessible to the public were entered by the undercover investigator;
10. in the case of Section 163d, the persons concerned, in respect of whom further investigations were carried out following evaluation of the data;
11. in the case of Section 163e, the person targeted and the person whose personal data was reported;
12. in the case of Section 163f, the person targeted and other persons significantly affected thereby.

In the notification, mention should be made of the option of subsequent court relief pursuant to subsection (7) and the applicable time limit. Notification shall be dispensed with where overriding interests of an affected person that merit protection constitute an obstacle thereto. Furthermore, notification of a person listed in numbers 2, 3 and 6 of the first sentence who was not the target of the measure may be dispensed with if such person was only tangentially affected by the measure and it may be assumed that the person has no interest in being notified. Investigations to determine the identity of a person listed in the first sentence are to be carried out only if this appears necessary taking into account the degree of invasiveness of the measure in respect of the person concerned, the effort associated with establishing their identity, as well as the resulting detriment for such person or other persons.

(5) Notification shall take place as soon as it can be effected without endangering the purpose of the investigation, the life, physical integrity and personal liberty of another, or significant assets, in the case of Section 110a including the possibility of

continued use of the undercover investigator. Where notification is deferred pursuant to the first sentence, the reasons shall be documented on the file.

(6) Where notification is deferred pursuant to subsection (5) and has not taken place within twelve months after completion of the measure, any further deferral of notification shall be subject to the approval of the court. The court shall decide upon the duration of any further deferrals. The court may approve the permanent dispensation with notification where there is a probability bordering on certainty that the requirements for notification will not be fulfilled, even in future. If several measures have been implemented within a short period of time, the time limit mentioned in the first sentence shall begin upon conclusion of the last measure. In the case of Section 100c the time period mentioned in the first sentence shall be six months.

(7) Court decisions pursuant to subsection (6) shall be taken by the court competent to order the measure. In all other cases the court situated where the competent public prosecution office is located shall be competent. Even after completion of the measure and for up to two weeks following their notification, the persons named in subsection (4), first sentence, may apply to the court competent pursuant to the first sentence for a review of the lawfulness of the measure, as well as of the manner and means of its implementation. An immediate complaint against the decision shall be admissible. Where public charges have been preferred and the accused has been notified, the court seized of the matter shall decide upon the application in its concluding decision.

(8) Personal data acquired by means of the measure which is no longer necessary for the purposes of criminal prosecution or a possible court review of the measure shall be deleted without delay. The fact of the deletion is to be documented. Insofar as deletion of the data has been deferred merely for the purposes of a possible court review of the measure, the data shall not be used for any other purpose without the consent of the persons concerned; access to the data is to be restricted accordingly.

Section 102

[Search in Respect of the Suspect]

A body search, a search of the property and of the private and other premises of a person who, as a perpetrator or as an inciter or accessory before the fact, is suspected of committing a criminal offence, or is suspected of accessoryship after the fact or of obstruction of justice or of handling stolen goods, may be made for the purpose of his apprehension, as well as in cases where it may be presumed that the search will lead to the discovery of evidence.

Section 103

[Searches in Respect of Other Persons]

(1) Searches in respect of other persons shall be admissible only for the purpose of apprehending the accused or to follow up the traces of a criminal offence or to seize certain objects, and only if certain facts support the conclusion that the person, trace, or object sought is located on the premises to be searched. For the purposes of apprehending an accused who is strongly suspected of having committed a criminal offence pursuant to section 89a of the Criminal Code or pursuant to section 129a, also in conjunction with section 129b subsection (1), of the Criminal Code, or one of the criminal offences designated in this provision, a search of private and

other premises shall also be admissible if they are located in a building in which it may be assumed, on the basis of certain facts, that the accused is located.

(2) The restrictions of subsection (1), first sentence, shall not apply to premises where the accused was apprehended or which he entered during the pursuit.

Section 104

[Searches During the Night]

(1) Private premises, business premises and enclosed property may be searched during the night only in pursuit of a person caught in the act, in exigent circumstances, or for the purpose of re-apprehending an escaped prisoner.

(2) This restriction shall not apply to premises which are accessible at night to anyone, or which are known to the police as shelters or gathering places of offenders, as depots of property obtained through criminal offences, or as hiding places for gambling, illegal trafficking in narcotics or weapons, or prostitution.

(3) Night shall include, during the period from 1 April to 30 September, the hours from nine o'clock in the evening to four o'clock in the morning and during the period from 1 October to 31 March, the hours from nine o'clock in the evening to six o'clock in the morning.

Section 105

[Search Order; Execution]

(1) Searches may be ordered only by the judge and, in exigent circumstances, also by the public prosecution office and the officials assisting it (section 152 of the Courts Constitution Act). Searches pursuant to Section 103 subsection (1), second sentence, shall be ordered by the judge; in exigent circumstances the public prosecution office shall be authorized to order such searches.

(2) Where private premises, business premises, or enclosed property are to be searched in the absence of the judge or the public prosecutor, a municipal official or two members of the community in the district of which the search is carried out shall be called in, if possible, to assist. The persons called in as members of the community may not be police officers or officials assisting the public prosecution office.

(3) If it is necessary to carry out a search in an official building or in an installation or establishment of the Federal Armed Forces which is not open to the general public, the superior official agency of the Federal Armed Forces shall be requested to carry out such search. The requesting agency shall be entitled to participate. No such request shall be necessary if the search is to be carried out on premises which are inhabited exclusively by persons other than members of the Federal Armed Forces.

Section 106

[Calling In the Occupant]

(1) The occupant of the premises or the possessor of the objects to be searched may be present at the search. If he is absent, his representative or an adult relative, or a person living in his household, or a neighbour shall, if possible, be called in to assist.

(2) In the cases referred to in Section 103 subsection (1), the purpose of the search shall be made known to the occupant or possessor or to the person called in in his absence, before the search begins. This provision shall not apply to the occupants of the premises indicated in Section 104 subsection (2).

Section 107
[Notification; Inventory]

Upon conclusion of the search the person affected thereby shall, upon his request, be given a written notification indicating the reason for the search (Sections 102, 103) and, in the case of Section 102, the criminal offence. Upon request, he shall also be given a list of the objects which were impounded or seized; if nothing suspicious was found, he shall be given a certificate to this effect.

Section 108
[Seizure of Other Objects]

(1) Where objects which indicate the commission of another criminal offence are found during a search, they shall be provisionally seized even though they are not connected with the ongoing investigation. The public prosecution office shall be informed thereof. The first sentence shall not apply to searches carried out pursuant to Section 103 subsection (1), second sentence.

(2) Where objects as defined in subsection (1), first sentence, which relate to the termination of a patient's pregnancy, are found on the premises of a physician, their use for evidential purposes in criminal proceedings against the patient shall be inadmissible in respect of a criminal offence pursuant to section 218 of the Criminal Code.

(3) Where objects as defined in subsection (1), first sentence, are found on the premises of a person named in Section 53 subsection (1), first sentence, number 5, such objects being, covered by the right of the person named to refuse to testify, the object shall only be admissible as evidence in criminal proceedings insofar as the subject of these criminal proceedings is a criminal offence which is punishable by a minimum sentence of five years' imprisonment and is not a criminal offence pursuant to section 353b of the Criminal Code.

Section 109
[Marking Seized Objects]

Objects impounded or seized shall be listed exactly and, in order to prevent mistakes, shall be marked with an official seal or in some other appropriate manner.

Section 110
[Examination of Papers]

(1) The public prosecution office and, if it so orders, the officials assisting it (section 152 of the Courts Constitution Act), shall have the authority to examine documents belonging to the person affected by the search.

(2) In all other cases, officials shall be authorized to examine papers found by them only if the holder permits such examination. In all other cases they shall deliver any papers, the examination of which they deem necessary, to the public prosecution office in an envelope which shall be sealed with the official seal in the presence of the holder.

(3) The examination of an electronic storage medium at the premises of the person affected by the search may be extended to cover also physically separate storage media insofar as they are accessible from the storage medium if there is a concern that the data sought would otherwise be lost. Data which may be of significance for the investigation may be secured; Section 98 subsection (2) shall apply *mutatis mutandis*.

Section 110a
[Undercover Investigators]

(1) Undercover investigators may be used to clear up criminal offences where there are sufficient factual indications showing that a criminal offence of substantial significance has been committed

1. in the sphere of illegal trade in drugs or weapons, of counterfeiting money or official stamps;
2. in the sphere of national security (sections 74a and 120 of the Courts Constitution Act);
3. on a commercial or habitual basis; or
4. by a member of a gang or in some other organized way.

Undercover investigators may also be used to clear up felonies where certain facts substantiate the risk of a repetition. Their use shall only be admissible where other means of clearing up the serious criminal offence would offer no prospect of success or be much more difficult. Undercover investigators may also be used to clear up felonies where the special significance of the offence makes the operation necessary and other measures offer no prospect of success.

(2) Undercover investigators shall be officials in the police force who carry out investigations using a changed and lasting identity (legend) which is conferred on them. They may take part in legal transactions using their legend.

(3) Where it is indispensable for building up or maintaining a legend, relevant documents may be drawn up, altered and used.

Section 110b

[Consent of the Public Prosecution Office; Consent of the Court; Non-Disclosure of Identity]

(1) The use of an undercover investigator shall be admissible only after the consent of the public prosecution office has been obtained. In exigent circumstances and if the decision of the public prosecution office cannot be obtained in time, such decision shall be obtained without delay; the measure shall be terminated if the public prosecution office does not give its consent within three working days. Consent shall be given in writing and for a specified period. Extensions shall be admissible providing the conditions for the use of undercover investigators continue to apply.

(2) Use of undercover investigators

1. concerning a specific accused, or
2. which involve the undercover investigator entering private premises which are not generally accessible

shall require the consent of the court. In exigent circumstances consent of the public prosecution office shall suffice. Where the decision of the public prosecution office cannot be obtained in time, such decision shall be obtained without delay. The measure shall be terminated if the court does not give its consent within three working days. Subsection (1), third and fourth sentences, shall apply *mutatis mutandis*.

(3) The identity of the undercover investigator may be kept secret even after the operation has ended. The public prosecution office and the court responsible for the decision whether to consent to the use of the undercover investigator may require the identity to be revealed to them. In all other cases, maintaining the secrecy of the

identity in criminal proceedings shall be admissible pursuant to Section 96, particularly if there is reason to fear that revealing the identity would endanger the life, limb or liberty of the undercover investigator or of another person, or would jeopardize the continued use of the undercover investigator.

Section 110c

[Entering Private Premises]

Undercover investigators may enter private premises using their legend with the consent of the entitled person. Such consent may not be obtained by any pretence of a right of access extending beyond the use of the legend. In all other respects, the undercover investigator's powers shall be governed by this statute and by other legal provisions.

Section 110d

(Deleted)

Section 110e

(Deleted)

Section 111

[Road Traffic Controls]

(1) If certain facts substantiate the suspicion that a criminal offence pursuant to section 89a of the Criminal Code or pursuant to section 129a, also in conjunction with section 129b subsection (1), of the Criminal Code, one of the offences designated in this provision, or an offence pursuant to section 250 subsection (1), number 1, of the Criminal Code has been committed, checkpoints may be established on public roads, squares and at other publicly accessible places, if facts justify the assumption that this measure may lead to the apprehension of the perpetrator or to the securing of evidence which may serve to clear up the offence. At a checkpoint all persons shall be obliged to establish their identity and to subject themselves or objects found on them to a search.

(2) The order to establish a checkpoint shall be issued by the judge; in exigent circumstances, the public prosecution office and the officials assisting it (section 152 of the Courts Constitution Act) shall be authorized to make such an order.

(3) Section 106 subsection (2), first sentence, Section 107, first half of the second sentence, Sections 108 and 109, Section 110 subsections (1) and (2), as well as Sections 163b and 163c shall apply *mutatis mutandis* to the search and establishment of identity pursuant to subsection (1).

Section 111a

[Provisional Withdrawal of Permission to Drive]

(1) If there are cogent reasons to assume that permission to drive will be withdrawn (section 69 of the Criminal Code), the judge may, by order, provisionally withdraw the accused's permission to drive. Certain types of motor vehicles may be exempted from the provisional withdrawal of permission to drive if special circumstances justify the assumption that the purpose of the measure will not be jeopardized thereby.

(2) The provisional withdrawal of permission to drive shall be set aside if the reason for it no longer applies or if the court does not withdraw permission to drive in the judgment.

(3) Provisional withdrawal of permission to drive shall have the effect of an order or confirmation of seizure of the driver's licence issued by a German authority. This

shall also apply if the driver's licence was issued by an authority of a Member State of the European Union or of another contracting party to the Agreement on the European Economic Area insofar as the licence holder's ordinary place of residence is located in Germany.

(4) If a driver's licence has been seized because it may be confiscated pursuant to section 69 subsection (3), second sentence, of the Criminal Code, and if a judicial decision concerning seizure is required, the latter shall be replaced by the decision on the provisional withdrawal of permission to drive.

(5) A driver's licence which has been impounded, secured or seized because it may be confiscated pursuant to section 69 subsection (3), second sentence, of the Criminal Code shall be returned to the accused if the judge refuses to provisionally withdraw permission to drive due to the absence of the prerequisites designated under subsection (1) or revokes the withdrawal, or if the court does not withdraw permission to drive in the judgment. However, where a driving ban is imposed in the judgment pursuant to section 44 of the Criminal Code, the return of the driver's licence may be postponed if the accused does not protest.

(6) Provisional withdrawal of permission to drive shall be endorsed on foreign driver's licences other than those referred to in subsection (3), second sentence. Pending this endorsement the driver's licence may be seized (Section 94 subsection (3), Section 98).

Section 111b

[Securing of Objects]

(1) Objects may be secured by seizure pursuant to Section 111c if there are grounds to assume that the conditions for their forfeiture or for their confiscation have been fulfilled. Section 94 subsection (3) shall remain unaffected.

(2) If there are grounds to assume that the conditions have been fulfilled for forfeiture of equivalent value or for confiscation of equivalent value of the object, attachment *in rem* may be ordered pursuant to Section 111d in order to secure such equivalent value.

(3) If there are no cogent grounds, the court may revoke the order in respect of the measures referred to in the first sentence of subsection (1) and in subsection (2) after a maximum period of six months. Where certain facts substantiate the suspicion of the offence and the time limit referred to in the first sentence is not sufficient given the particular difficulty or particular extent of the investigations or for another important reason, the court may, upon application by the public prosecution office, extend the measure provided the grounds referred to justify their continuation. Unless there are cogent grounds, the measure shall not be continued for longer than a period of twelve months.

(4) Sections 102 to 110 shall apply *mutatis mutandis*.

(5) Subsections (1) to (4) shall apply *mutatis mutandis* insofar as forfeiture may not be ordered for the sole reason that the conditions under section 73 subsection (1), second sentence, of the Criminal Code apply.

Section 111c

[Effecting Seizure]

(1) Seizure of a moveable asset shall be effected in the cases referred to under Section 111b by impounding the asset or by indicating the seizure by seal or in some other way.

(2) Seizure of a plot of land or of a right subject to the provisions on compulsory execution in respect of immovable property shall be effected by making an entry concerning the seizure in the Land Register. The provisions of the Act on Compulsory Sale by Public Auction and Compulsory Administration in respect of the extent of seizure on compulsory sale by public auction shall apply *mutatis mutandis*.

(3) Seizure of a claim or any other property right not subject to the provisions on compulsory execution in respect of immovable property shall be effected by attachment. The provisions of the Code of Civil Procedure on compulsory execution in respect of claims and other property rights shall apply *mutatis mutandis*. The request to make the declarations referred to in section 840 subsection (1) of the Code of Civil Procedure shall be linked to seizure.

(4) Seizure of ships, ship constructions and aircraft shall be effected pursuant to subsection (1). The seizure shall be entered in the Register in respect of those ships, ship constructions and aircraft that are entered in the Register of Ships, in the Register of Ship Constructions or in the Register of Liens on Aircraft. Application for such entry may be made in respect of ship constructions or aircraft that have not been, but are capable of being, entered in the Register; the provisions governing an application by a person who is entitled to request entry in the Register by virtue of an executory title shall apply *mutatis mutandis* in this case.

(5) Seizure of an object pursuant to subsections (1) to (4) shall have the effect of a prohibition of alienation within the meaning of section 136 of the Civil Code; the prohibition shall also cover other directions besides alienation.

(6) A moveable asset that has been seized may

1. be handed over to the person concerned against immediate payment of its value or
2. be retained by the person concerned, subject to revocation at any time, for further use in the interim until conclusion of the proceedings.

The sum paid pursuant to the first sentence, number 1, shall be substituted for the asset. The measure pursuant to the first sentence, number 2, may be made dependent on the person concerned providing security or fulfilling certain conditions.

Section 111d

[Attachment for Equivalent Value; Fine or Costs]

(1) Attachment *in rem* may be ordered by virtue of forfeiture or of confiscation of equivalent value, by virtue of a fine or of the anticipated costs of criminal proceedings. Attachment may only be ordered by virtue of a fine or of the anticipated costs if judgment has been passed against the defendant imposing punishment. Attachment shall not be ordered to secure execution costs or negligible amounts.

(2) Sections 917 and 920 subsection (1) as well as sections 923, 928, 930 to 932, and 934 subsection (1) of the Code of Civil Procedure shall apply *mutatis mutandis*.

(3) If attachment has been ordered by virtue of a fine or of the anticipated costs, an enforcement measure shall be revoked upon application by the defendant if the defendant needs the object of attachment to pay the costs of his defence, his maintenance or the maintenance of his family.

Section 111e

[Order for Seizure or Attachment]

- (1) Only the court, and in exigent circumstances also the public prosecution office, shall be competent to order seizure (Section 111c) and attachment (Section 111d). Officials assisting the public prosecution office (section 152 Courts Constitution Act) shall also be competent to order seizure of a moveable asset (Section 111c, subsection (1)) in exigent circumstances.
- (2) If the public prosecution office has ordered seizure or attachment, it shall apply for court confirmation of the order within one week. This shall not apply when seizure of a moveable asset has been ordered. In all cases the person concerned may apply for a court decision at any time.
- (3) The public prosecution office shall inform the person who is aggrieved as a result of the act without delay of enforcement of the order for seizure or attachment, insofar as his identity is known or becomes known during the course of proceedings.
- (4) If notifying each aggrieved person individually would result in a disproportionate amount of effort or if it may be assumed that other yet unknown aggrieved persons have claims arising from the act, notice may be given of the seizure or attachment by insertion once in the Federal Gazette. In addition, notice may also be published in some other suitable manner. Personal particulars may only be published insofar as their provision is essential for enabling the aggrieved persons to access the secured assets in order to enforce their claims. Once the security measures have been concluded the public prosecution office shall initiate the deletion of the publication inserted in the Federal Gazette.

Section 111f

[Effecting Seizure and Enforcing Attachment]

- (1) Effecting seizure (Section 111c) shall be incumbent upon the public prosecution office and, in the case of moveable assets (Section 111c subsection (1)), also upon the officials assisting it. Section 98 subsection (4) shall apply *mutatis mutandis*.
- (2) The required entries in the Land Register as well as in the registers referred to in Section 111c subsection (4) shall be made upon application by the public prosecution office or by the court that ordered seizure. The same shall apply *mutatis mutandis* to the applications referred to in Section 111c subsection (4).
- (3) If enforcement of attachment is to be effected pursuant to the provisions on attachment of moveable assets, this may be effected by the authority designated in section 2 of the Ordinance on Recovery of Claims of the Judicial Authorities, by the court bailiff, by the public prosecution office, or by the officials assisting it (section 152 of the Courts Constitution Act). Subsection (2) shall apply *mutatis mutandis*. The public prosecution office or, upon the application of the public prosecution office, the court that ordered the attachment shall be competent to order attachment of a registered ship or ship construction and to order attachment of a claim arising out of the attachment pursuant to Section 111d.
- (4) Section 37 subsection (1) shall apply to service, subject to the proviso that the officials assisting the public prosecution office (section 152 of the Courts Constitution Act) may also be assigned the task of implementing the order.
- (5) The person concerned may at any time apply for a decision of the court in respect of measures taken in the course of enforcing the seizure or attachment.

Section 111g

[Compulsory Execution; Enforcement of Attachment by the Aggrieved Person]

- (1) Seizure of an object pursuant to Section 111c and the enforcement of attachment pursuant to Section 111d shall not take effect against a disposition made

by the aggrieved person, by way of compulsory execution or enforcement of attachment on the basis of a claim arising from the criminal offence.

(2) Compulsory execution or enforcement of attachment pursuant to subsection (1) shall require the approval of the court which is competent to order seizure (Section 111c) or attachment (Section 111d). The decision shall be given in the form of an order that may be contested by the public prosecution office, the accused and the aggrieved person by means of an immediate complaint. Approval shall be refused if the aggrieved person cannot furnish *prima facie* evidence that the claim arose from the criminal offence. Section 294 of the Code of Civil Procedure shall apply.

(3) The prohibition of alienation pursuant to Section 111c subsection (5) shall apply from the moment of seizure also for the benefit of aggrieved persons who, during seizure, pursue compulsory execution in respect of the object seized or who enforce attachment. Entry of the prohibition of alienation in the Land Register for the benefit of the state shall also apply, for the purposes of section 892 subsection (1), second sentence, of the Civil Code, as an entry for the benefit of those aggrieved persons who, during seizure, are entered in the Land Register as beneficiaries of the prohibition of alienation. Proof that the claim arose from the criminal offence can be furnished to the Land Registry by submission of the order granting approval. The second and third sentences shall apply *mutatis mutandis* to the prohibition of alienation in the case of ships, ship constructions and aircraft referred to in Section 111c subsection (4). The legal force of the prohibition of alienation for the benefit of the aggrieved person shall not be affected by revocation of seizure. The first and fifth sentences shall apply *mutatis mutandis* for the effect of the lien which arises in respect of the moveable assets through the enforcement of the attachment (Section 111d).

(4) If the object seized or distrained by virtue of attachment is not subject to forfeiture on grounds other than those referred to in section 73 subsection (1), second sentence, of the Criminal Code, or if approval was wrongfully granted, the aggrieved person shall be obliged to compensate third parties for the damage caused to them due to the fact that the prohibition of alienation applies for his benefit pursuant to subsection (3).

(5) Subsections (1) to (4) shall apply *mutatis mutandis* if forfeiture of an object has been ordered but the order has not yet become binding. They shall not apply if the object is subject to confiscation.

Section 111h

[Prior Satisfaction of Claims of the Aggrieved Person on Attachment]

(1) If the aggrieved person applies for compulsory execution in respect of a claim arising from the criminal offence or if he enforces attachment in respect of a plot of land where attachment has been enforced pursuant to Section 111d, he may demand that his right shall have priority over the collateral mortgage established by enforcement of that attachment. The priority of such right shall not be lost by virtue of revocation of the attachment. The consent of the owner shall not be required for the change of priority. In all other respects section 880 of the Civil Code shall apply *mutatis mutandis*.

(2) The change of priority shall require approval by the judge who is competent to order attachment (Section 111d). Section 111g subsection (2), second to fourth sentences, and subsection (3), third sentence, shall apply *mutatis mutandis*.

(3) If approval was wrongfully granted, the aggrieved person shall be obliged to compensate third persons for the damage caused to them due to the change of priority.

(4) Subsections (1) to (3) shall apply *mutatis mutandis* if attachment pursuant to Section 111d is enforced in respect of a ship, a ship construction or an aircraft as defined in Section 111c subsection (4), second sentence.

Section 111i **[Maintenance of Seizure]**

(1) The court may order that seizure pursuant to Section 111c or attachment pursuant to Section 111d be maintained for a maximum period of three months, as long as the proceedings pursuant to Sections 430 and 442, subsection (1) are confined to the other legal consequences and the immediate revocation would be unjust in respect of the aggrieved person.

(2) If the court did not order forfeiture simply because claims of an aggrieved person within the meaning of section 73 subsection (1), second sentence, of the Criminal Code present an obstacle to this, it may state this in the judgment. In such a case, it shall describe what was acquired. Insofar as the preconditions for section 73a of the Criminal Code apply, the court shall determine a sum of money equivalent to the value of what was acquired. Insofar as

1. the aggrieved person has already taken action by way of compulsory execution or enforcement of attachment,
2. it is proven that the aggrieved person was satisfied out of assets that were not seized or pledged by way of enforcement of attachment, or
3. what was acquired was delivered to the aggrieved person pursuant to Section 111k,

this is to be deducted as part of the assessment to be made pursuant to the second and third sentences.

(3) Insofar as the court proceeds pursuant to subsection (2), it shall maintain, in its order, the seizure (Section 111c) of what was acquired within the meaning of subsection (2), second and fourth sentences, as well as the attachment *in rem* (Section 111d) up to the amount of the sum determined pursuant to subsection (2), third and fourth sentences, for three years. Time shall start to run with effect from the binding judgment. Secured assets shall be listed in the order. Section 917 of the Code of Civil Procedure shall not apply. If it is proven that the aggrieved person was satisfied out of assets that were not seized or distrained by way of enforcement of attachment, the court shall revoke the seizure (Section 111c) or attachment *in rem* (Section 111d) upon application by the person concerned.

(4) The court shall notify the person aggrieved by the act without delay of the order made pursuant to subsection (3) as well as the fact of its entry into force. With the notification, attention is to be drawn to the consequences listed in subsection (5) and to the option of enforcing claims by way of compulsory execution or enforcement of attachment. Section 111e subsection (4), first to third sentences, shall apply *mutatis mutandis*.

(5) Upon expiry of the time limit specified in subsection (3) the state shall acquire the assets listed in accordance with subsection (2) pursuant to section 73e subsection (1) of the Criminal Code, as well as a right to payment in the amount of the sum assessed pursuant to subsection (2), unless

1. the aggrieved person has in the meantime already taken action by way of compulsory execution or enforcement of attachment in respect of his claim,
2. it is proven that the aggrieved person was satisfied out of assets that were not seized or distrained by way of enforcement of attachment, or
3. objects have in the meantime been delivered to the aggrieved person or deposited pursuant to Section 111k, or
4. objects pursuant to Section 111k would have had to have been delivered to the aggrieved person and he applied for their delivery prior to expiry of the time limit specified in subsection (3).

At the same time, the state may realize the lien based on enforcement of attachment *in rem* in accordance with the provision of Part Eight of the Code of Civil Procedure. The proceeds as well as any money deposited as security shall fall to the state. Upon realization the right to payment which arose pursuant to the first sentence shall also expire insofar as the proceeds of realization do not exceed the amount of the claim.

(6) The court of first instance shall issue an order confirming the occurrence, and extent, of the acquisition of rights by the state pursuant to subsection (5) first sentence. Section 111l subsection (4) shall apply *mutatis mutandis*. The order may be challenged by way of immediate complaint. Once the order has legal force the court shall initiate the deletion of the publications in the Federal Gazette initiated pursuant to subsection (4).

(7) Insofar as the person convicted or affected by the seizure or attachment *in rem* satisfies the claims of the aggrieved person secured thereby after expiry of the time limit specified in subsection (3), he may demand compensation up to the amount received by the state for the realization. The right to compensation shall be excluded

1. insofar as the state's right to payment pursuant to subsection (5), first sentence, taking into account the proceeds received by the state, precludes it or
2. if three years have passed since expiry of the time limit set out in subsection (3).

(8) In the cases referred to in section 76a subsection (1) or (3) of the Criminal Code, subsections (2) to (7) are to be applied *mutatis mutandis* to the proceedings pursuant to Sections 440 and 441 in conjunction with Section 442 subsection (1).

Section 111k

[Return of Moveable Assets to the Aggrieved Person]

Moveable assets which have been seized or otherwise secured pursuant to Section 94 or which have been seized pursuant to Section 111c subsection (1) shall be handed over to the aggrieved person from whom they have been taken as a result of the criminal offence if his identity is known, if the claims of third persons do not present an obstacle and if the assets are no longer required for the purposes of the criminal proceedings. Section 111f subsection (5) shall apply. The public prosecution office may obtain a decision of the court if the rights of the aggrieved person are not evident.

Section 111l

[Emergency Sale]

(1) Objects which have been seized pursuant to Section 111c, as well as objects which have been attached (Section 111d), may be sold before the judgment becomes final if they are subject to deterioration or substantial reduction of their value, or if their preservation, care or maintenance would result in disproportionately high costs or difficulties. In the cases referred to in Section 111i subsection (2), assets which have been attached (Section 111d) may be sold after the judgment has become binding, if this appears expedient. The proceeds shall be substituted for the objects.

(2) The emergency sale shall be ordered by the public prosecution office in the preparatory proceedings and after the judgment has become final. The officials assisting it (section 152 of the Courts Constitution Act) shall have the authority to order such sale if there is a danger that the object will be subject to deterioration before the decision of the public prosecution office can be obtained.

(3) Upon preferring public charges the order shall be made by the court seized of the main proceedings. The public prosecution office shall have the authority to make such order if there is a danger that the object will be subject to deterioration before the decision of the court can be obtained; subsection (2), second sentence, shall apply *mutatis mutandis*.

(4) The accused, the owner and other persons who have rights in relation to the object shall be heard prior to the order. The order, as well as the time and place of the sale, shall be made known to them as far as this appears to be practicable.

(5) The emergency sale shall be carried out in accordance with the provisions of the Code of Civil Procedure concerning the use of an attached object. The public prosecution office shall take the place of the court responsible for execution (section 764 of the Code of Civil Procedure) in the cases referred to in subsections (2) and (3), second sentence; in the case of subsection (3), first sentence, the court seized of the main proceedings. The use admissible pursuant to section 825 of the Code of Civil Procedure may be ordered at the same time as the emergency sale or subsequently, either *proprio motu* or upon application of the persons designated in subsection (4), or in the case of subsection (3), first sentence, also upon application by the public prosecution office. If it appears expedient, an emergency sale may be ordered in some other manner and by a person other than the bailiff.

(6) The person concerned may request a decision by the court competent pursuant to Section 162 regarding orders of the public prosecution office or the officials assisting it. Sections 297 to 300, 302, 302 to 306, 311a and 473a shall apply *mutatis mutandis*. The court, and in urgent cases the presiding judge, may order suspension of the sale.

Section 111m **[Writings and Printing Devices]**

(1) Seizure of printed material, of any other writing or object within the meaning of section 74d of the Criminal Code may not be ordered pursuant to Section 111b subsection (1) if its prejudicial consequences, in particular jeopardizing the public interest in prompt dissemination, is evidently disproportionate to the importance of the matter.

(2) Severable parts of the writing which do not contain anything of a criminal nature shall be excluded from seizure. Seizure may be further restricted in the order.

(3) Those passages of the writing giving rise to seizure shall be designated in the order for seizure.

(4) Seizure may be averted if the person concerned excludes that part of the writing giving rise to seizure from reproduction or dissemination.

Section 111n

[Seizure Order; Time Restriction]

(1) Seizure of periodically printed material or of another object equivalent thereto within the meaning of section 74d of the Criminal Code may be ordered by the judge only. Seizure of other printed material or of another object within the meaning of section 74d of the Criminal Code may also, in exigent circumstances, be ordered by the public prosecution office. The order of the public prosecution office shall become ineffective if it is not confirmed by the judge within three days.

(2) Seizure shall be revoked if public charges have not been preferred or independent confiscation has not been applied for within two months. If the time limit set in the first sentence is not sufficient due to the particular scope of the investigations the court may, upon application by the public prosecution office, extend the time limit by another two months. The application may be repeated once.

(3) As long as public charges have not been preferred or independent confiscation not been applied for, seizure shall be revoked if the public prosecution office so applies.

Section 111o

[Attachment *in Rem* for a Property Fine]

(1) If there are grounds to assume that the requirements for imposing a property fine have been fulfilled, attachment *in rem* may be ordered in respect thereof.

(2) Sections 917, 928, 930 to 932, and 934 subsection (1) of the Code of Civil Procedure shall apply *mutatis mutandis*. In the attachment order a sum of money shall be specified whose deposit shall have the effect of hindering enforcement of attachment and of entitling the debtor to apply for revocation of enforced attachment. The amount concerned shall be governed by the circumstances of the case in question, namely by the anticipated amount of the property fine. This may be assessed. The request for discharge of attachment shall contain the facts required for specifying the amount of money.

(3) Only the judge, and in exigent circumstances also the public prosecution office, shall be competent to order attachment in relation to a property fine. If the public prosecution office has made the order, it shall apply for judicial confirmation of the order within one week. The accused may apply for a judicial decision at any time.

(4) If, in relation to a property fine, enforcement of attachment is to be effected in respect of moveable assets, Section 111f subsection (1) shall apply *mutatis mutandis*.

(5) In all other cases Section 111b subsection (3), Section 111e subsections (3) and 4, Section 111f subsections (2) and (3), second and third sentences, and Sections 111g and 111h shall apply.

Section 111p

[Seizure of Property]

(1) Subject to the requirements of Section 111o subsection (1), the property of the accused may be seized if enforcement of the anticipated property fine by means of an attachment order pursuant to Section 111o does not seem secure having regard to the type and scale of the property concerned or for other reasons.

(2) Seizure shall be confined to individual property components if this is sufficient in the light of circumstances, namely of the anticipated amount of the property fine, to ensure its execution.

(3) With the order for seizure of property the accused shall lose the right to administer the seized property and to dispose thereof *inter vivos*. The time of seizure shall be indicated in the order.

(4) Section 111b subsection (3), Section 111o subsection (3), Section 291, Section 292 subsection (2) and Section 293 shall apply *mutatis mutandis*.

(5) The administrator of the property shall notify the public prosecution office and the court of all information acquired during the course of administering the property that may serve the intended purpose of the seizure.

CHAPTER IX ARREST AND PROVISIONAL APPREHENSION

Section 112

[Admissibility of Remand Detention; Grounds for Arrest]

(1) Remand detention may be ordered against the accused if he is strongly suspected of the offence and if there is a ground for arrest. It may not be ordered if it is disproportionate to the significance of the case or to the penalty or measure of reform and prevention likely to be imposed.

(2) A ground for arrest shall exist if, on the basis of certain facts,

1. it is established that the accused has fled or is hiding;
2. considering the circumstances of the individual case, there is a risk that the accused will evade the criminal proceedings (risk of flight); or
3. the accused's conduct gives rise to the strong suspicion that he will
 - a) destroy, alter, remove, suppress, or falsify evidence,
 - b) improperly influence the co-accused, witnesses, or experts, or
 - c) cause others to do so,

and if, therefore, the danger exists that establishment of the truth will be made more difficult (risk of tampering with evidence).

(3) Remand detention may also be ordered against an accused strongly suspected pursuant to section 308 subsections (1) to (3) of the Criminal Code, of having committed a criminal offence pursuant to section 6 subsection (1), number 1, of the Code of Crimes against International Law or section 129a subsections (1) or (2), also in conjunction with section 129b subsection (1), or pursuant to sections 211, 212, 226, 306b or 306c of the Criminal Code, or insofar as life and limb of another have been endangered by the offence, even if there are no grounds for arrest pursuant to subsection (2).

Section 112a

[Further Grounds for Arrest]

(1) A ground for arrest shall also exist if the accused is strongly suspected of

1. having committed a criminal offence pursuant to sections 174, 174a, 176 to 179, or pursuant to section 238 subsections (2) and (3) of the Criminal Code, or

2. having repeatedly or continually committed a criminal offence which seriously undermines the legal order pursuant to section 89a, pursuant to section 125a, pursuant to sections 224 to 227, pursuant to sections 243, 244, 249 to 255, 260, pursuant to section 263, pursuant to sections 306 to 306c or section 316a of the Criminal Code or pursuant to section 29 subsection (1), numbers 1, 4 or 10, or subsection (3), section 29a subsection (1), section 30 subsection (1), section 30a subsection (1) of the Narcotics Act,

and certain facts substantiate the risk that prior to final conviction he will commit further serious criminal offences of the same nature or will continue the criminal offence, if detention is required to avert the imminent danger, and in the cases referred to in number 2, a prison sentence exceeding one year is expected to be imposed. In the assessment of strong suspicion of the accused's having committed an offence within the meaning of the first sentence, number 2, consideration shall also be given to offences which are or have been the subject of other, also finally concluded, proceedings.

(2) Subsection (1) shall not be applicable if the prerequisites for issuing a warrant of arrest prevail pursuant to Section 112 and the prerequisites for the suspension of execution of the warrant of arrest pursuant to Section 116 subsections (1) and (2) are not met.

Section 113

[Restrictions Applying to Remand Detention]

(1) If the offence is punishable only by imprisonment of up to six months, or by a fine up to one hundred and eighty daily units, remand detention may not be ordered on the ground of a risk of evidence being tampered with.

(2) In such cases, remand detention may be imposed on the ground of a risk of flight only if the accused

1. has previously evaded the proceedings against him or has made preparations for flight;
2. has no permanent domicile or place of residence within the territorial scope of this statute; or
3. cannot establish his identity.

Section 114

[Warrant of Arrest]

(1) Remand detention shall be imposed by the judge in a written warrant of arrest.

(2) The warrant of arrest shall indicate

1. the accused;
2. the offence of which he is strongly suspected, the time and place of its commission, the statutory elements of the criminal offence and the penal provisions to be applied;
3. the ground for arrest; as well as
4. the facts disclosing the strong suspicion of the offence and the ground for arrest, unless disclosure would endanger national security.

(3) If it appears that Section 112 subsection (1), second sentence, is applicable, or if the accused invokes that provision, the grounds for not applying it shall be stated.

Section 114a

[Notification of Accused]

A copy of the warrant of arrest shall be handed over to the accused at the time of his arrest; if he does not have a sufficient command of the German language he shall additionally be provided with a translation in a language he understands. If it is not possible for a copy and, where necessary, a translation to be handed over to him, he must be informed without delay, in a language he understands, of the grounds for his arrest and the accusations levied against him. In that case the copy of the warrant of arrest and, where necessary, a translation shall subsequently be handed over to him without delay.

Section 114b

[Instruction of Arrested Accused; Rights]

(1) The arrested accused shall be instructed as to his rights without delay and in writing in a language he understands. If written instruction is clearly insufficient, oral instruction shall also be given. The same procedure shall apply *mutatis mutandis* if it is not possible to give instruction in writing; written instruction shall, however, be given subsequently insofar as this can reasonably be done. The accused shall confirm in writing that he was given instruction; if he refuses, this shall be documented.

(2) In the instruction pursuant to subsection (1) the accused shall be advised that he

1. shall, without delay, at the latest on the day after his apprehension, be brought before the court that is to examine him and decide on his further detention;
2. has the right to reply to the accusation or to remain silent;
3. may request that evidence be taken in his defence;
4. may at any time, also before his examination, consult with defence counsel of his choice;
- 4a. may, in the cases referred to in Section 140 subsections (1) and (2), request the appointment of defence counsel in accordance with Section 141 subsections (1) and (3);
5. has the right to demand an examination by a female or male physician of his choice;
6. may notify a relative or a person trusted by him, provided the purpose of the investigation is not endangered thereby.
7. may, in accordance with Section 147 subsection (7), apply to be given information and copies from the files, insofar as he has no defence counsel; and
8. may, if remand detention is continued after he is brought before the competent judge,

- a) lodge a complaint against the warrant of arrest or apply for a review of detention (Section 117 subsections (1) and (2)) and an oral hearing (Section 118 subsections (1) and (2)),
- b) in the event of inadmissibility of the complaint, make an application for a court decision pursuant to Section 119 subsection (5), and
- c) make an application for a court decision pursuant to §119a subsection (1) against official decisions and measures in the execution of remand detention.

The accused is to be advised of defence counsel's right to inspect the files pursuant to Section 147. An accused who does not have a sufficient command of the German language or who is hearing impaired or speech impaired shall be advised in a language he understands that he may, in accordance with section 187 subsections (1) to (3) of the Courts Constitution Act, demand that an interpreter or a translator be called in for the entire criminal proceedings free of charge. A foreign national shall be advised that he may demand notification of the consular representation of his native country and have messages communicated to the same.

Section 114c

[Notification of Relatives]

- (1) An arrested accused shall be given an opportunity without delay to notify a relative or a person trusted by him, provided the purpose of the investigation is not endangered thereby.
- (2) If detention is executed against the arrested accused after he is brought before the court, the court shall order that one of his relatives or a person trusted by him be notified without delay. The same duty shall exist in respect of every further decision on the continuation of detention.

Section 114d

[Communication of Information to the Penal Institution]

- (1) The court shall communicate a copy of the warrant of arrest along with the request for admission to the penal institution competent for the accused. In addition, it shall inform the penal institution concerning
 - 1. the public prosecution office in charge of the proceedings and the court competent pursuant to Section 126;
 - 2. the persons notified pursuant to Section 114c;
 - 3. decisions and other measures pursuant to Section 119 subsections (1) and (2);
 - 4. other decisions given in the proceedings, so far as this is necessary for the fulfilment of the duties of the penal institution;
 - 5. dates set down for the main hearing and information following therefrom that is necessary for the fulfilment of the duties of the penal institution;
 - 6. the time of the entry into force of the judgment; as well as
 - 7. other personal data of the accused that is necessary for the fulfilment of the duties of the penal institution, especially data concerning his personality and other relevant criminal proceedings.

The first and second sentences shall apply *mutatis mutandis* in the event of changes in the communicated facts. Communications shall be dispensed with insofar as the facts have already otherwise become known to the penal institution.

(2) The public prosecution office shall support the court in the fulfilment of its duties pursuant to subsection (1) and shall in particular, *proprio motu*, communicate to the penal institution the data pursuant to subsection (1), second sentence, number 7, as well as decisions and other measures it has taken pursuant to Section 119 subsections (1) and (2). Moreover, the public prosecution office shall transmit a copy of the bill of indictment to the penal institution and communicate the preferment of charges to the court competent pursuant to Section 126 subsection (1).

Section 114e

[Communication of Information by the Penal Institution]

The penal institution shall, *proprio motu*, communicate to the court and to the public prosecution office information obtained during the execution of remand detention, insofar as such information, in the opinion of the penal institution, is of importance for the fulfilment of the duties of the recipients and has not already otherwise become known to them. Other rights of the penal institution to communicate information to the court and to the public prosecution office shall remain unaffected.

Section 115

[Examination by the Court]

- (1) If the accused is apprehended on the basis of the warrant of arrest, he shall be brought before the competent court without delay.
- (2) The court shall examine the accused concerning the subject of the accusation without delay following the arrest and not later than on the following day.
- (3) During the examination, the incriminating circumstances shall be pointed out to the accused and he shall be informed of his right to reply to the accusation or to remain silent. He shall be given an opportunity to remove grounds for suspicion and arrest and to present those facts which speak in his favour.
- (4) If remand detention is continued, the accused shall be informed of the right of complaint as well as of other appellate remedies (Section 117 subsections (1) and (2), Section 118 subsections (1) and (2), Section 119 subsection (5), Section 119a subsection (1)). Section 304 subsections (4) and (5) shall remain unaffected.

Section 115a

[Examination by the Nearest Local Court]

- (1) If the accused cannot be brought before the competent court at the latest on the day after his apprehension, he shall be brought before the nearest Local Court without delay, not later than the day following his apprehension.
- (2) Once the accused has been brought before it, the court shall examine him without delay, no later than the following day. At this examination, to the extent possible, Section 115 subsection (3) shall be applied. If the examination shows that the warrant of arrest has been revoked, that an application for its revocation has been made by the public prosecution office (Section 120 subsection (3)), or that the person apprehended is not the person designated in the warrant of arrest, the apprehended person shall be released. If he raises other objections to the warrant of arrest or its execution which are not manifestly unfounded, or if the court has doubts regarding the continuation of detention, it shall inform the competent court and the competent public prosecution office accordingly without delay, using the fastest

means available in the circumstances; the competent court shall review without delay whether the warrant of arrest is to be revoked or its execution suspended.

(3) If the accused is not released, he shall, at his request, be brought before the competent court for examination in accordance with Section 115. The accused shall be informed of this right and shall be instructed pursuant to Section 115 subsection (4).

Section 116

[Suspension of Execution]

(1) The judge shall suspend execution of a warrant of arrest which is justified merely by a risk of flight if the expectation is sufficiently substantiated that the purpose of remand detention may also be achieved by less severe measures. The following measures, in particular, may be considered:

1. an instruction to report at certain times to the judge, the criminal prosecuting authority, or to a specific office to be designated by them;
2. an instruction not to leave his place of residence, or wherever he happens to be, or a certain area, without the permission of the judge or the criminal prosecuting authority;
3. an instruction not to leave his private premises except under the supervision of a designated person;
4. the furnishing of adequate security by the accused or another person.

(2) The judge may also suspend execution of a warrant of arrest which is justified for risk of tampering with evidence, if less severe measures sufficiently substantiate the expectation that they will considerably reduce the risk of tampering with evidence. In particular, an instruction not to have contact with co-accused persons, witnesses, or experts may be considered.

(3) The judge may suspend execution of a warrant of arrest issued in accordance with Section 112a provided there are sufficient grounds to assume that the accused will comply with certain instructions and that the purpose of detention will be fulfilled thereby.

(4) In the cases referred to in subsections (1) to (3), the judge shall order execution of the warrant of arrest if

1. the accused grossly violates the duties and restrictions imposed upon him;
2. the accused makes preparations for flight, remains absent without sufficient excuse upon proper summons to appear, or shows in any other manner that the trust reposed in him was not justified; or
3. new circumstances have arisen which necessitate the arrest.

Section 116a

[Type of Bail; Authorization to Receive Service]

(1) Bail shall be furnished by depositing cash, shares or bonds, by pledging property, or in the form of a surety by suitable persons. Any diverging provisions in a statutory instrument issued under the Act on Payments to and from Courts and Judicial Authorities shall remain unaffected.

(2) The judge shall determine the amount and type of bail at his discretion.

(3) An accused person who is not resident within the territorial scope of this statute and applies for suspension of execution of the warrant of arrest upon furnishing bail shall authorize a person residing within the district of the competent court to receive service on his behalf.

Section 116b

[Execution of Detention; Precedence]

Execution of remand detention shall precede the execution of detention pending extradition, provisional detention pending extradition, detention pending deportation and detention pending exit from the Federal territory. Execution of other custodial measures shall precede the execution of remand detention, unless the court rules otherwise because the purpose of remand detention so requires.

Section 117

[Review of Detention]

(1) As long as the accused is in remand detention, he may at any time apply for a court hearing as to whether the warrant of arrest is to be revoked or its execution suspended in accordance with Section 116 (review of detention).

(2) A complaint shall be inadmissible where an application has been made for a review of detention. The right of complaint against the decision following the application shall remain unaffected.

(3) The judge may order specific investigations which may be important for the subsequent decision concerning continuation of remand detention, and he may conduct a further review after completion of such investigations.

(4) (Deleted)

(5) (Deleted)

Section 118

[Oral Hearing]

(1) In the case of review of detention, a decision shall be given after an oral hearing upon application by the accused, or at the court's discretion *proprio motu*.

(2) Where a complaint has been lodged against the warrant of arrest, then upon application by the accused or on the court's own motion, a decision may also be given in the complaint proceedings after an oral hearing.

(3) Where following an oral hearing remand detention has been maintained, the accused shall have a right to further oral hearing only if remand detention has continued for at least three months and at least two months of remand detention have elapsed since the last oral hearing.

(4) A right to an oral hearing shall not exist as long as the main hearing is in process, or after a judgment has been pronounced which imposes imprisonment or a custodial measure of reform and prevention.

(5) The oral hearing shall be held without delay; unless the accused consents otherwise, it may not be scheduled more than 2 weeks after receipt of the application.

Section 118a

[Conducting the Oral Hearing]

(1) The public prosecution office, as well as the accused and defence counsel, shall be notified of the place and time of the oral hearing.

(2) The accused shall be brought to the hearing unless he has waived his right to be present at the hearing or unless great distance or sickness of the accused or other

insurmountable obstacles prevent his being brought to the hearing. The court may order that under the conditions set out in the first sentence the oral hearing shall be conducted in such a way that the accused is located in another place than the court and the hearing is simultaneously transmitted audio-visually to the place where the accused is located and to the courtroom. If the accused is not brought to the oral hearing and if the procedure pursuant to the second sentence is not followed, defence counsel shall safeguard his rights at the hearing. In that case, the accused shall be assigned defence counsel for the oral hearing if he does not yet have such counsel. Sections 142, 143 and 145 shall apply *mutatis mutandis*.

(3) The participants present shall be heard during the oral hearing. The court shall determine the type and extent of evidence to be taken. A record shall be made of the hearing; Sections 271 to 273 shall apply *mutatis mutandis*.

(4) The decision shall be pronounced at the end of the oral hearing. If this is not possible, the decision shall be given within one week at the latest.

Section 118b

[Persons Entitled to File Applications]

Sections 297 to 300 and Section 302 subsection (2) shall apply *mutatis mutandis* to the application for review of detention (Section 117 subsection (1)) and to the application for an oral hearing.

Section 119

[Decisions and Measures in Execution of Detention]

(1) Insofar as necessary to avert the risk of flight, tampering with evidence or repetition (Sections 112, 112a), restrictions may be imposed upon a detained accused. In particular, it may be ordered that

1. visitation and telecommunication shall be subject to permission;
2. visitation, telecommunication, correspondence and packages shall be monitored;
3. handing over of items during visitation shall be subject to permission;
4. the accused shall be separated from individual or all other detainees;
5. his placement and presence in premises shared with other detainees shall be restricted or excluded.

The orders shall be made by the court. If its order cannot be obtained in time, the public prosecution office or the penal institution may make a provisional order. The order shall be submitted to the court for approval within three working days unless it has meanwhile ceased to be operative. The accused shall be informed of orders. The order pursuant to the second sentence, number 2, shall include the authorization to terminate visitation and telecommunication as well as to hold correspondence and packages.

(2) Implementation of the order shall be incumbent upon the authority making the order. The court may revocably transfer the implementation of orders to the public prosecution office, which may avail itself of the services of the officials assisting it and the penal institution in effecting such implementation. The transfer shall be incontestable.

(3) Where the monitoring of telecommunication has been ordered pursuant to subsection (1), second sentence, number 2, the persons with whom the accused is

communicating shall be informed of the intended monitoring immediately after the connection has been established. The information may be given by the accused himself. The accused shall be advised in good time prior to the commencement of telecommunication of the duty to so inform.

(4) Sections 148 and 148a shall remain unaffected. They shall apply *mutatis mutandis* to communication of the accused with

1. the probation office competent for his case;
2. the supervisory agency competent for his case;
3. the court assistance agency competent for his case;
4. the parliaments of the Federation and the *Länder*;
5. the Federal Constitutional Court and the *Land* constitutional court competent for his case;
6. the *Land* ombudsman competent for his case;
7. the Federal Commissioner for Data Protection and Freedom of Information, the agencies of the *Länder* competent for the monitoring of compliance with data protection provisions in the *Länder*, and the supervisory authorities pursuant to section 38 of the Federal Data Protection Act;
8. the European Parliament;
9. the European Court of Human Rights;
10. the European Court of Justice;
11. the European Data Protection Supervisor;
12. the European Ombudsman;
13. the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
14. the European Commission against Racism and Intolerance;
15. the United Nations Human Rights Committee;
16. the United Nations Committee on the Elimination of Racial Discrimination and the United Nations Committee on the Elimination of Discrimination against Women;
17. the United Nations Committee against Torture, its Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the corresponding national preventive mechanisms;
18. the persons mentioned in Section 53 subsection (1), first sentence, numbers 1 and 4, in regard to the content specified therein;
19. unless the court orders otherwise,
 - a) the prison advisory boards and
 - b) the consular representation of his native country.

The measures necessary to determine the existence of the conditions set out in the first and second sentences shall be taken by the authority competent pursuant to subsection (2).

(5) An application for a court decision may be made against decisions or other measures taken pursuant to this provision, unless the legal remedy of complaint is admissible. The application shall not have suspensive effect. The court may, however, make provisional orders.

(6) Subsections (1) to (5) shall also apply where another custodial measure (Section 116b) is executed against an accused in respect of whom remand detention has been ordered. In this case as well, the competence of the court shall be determined by Section 126.

Section 119a

[Applications in Respect of Decisions and Measures]

(1) An application for a court decision may be made against an official decision or measure in the execution of remand detention. An application for a court decision may also be made if an official decision applied for in the execution of remand detention is not given within three weeks.

(2) The application for a court decision shall not have suspensive effect. The court may, however, make provisional orders.

(3) The authority competent for the decision or measure relating to execution may also file a complaint against the decision of the court.

Section 120

[Revocation of the Warrant of Arrest]

(1) The warrant of arrest shall be revoked as soon as the conditions for remand detention no longer exist, or if the continued remand detention is disproportionate to the importance of the case or to the anticipated penalty or measure of reform and prevention. In particular, it is to be revoked if the accused is acquitted or if the opening of the main proceedings is refused, or if the proceedings are terminated other than provisionally.

(2) The release of the accused shall not be delayed by the fact that an appellate remedy is being sought.

(3) The warrant of arrest shall also be revoked if the public prosecution office makes the relevant application before public charges have been preferred. Simultaneously with this application, the public prosecution office may order the release of the accused.

Section 121

[Remand Detention Exceeding Six Months]

(1) As long as a judgment has not been given imposing imprisonment or a custodial measure of reform and prevention, remand detention for one and the same offence exceeding a period of six months shall be executed only if the particular difficulty or the unusual extent of the investigation or some other important reason do not yet admit pronouncement of judgment and justify continuation of remand detention.

(2) In the cases referred to in subsection (1), the warrant of arrest shall be revoked upon expiry of the six-month period unless execution of the warrant of arrest is suspended pursuant to Section 116 or the Higher Regional Court orders remand detention to continue.

(3) If the case file is submitted to the Higher Regional Court prior to the expiry of the time limit referred to in subsection (2) the running of the time limit shall be

suspended pending that court's decision. If the main proceedings commenced prior to the expiry of the time limit, the running of the time limit shall be suspended until pronouncement of the judgment. If the main proceedings are suspended and the case file is forwarded to the Higher Regional Court without delay upon suspension of the proceedings, the running of the time limit shall likewise be suspended pending that court's decision.

(4) In cases over which a criminal division has jurisdiction pursuant to section 74a of the Courts Constitution Act, the decision shall be given by the Higher Regional Court competent pursuant to sections 120 or 120b of the Courts Constitution Act. In cases over which a Higher Regional Court has jurisdiction pursuant to section 120 of the Courts Constitution Act, the Federal Court of Justice shall decide instead.

Section 122

[Special Review of Detention by the Higher Regional Court]

(1) In the cases referred to in Section 121 the competent court shall submit the files through the public prosecution office to the Higher Regional Court for decision if it deems the continuation of remand detention necessary or if the public prosecution office so requests.

(2) The accused and his defence counsel shall be heard prior to the decision. The Higher Regional Court may decide on the continuation of remand detention after the oral hearing; in that case, Section 118a shall apply *mutatis mutandis*.

(3) If the Higher Regional Court orders continuation of remand detention, Section 114 subsection (2), number 4, shall apply *mutatis mutandis*. For the further review of remand detention (Section 117 subsection (1)) the Higher Regional Court shall have jurisdiction until a judgment is given imposing imprisonment or a custodial measure of reform and prevention. It may refer the review of remand detention to the court having jurisdiction according to the general provisions for a period not exceeding three months. In the cases referred to in Section 118 subsection (1), the Higher Regional Court shall decide on an application for an oral hearing at its discretion.

(4) During further proceedings as well the review of the prerequisites pursuant to Section 121 subsection (1) shall be reserved for the Higher Regional Court. This review must be repeated no later than every three months.

(5) The Higher Regional Court may suspend execution of the warrant of arrest in accordance with Section 116.

(6) If in the same case more than one accused person is in remand detention the Higher Regional Court may decide on the continuation of remand detention even of those accused persons for whom it would not yet be competent pursuant to Section 121 and to the aforementioned provisions.

(7) If the Federal Court of Justice has jurisdiction it shall decide instead of the Higher Regional Court.

Section 122a

[Maximum Detention Period Pursuant to Article 112a]

In the cases referred to in Section 121 subsection (1), execution of detention may not be maintained for longer than one year if it is based on the grounds for arrest under Section 112a.

Section 123

[Revoking Less Severe Measures]

(1) A measure serving to suspend execution of detention (Section 116) shall be revoked if

1. the warrant of arrest has been withdrawn; or
2. remand detention or imprisonment or the custodial measure of reform and prevention is being executed.

(2) Under the same conditions, a security not yet forfeited shall be discharged.

(3) Anybody who has furnished security for the accused may bring about its discharge either by causing the accused to appear within a time limit to be set by the court or by reporting facts which warrant a suspicion that the accused intends to flee, early enough to allow for the accused to be arrested.

Section 124

[Forfeiture of Security]

(1) A security not yet discharged shall be forfeited to the Treasury if the accused evades the investigation or the commencement of imprisonment or the custodial measure of reform and prevention.

(2) Prior to the decision, the accused as well as the person who has furnished security for the accused shall be requested to make a statement. They shall be entitled only to lodge an immediate complaint against the decision. Before a decision is given concerning the complaint, these persons and the public prosecution office shall be given an opportunity to support their applications orally and to discuss the investigations which were made.

(3) Regarding the person who has furnished security for the accused, the decision declaring forfeiture shall have the effect of a final judgment passed by a civil court judge and declared provisionally enforceable. After expiry of the time limit for lodging a complaint the decision shall take binding effect as a final civil judgment.

Section 125

[Competence for Issuing the Arrest Warrant]

(1) Prior to the preferment of public charges, the judge at the Local Court within whose district venue is vested, or where the accused is residing, shall issue the warrant of arrest upon application of the public prosecution office or if a public prosecutor cannot be reached, or in exigent circumstances, *ex officio*.

(2) After public charges have been preferred, the warrant of arrest shall be issued by the court seized of the case and, if an appeal on law has been filed, by the court whose judgment is being contested. In urgent cases the presiding judge may also issue the warrant of arrest.

Section 126

[Competence for Subsequent Decisions]

(1) Prior to the preferment of public charges, the court that issued the warrant of arrest shall be competent in respect of further court decisions and measures relating to remand detention, suspension of its execution (Section 116), its execution (Section 116b) and applications pursuant to Section 119a. If the warrant of arrest has been issued by a court hearing the complaint, jurisdiction shall rest with the court that gave the preceding decision. If the preparatory proceedings are conducted at another place, or if remand detention is executed at another place, the court may, upon application by the public prosecution office, transfer its jurisdiction to the Local Court competent for that other place. If that place is divided into more

than one court district, the *Land* government shall issue a statutory instrument determining which Local Court is to be competent. The *Land* government may transfer this authorization to the *Land* department of justice.

(2) After public charges have been preferred, the court seized of the case shall have jurisdiction. During appellate proceedings on law, the court whose judgment is being contested shall have jurisdiction. Individual measures, particularly those under Section 119, shall be ordered by the presiding judge. In urgent cases he may also revoke the warrant of arrest or suspend its execution (Section 116) with the consent of the public prosecution office; otherwise the decision of the court shall be obtained without delay.

(3) The court hearing the appeal on law may revoke the warrant of arrest if it quashes the contested judgment and in arriving at this decision it is evident that the prerequisites of Section 120 subsection (1) have been fulfilled.

(4) Sections 121 and 122 shall remain unaffected.

Section 126a

[Provisional Placement]

(1) If there are strong grounds to assume that while lacking criminal responsibility or in a state of diminished responsibility (sections 20 and 21 of the Criminal Code) someone has committed an unlawful act and that his placement in a psychiatric hospital or to an institution for withdrawal treatment will be ordered, the court may, in a placement order, direct that he be provisionally committed to one of these institutions, if public security so requires.

(2) Sections 114 to 115a, 116 subsections (3) and (4), Sections 117 to 119a, 123, 125 and 126 shall apply *mutatis mutandis* with respect to provisional placement. Sections 121 and 122 shall apply *mutatis mutandis* subject to the proviso that the Higher Regional Court shall review whether the requirements for provisional placement continue to apply.

(3) The placement order shall be revoked if the conditions for provisional placement no longer exist or if the court does not order placement in a psychiatric hospital or to an institution for withdrawal treatment in its judgment. The release shall not be delayed by the fact that appellate remedies have been sought. Section 120 subsection (3) shall apply *mutatis mutandis*.

(4) Where the person committed has a statutory representative or a legal representative as defined in section 1906 subsection (5) of the Civil Code, the latter shall also be notified of any decisions pursuant to subsections (1) to (3).

Section 127

[Provisional Arrest]

(1) If a person is caught in the act or is being pursued, any person shall be authorized to arrest him provisionally, even without judicial order, if there is reason to suspect flight or if his identity cannot be immediately established. The establishment of the identity of a person by the public prosecution office or by officials in the police force shall be governed by Section 163b subsection (1).

(2) Furthermore, in exigent circumstances, the public prosecution office and officials in the police force shall be authorized to make a provisional arrest if the prerequisites for issuance of a warrant of arrest or of a placement order have been fulfilled.

(3) In the case of a criminal offence which can only be prosecuted upon application, provisional arrest shall also be admissible where no application has yet been filed.

This shall apply *mutatis mutandis* if a criminal offence may be prosecuted only with authorization or upon request for prosecution.

(4) Sections 114a to 114c shall apply *mutatis mutandis* to provisional arrest by the public prosecution office and by officials in the police force.

Section 127a

[Dispensing with Arrest]

(1) If the accused has no permanent domicile or place of residence within the territorial scope of this statute and if the prerequisites for a warrant of arrest are fulfilled only because of risk of flight, the court may dispense with ordering or maintaining his arrest if

1. it is not expected that imprisonment or a custodial measure of reform and prevention will be ordered on account of the offence and
2. the accused furnishes adequate security for the fine to be expected and the costs of the proceedings.

(2) Section 116a subsections (1) and (3) shall apply *mutatis mutandis*.

Section 127b

[Arrest in Connection with the Main Hearing]

(1) The public prosecution office and officials in the police force shall also be authorized to arrest provisionally a person caught in the act or being pursued

1. if it is probable that an immediate decision will be taken in accelerated proceedings and
2. if, on the basis of certain facts, it is to be feared that the arrested person will fail to appear at the main hearing.

Sections 114a to 114c shall apply *mutatis mutandis*.

(2) A warrant of arrest (Section 128 subsection (2), second sentence) may be issued on the grounds set out in subsection (1) against the individual strongly suspected of the offence only if it can be expected that the main hearing will be held within one week of the arrest. The warrant of arrest shall be limited to a maximum period of one week running from the day of the arrest.

(3) The decision to issue the warrant of arrest shall be given by the judge responsible for conducting the accelerated proceedings.

Section 128

[Appearance Before the Judge]

(1) The arrested person shall, without delay, be brought before the judge of the Local Court in whose district he was arrested at the latest on the day after his arrest, unless he has been released. The judge shall examine the person brought before him in accordance with Section 115 subsection (3).

(2) If the judge does not consider the arrest justified, or if he considers that the reasons therefor no longer apply, he shall order release. Otherwise he shall issue a warrant of arrest or a placement order upon application by the public prosecution office or, if the public prosecutor cannot be reached, *ex officio*. Section 115 subsection (4) shall apply *mutatis mutandis*.

Section 129

[Appearance After Preferment of Public Charges]

If public charges have already been preferred against the arrested person, he shall be brought before the competent court either immediately or upon the direction of the judge before whom he was first brought; this court shall, at the latest on the day after the arrest, decide on release, detention, or provisional placement of the arrested person.

Section 130

[Arrest Warrant for Offences Prosecuted on Application]

If, because of a suspected criminal offence which can only be prosecuted upon application, a warrant of arrest is issued before the application is filed, the person entitled to file such application or, if there is more than one such person, then at least one of them shall be immediately informed of the issuance of the warrant of arrest and be notified that the warrant of arrest will be revoked if the application is not filed within a time limit to be determined by the judge, not to exceed one week. If no application for prosecution is filed within this time limit, the warrant of arrest shall be revoked. This shall apply *mutatis mutandis* if a criminal offence may be prosecuted only with authorization or upon request for prosecution. Section 120 subsection (3) shall apply.

CHAPTER IXa

FURTHER MEASURES TO SECURE CRIMINAL PROSECUTION AND EXECUTION OF SENTENCE

Section 131

[Arrest Notice]

(1) On the basis of a warrant of arrest or a placement order, the judge or the public prosecution office, and in exigent circumstances the officials assisting it (section 152 of the Courts Constitution Act), may issue an arrest notice.

(2) If the prerequisites are fulfilled for a warrant of arrest or a placement order the issuance of which cannot be awaited without endangering the success of the investigations, the public prosecution office and the officials assisting it (section 152 of the Courts Constitution Act) can order measures pursuant to subsection (1) if this is necessary for a provisional arrest. The decision on issuance of a warrant of arrest or a placement order shall be obtained without delay and at the latest within one week.

(3) In the case of a criminal offence of substantial significance the judge and the public prosecution office may, in the cases referred to in subsections (1) and (2), order public searches where other means of determining the accused's whereabouts would offer much less prospect of success or be much more difficult. In exigent circumstances and where the judge or the public prosecution office cannot be reached in time, the officials assisting the public prosecution office (section 152 of the Courts Constitution Act) shall also be entitled to exercise this power subject to the same conditions. In the cases referred to in the second sentence the decision of the public prosecution office shall be obtained without delay. The order shall become ineffective if not confirmed within twenty-four hours.

(4) The accused shall be named and, where necessary, described as accurately as possible; a picture may be attached. The offence of which he is suspected, the place and time of its commission, as well as circumstances that may be relevant for his apprehension can be indicated.

(5) Sections 115 and 115a shall apply *mutatis mutandis*.

Section 131a

[Notice to Determine Whereabouts]

- (1) A notice may be issued requiring determination of the whereabouts of an accused or of a witness if his whereabouts are not known.
- (2) Subsection (1) shall also apply to notices referring to the accused so far as they are necessary for securing a driver's licence, for identification measures, for carrying out a DNA analysis or for establishing his identity.
- (3) A public search may also be ordered in the case of a criminal offence of substantial significance on the basis of a notice requiring determination of the whereabouts of an accused or of a witness if the accused is strongly suspected of having committed the offence and where other means of determining his whereabouts would offer much less prospect of success or be much more difficult.
- (4) Section 131 subsection (4) shall apply *mutatis mutandis*. When determining the whereabouts of a witness it shall be made clear that the person sought is not the accused. There shall be no public search where overriding interests of the witness meriting protection present an obstacle thereto. Pictures of the witness may be used only where other means of determining his whereabouts would offer no prospect of success or be much more difficult.
- (5) Notices pursuant to subsections (1) and (2) may be issued in all search instruments used by the criminal prosecuting authorities.

Section 131b

[Publication of Pictures]

- (1) Publication of pictures of an accused suspected of having committed a criminal offence of substantial significance shall also be admissible if clearing up a criminal offence, in particular establishing the identity of an unknown perpetrator, by other means offers much less prospect of success or would be much more difficult.
- (2) Publication of pictures of a witness and references to the criminal proceedings underlying such publication shall also be admissible if clearing up a criminal offence of substantial significance, in particular, if establishing the identity of the witness by other means offers no prospect of success or would be much more difficult. The publication must make it clear that the person in the picture is not an accused person.
- (3) Section 131 subsection (4), first part of the first sentence, and second sentence, shall apply *mutatis mutandis*.

Section 131c

[Order and Confirmation of Searches]

- (1) Searches pursuant to Section 131a subsection (3) and Section 131b may be ordered only by the judge and, in exigent circumstances, also by the public prosecution office and the officials assisting it (section 152 of the Courts Constitution Act). Searches pursuant to Section 131a subsections (1) and (2) shall be ordered by the public prosecution office; in exigent circumstances they may also be ordered by the officials assisting it (section 152 of the Courts Constitution Act).
- (2) In cases of constant publication in electronic media as well as in cases of repeated publication on television and in periodically printed matter, the order made by the public prosecution office and the officials assisting it (section 152 of the Courts Constitution Act) pursuant to subsection (1), first sentence, shall become ineffective if not confirmed by a judge within one week. In all other cases search orders made by officials assisting the public prosecution office (section 152 of the

Courts Constitution Act) shall become ineffective if not confirmed by the public prosecution office within one week.

Section 132

[Provision of Security and Address for Service]

(1) If an accused who is strongly suspected of a criminal offence has no permanent domicile or place of residence within the territorial scope of this statute and the prerequisites for a warrant of arrest are not fulfilled, an order may be made so as to ensure that criminal proceedings are conducted to the effect that the accused

1. provide adequate security for the anticipated fine and the costs of the proceedings, and
2. authorize a person residing within the district of the competent court to accept service of documents.

Section 116a subsection (1) shall apply *mutatis mutandis*.

(2) This order may be issued only by the judge and, in exigent circumstances, also by the public prosecution office and the officials assisting it (section 152 of the Courts Constitution Act).

(3) If the accused fails to comply with the order, means of transportation and other objects which the accused has on his person and which belong to him may be seized. Sections 94 and 98 shall apply *mutatis mutandis*.

CHAPTER IXb

PROVISIONAL PROHIBITION OF PURSUIT OF AN OCCUPATION

Section 132a

[Provisional Prohibition of Pursuit of an Occupation]

(1) If there are cogent reasons for assuming that a prohibition of pursuit of an occupation will be ordered (section 70 of the Criminal Code), the judge may, by order, prohibit the accused, on a provisional basis, from practising his occupation, profession, trade or branch thereof. Section 70 subsection (3) of the Criminal Code shall apply *mutatis mutandis*.

(2) The provisional prohibition of pursuit of an occupation shall be revoked if the reason therefor no longer exists or if the court does not order the prohibition of pursuit of an occupation in the judgment.

CHAPTER X

EXAMINATION OF THE ACCUSED

Section 133

[Written Summons]

- (1) The accused shall be summoned in writing to the examination.
- (2) The summons may include an admonition that the accused shall be brought before the court in the case of non-compliance.

Section 134

[Bringing the Accused Before the Court]

(1) It may be ordered that the accused be brought before the court immediately if reasons exist which would justify the issuance of a warrant of arrest.

(2) The order shall precisely describe the accused and the criminal offence with which he is charged; the reason for his being brought before the court shall be indicated.

Section 135
[Immediate Examination]

The accused shall be brought before the judge without delay and shall be examined by him. He shall not be kept in custody by virtue of the order for longer than the end of the day following the moment he was first brought before the court.

Section 136
[First Examination]

- (1) At the commencement of the first examination, the accused shall be informed of the offence with which he is charged and of the applicable criminal law provisions. He shall be advised that the law grants him the right to respond to the charges, or not to make any statement on the charges, and the right, at any stage, even prior to his examination, to consult with defence counsel of his choice. He shall further be advised that he may request evidence to be taken in his defence and, under the conditions set out in Section 140 subsections (1) and (2), request the appointment of defence counsel in accordance with Section 141 subsections (1) and (3). In appropriate cases the accused shall also be informed that he may make a written statement, and of the possibility of perpetrator-victim mediation.
- (2) The examination shall give the accused an opportunity to dispel the grounds for suspecting him and to assert the facts which speak in his favour.
- (3) At the first examination of the accused, consideration shall also be given to ascertaining his personal situation.

Section 136a
[Prohibited Methods of Examination]

- (1) The accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. Coercion may be used only as far as this is permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited.
- (2) Measures which impair the accused's memory or his ability to understand shall not be permitted.
- (3) The prohibition under subsections (1) and (2) shall apply irrespective of the accused's consent. Statements which were obtained in breach of this prohibition shall not be used, even if the accused consents to their use.

CHAPTER XI
DEFENCE

Section 137
[Defence Counsel]

- (1) The accused may have the assistance of defence counsel at any stage of the proceedings. Not more than three defence counsel may be chosen.
- (2) If the accused has a statutory representative, the latter may also engage defence counsel independently. Subsection (1), second sentence, shall apply *mutatis mutandis*.

Section 138
[Choice of Defence Counsel]

- (1) Attorneys admitted to practice before a German court, as well as professors of law at German institutions of higher education as defined in the Framework Act for

Higher Education who are qualified to hold judicial office, may be engaged as defence counsel.

(2) Other persons may be engaged only with the approval of the court. In cases where the assistance of defence counsel is mandatory and the person chosen is not among the persons who may be appointed as defence counsel, such person may additionally be admitted as counsel of the accused's own choice only together with one who may be so appointed.

(3) If witnesses, private prosecutors, private accessory prosecutors, persons entitled to private accessory prosecution and aggrieved persons can avail themselves of the assistance of an attorney or representation by an attorney, they may, in accordance with subsection (1) and subsection (2), first sentence, also choose the other persons designated therein.

Section 138a **[Exclusion of Defence Counsel]**

(1) Defence counsel shall be excluded from participation in proceedings if he is strongly suspected, or suspected to a degree justifying the opening of the main proceedings,

1. of being involved in the offence which constitutes the subject of investigation,
2. of abusing communication with an accused who is not at liberty for the purpose of committing criminal offences or substantially endangering the security of a penal institution, or
3. of having committed an offence which in the event of the conviction of the accused would constitute accessoryship after the fact, obstruction of justice or handling stolen goods.

(2) Defence counsel shall also be excluded from participation in proceedings the subject of which is a criminal offence pursuant to section 129a, also in conjunction with section 129b subsection (1) of the Criminal Code, if certain facts substantiate the suspicion that he has committed or is committing one of the acts designated in subsection (1), numbers 1 and 2.

(3) The exclusion shall be revoked

1. as soon as its prerequisites no longer exist, not, however, for the sole reason that the accused has been released;
2. if defence counsel is acquitted in the main proceedings opened on account of the facts leading to exclusion, if a culpable breach of official duties in relation to these facts is not determined in a judgment of the disciplinary court;
3. if, within one year after exclusion, main criminal proceedings or professional disciplinary proceedings have not been opened or a penal order issued, on account of the facts leading to exclusion.

An exclusion which is to be revoked in accordance with number 3 may be maintained for a limited time, at the most however for one more year, if the particular difficulty or the particular scope of the case or another important reason do not yet permit a decision to be taken on the opening of the main proceedings.

(4) Where defence counsel is excluded, he may not defend the accused in other proceedings governed by statute either. In relation to other matters he shall not visit the accused if the latter is not at liberty.

(5) Where defence counsel is excluded, he may not defend other accused persons in the same proceedings either or in other proceedings where such proceedings are based on a criminal offence pursuant to section 129a, also in conjunction with section 129b subsection (1) of the Criminal Code and where exclusion was ordered during proceedings which were also based on such a criminal offence. Subsection (4) shall apply *mutatis mutandis*.

Section 138b

[Exclusion of Defence Counsel for Endangering National Security]

Defence counsel shall also be excluded from participating in proceedings the subject of which is one of the criminal offences designated under section 74a subsection (1), number 3, and section 120 subsection (1), number 3, of the Courts Constitution Act, or non-performance of the duties pursuant to section 138 of the Criminal Code concerning criminal offences of high treason or endangering external security pursuant to sections 94 to 96, 97a and 100 of the Criminal Code, if in view of certain facts there is reason to assume that his participation would endanger the security of the Federal Republic of Germany. Section 138a subsection (3), first sentence, number 1, shall apply *mutatis mutandis*.

Section 138c

[Procedure for Excluding Defence Counsel]

(1) Decisions under Sections 138a and 138b shall be given by the Higher Regional Court. If in the preparatory proceedings the investigations are conducted by the Federal Public Prosecutor General, or if the proceedings are pending before the Federal Court of Justice, the Federal Court of Justice shall decide. If the proceedings are pending before a panel of the Higher Regional Court or of the Federal Court of Justice, another panel shall decide.

(2) After public charges have been preferred and until final conclusion of the proceedings the court of competency pursuant to subsection (1) shall decide, upon submission by the court before which the proceedings are pending and otherwise upon application by the public prosecution office. The submission shall be made upon application by the public prosecution office or *ex officio* through intervention of the public prosecution office. If defence counsel, being a member of a Bar Association, is to be excluded, a copy of the public prosecution office's application pursuant to the first sentence or the submission by the court shall be communicated to the president of the competent Bar Association. He may make submissions in the proceedings.

(3) The court before which the proceedings are pending may order the rights of defence counsel under Sections 147 and 148 to be suspended pending a ruling on exclusion by the court competent under subsection (1); it may also order suspension of such rights with respect to the cases designated under Section 138a subsections (4) and (5). Prior to preferment of public charges and subsequent to final conclusion of the proceedings the order pursuant to the first sentence shall be given by the court that has to decide on exclusion of defence counsel. The ruling shall take the form of an incontestable order. For the duration of the order the court shall appoint another defence counsel to exercise the rights under Sections 147 and 148. Section 142 shall apply *mutatis mutandis*.

(4) If the court before which the proceedings are pending makes a submission pursuant to subsection (2) during the main hearing, it shall simultaneously interrupt or suspend the main hearing until a decision is given by the court competent pursuant to subsection (1). The main hearing may be interrupted for up to thirty days.

(5) If defence counsel, on his own initiative or at the request of the accused, withdraws from participation in the proceedings after an application for his exclusion has been filed pursuant to subsection (2) or the matter has been submitted to the court competent to decide, this court may continue the exclusion proceedings with the aim of determining whether the participation of defence counsel who has withdrawn is admissible in the proceedings. The determination of inadmissibility shall be equivalent to exclusion within the meaning of Sections 138a, 138b and 138d.

(6) If defence counsel has been excluded from participation in the proceedings, costs caused by suspension can be imposed on him. The decision on this shall be taken by the court before which the proceedings are pending.

Section 138d

[Oral Hearing; Immediate Complaint]

(1) A decision on the exclusion of defence counsel shall be given after an oral hearing.

(2) Defence counsel shall be summoned to the oral hearing. The time limit for the summons shall be one week; it may be reduced to three days. The public prosecution office, the accused and, in the cases referred to in Section 138c subsection (2), third sentence, the president of the Bar Association shall be notified of the date of the oral hearing.

(3) The oral hearing may be held without defence counsel if he has been properly summoned and has had his attention drawn in the summons to the fact that the oral hearing may be conducted in his absence.

(4) At the oral hearing those participants who are present shall be heard. Section 247a subsection (2), first sentence, shall apply to the hearing of the president of the Bar Association *mutatis mutandis*. The extent to which evidence is taken shall be determined by the court in the exercise of its duty-bound discretion. Records of the hearing shall be made; Sections 271 to 273 shall apply *mutatis mutandis*.

(5) The decision shall be pronounced at the end of the oral hearing. If this is not possible the decision shall be given no later than within one week.

(6) An immediate complaint shall be admissible against a decision excluding defence counsel for the reasons designated in Section 138a, or concerning a case referred to in Section 138b. The president of the Bar Association shall not be entitled to lodge a complaint. A decision rejecting the exclusion of defence counsel pursuant to Section 138a shall not be contestable.

Section 139

[Trainee Jurist as Defence Counsel]

The attorney engaged as defence counsel may, with the consent of the person who selected him, entrust the defence to a jurist who has passed the first examination for the judicial service and has been employed there for at least one year and three months.

Section 140

[Mandatory Defence]

(1) The participation of defence counsel shall be mandatory if

1. the main hearing at first instance is held at the Higher Regional Court or at the Regional Court;
2. the accused is charged with a felony;
3. the proceedings may result in an order prohibiting the pursuit of an occupation;
4. remand detention pursuant to Sections 112 or 112a or provisional placement pursuant to Section 126a or Section 275a subsection (6) is executed against an accused;
5. the accused has been in an institution for at least three months based on judicial order or with the approval of the judge and will not be released from such institution at least two weeks prior to commencement of the main hearing;
6. placement of the accused pursuant to Section 81 is being considered for the purpose of preparing an opinion on his mental condition;
7. proceedings for preventive detention are conducted;
8. the previous defence counsel is excluded from participation in the proceedings by a decision;
9. an attorney has been assigned to the aggrieved person pursuant to Sections 397a and 406g subsections (3) and (4).

(2) In other cases the presiding judge shall appoint defence counsel upon application or *ex officio* if the assistance of defence counsel appears necessary because of the seriousness of the offence, or because of the difficult factual or legal situation, or if it is evident that the accused cannot defend himself. Applications filed by accused persons with a speech or hearing impairment shall be granted.

(3) The appointment of defence counsel pursuant to subsection (1), number 5, may be revoked if the accused is released from the institution at least two weeks prior to commencement of the main hearing. The appointment of defence counsel pursuant to subsection (1), number 4, shall remain effective for the further proceedings under the prerequisites mentioned in subsection (1), number 5, unless another defence counsel is appointed.

Section 141

[Appointment of Defence Counsel]

(1) In the cases referred to in Section 140 subsection (1), numbers 1 to 3 and 5 to 9, and subsection (2), as soon as an indicted accused who has no defence counsel has been requested according to Section 201 to reply to the bill of indictment, defence counsel shall be appointed.

(2) If it only subsequently appears that defence counsel is needed, he shall be appointed immediately.

(3) Defence counsel may also be appointed during the preliminary proceedings. The public prosecution office shall request such appointment if in its opinion the assistance of defence counsel will be necessary pursuant to Section 140 subsection (1) or (2). Upon conclusion of the investigations (Section 169a) he shall be

appointed upon application by the public prosecution office. In the case of Section 140 subsection (1), number 4, defence counsel shall be appointed without delay after the commencement of execution.

(4) The judge presiding over the court competent for the main proceedings or over the court seized of the case shall decide on the appointment, or the court competent for a judicial examination applied for by the public prosecution office pursuant to Section 162 subsection (1), first or third sentences, if the public prosecution office considers this necessary in order to speed up the proceedings; in the case referred to in Section 140 subsection (1), number 4, the court competent pursuant to Section 126 or Section 275a subsection (6) shall decide.

Section 142

[Choice of Defence Counsel]

(1) Prior to the appointment of defence counsel the accused shall be given the opportunity to name defence counsel of his choice within a time limit to be specified. The presiding judge shall appoint such defence counsel unless there is an important reason for not doing so.

(2) In the cases referred to in Section 140 subsection (1), numbers 2, 5 and 9, as well as Section 140 subsection (2), jurists who have passed the prescribed first examination for the judicial service and have been employed within the judicial service for at least one year and three months may also be appointed as defence counsel in proceedings at first instance, but not before the court to whose judges they have been assigned for training.

Section 143

[Revocation of Appointment]

The appointment shall be revoked if another defence counsel is soon to be chosen and such counsel accepts the mandate.

Section 144

(Deleted)

Section 145

[Absence of Defence Counsel]

(1) If, in a case where defence is mandatory, defence counsel fails to appear at the main hearing, leaves at an inappropriate time, or refuses to carry on the defence, the presiding judge shall immediately appoint another defence counsel for the defendant. However, the court may also decide to suspend the hearing.

(2) If mandatory defence counsel pursuant to Section 141 subsection (2) is appointed only during the course of the main hearing the court may decide to suspend the main hearing.

(3) The hearing shall be interrupted or suspended if the newly appointed defence counsel declares that he does not have the time needed to prepare the defence.

(4) If a suspension becomes necessary through the fault of defence counsel, he shall be charged with the costs caused thereby.

Section 145a

[Service of Documents on Defence Counsel]

(1) Defence counsel of choice, whose power of attorney is recorded in the files, as well as court-appointed defence counsel are considered authorized to receive service of documents and other communications on behalf of the accused.

(2) A summons for the accused may be served on defence counsel only if he is expressly authorized to receive summonses by power of attorney recorded in the files. Section 116a subsection (3) shall remain unaffected.

(3) If pursuant to subsection (1) a decision is served on defence counsel, the accused shall be informed thereof; at the same time he shall be provided with a copy of the decision. If a decision is served on the accused, defence counsel shall be simultaneously informed thereof even if a written power of attorney is not contained in the file; he shall also be provided with a copy of the decision.

Section 146

[Joint Defence Counsel]

Defence counsel may not appear for more than one person accused of the same offence. Nor may he appear in a single proceeding for more than one person accused of different offences.

Section 146a

[Rejection of Defence Counsel of the Accused's Own Choice]

(1) Where a person has been chosen as defence counsel although the prerequisites of Section 137 subsection (1), second sentence, or of Section 146 have been fulfilled, he shall be rejected as defence counsel as soon as this becomes evident; the same shall apply if the prerequisites of Section 146 are fulfilled after he has been chosen. If, in the cases referred to in Section 137 subsection (1), second sentence, more than one defence counsel give notification of their mandate, and if this means that the maximum number of counsel has been exceeded, they shall all be rejected. The decision to reject shall be taken by the court before which the proceedings are pending or which would be competent to hear the main proceedings.

(2) Acts of defence counsel prior to his rejection shall not be ineffective merely because the prerequisites of Section 137 subsection (1), second sentence, or of Section 146, have been fulfilled.

Section 147

[Inspection of the Files]

(1) Defence counsel shall have authority to inspect those files which are available to the court or which will have to be submitted to the court if charges are preferred, as well as to inspect officially impounded pieces of evidence.

(2) If investigations have not yet been designated as concluded on the file, defence counsel may be refused inspection of the files or of individual parts of the files, as well as inspection of officially impounded pieces of evidence, insofar as this may endanger the purpose of the investigation. If the prerequisites of the first sentence have been fulfilled, and if the accused is in remand detention or if, in the case of provisional arrest, this has been requested, information of relevance for the assessment of the lawfulness of such deprivation of liberty shall be made available to defence counsel in suitable form; to this extent, as a rule, inspection of the files shall be granted.

(3) At no stage of the proceedings may defence counsel be refused inspection of records concerning the examination of the accused or concerning such judicial acts of investigation to which defence counsel was or should have been admitted, nor may he be refused inspection of expert opinions.

(4) Upon application, defence counsel shall be permitted to take the files, with the exception of pieces of evidence, to his office or to his private premises for

inspection, unless significant grounds present an obstacle thereto. The decision shall not be contestable.

(5) The public prosecution office shall decide whether to grant inspection of the files in preparatory proceedings and after final conclusion of the proceedings; in other cases the presiding judge of the court seized of the case shall be competent to decide. If the public prosecution office refuses inspection of the files after noting the termination of the investigations in the file, or if it refuses inspection pursuant to subsection (3), or if the accused is not at liberty, a decision by the court competent pursuant to Section 162 may be applied for. Sections 297 to 300, 302, 306 to 309, 311a and 473a shall apply *mutatis mutandis*. These decisions shall be given without reasons if their disclosure might endanger the purpose of the investigation.

(6) If the reason for refusing the inspection of the files has not already ceased to exist, the public prosecution office shall revoke the order no later than upon conclusion of the investigation. Defence counsel shall be notified as soon as he once again has the unrestricted right to inspect the files.

(7) Where an accused has no defence counsel, information and copies from the files shall be given to the accused upon his application, provided that this is necessary for an adequate defence, cannot endanger the purpose of the investigation, also in another criminal proceeding, and that overriding interests of third persons meriting protection do not present an obstacle thereto. Subsection (2), first part of the second sentence, subsection (5) and Section 477 subsection (5) shall apply *mutatis mutandis*.

Section 148

[Defence Counsel-Client Communication]

(1) The accused shall be entitled to communicate with defence counsel in writing as well as orally even when he is not at liberty.

(2) If an accused who is not at liberty is strongly suspected of having committed an offence pursuant to section 129a, also in conjunction with section 129b subsection (1) of the Criminal Code, the court shall order that in communication with defence counsel documents or other items shall be rejected if the sender does not agree to their being first submitted to the court competent pursuant to Section 148a. Where no warrant of arrest exists for a criminal offence pursuant to section 129a, also in conjunction with section 129b subsection (1) of the Criminal Code, the decision shall be given by the court which would be competent to issue a warrant of arrest. Where written correspondence is subject to monitoring pursuant to the first sentence, devices which exclude the possibility of handing over documents and other items shall be put in place for conversations with defence counsel.

Section 148a

[Implementing Monitoring Measures]

(1) The judge of the Local Court in whose district the penal institution is located shall be competent to implement monitoring measures pursuant to Section 148 subsection (2). Where a criminal information is to be laid pursuant to section 138 of the Criminal Code, documents or other items in respect of which there is an obligation to lay a criminal information shall be provisionally impounded. The provisions concerning seizure shall remain unaffected.

(2) The judge who is entrusted with implementing monitoring measures may not be or become seized of the subject of the investigation. The judge shall keep secret

any knowledge which he obtains during monitoring. Section 138 of the Criminal Code shall remain unaffected.

Section 149

[Admission of Assistance]

- (1) The spouse or civil partner of a defendant shall be admitted to the main hearing to give assistance in the defence and shall be heard upon his or her request. Time and place of the main hearing shall be communicated to him or her in time.
- (2) The same rule shall apply to a defendant's statutory representative.
- (3) In preliminary proceedings, the decision whether to admit such assistance shall be left to judicial discretion.

Section 150

(Deleted)

PART TWO

PROCEEDINGS AT FIRST INSTANCE

CHAPTER I

PUBLIC CHARGES

Section 151

[Principle of Indictment]

The opening of a court investigation shall be conditional upon preferment of charges.

Section 152

[Indicting Authority; Principle of Mandatory Prosecution]

- (1) The public prosecution office shall have the authority to prefer public charges.
- (2) Except as otherwise provided by law, the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications.

Section 152a

[Prosecution of Elected Public Representatives]

The law of a *Land* concerning the conditions under which a criminal prosecution may be instituted or continued against members of a legislative body shall also be applicable to the other *Länder* of the Federal Republic of Germany and to the Federation.

Section 153

[Non-Prosecution of Petty Offences]

- (1) If a misdemeanour is the subject of the proceedings, the public prosecution office may dispense with prosecution with the approval of the court competent to open the main proceedings if the perpetrator's guilt is considered to be of a minor nature and there is no public interest in the prosecution. The approval of the court shall not be required in the case of a misdemeanour which is not subject to an increased minimum penalty and where the consequences ensuing from the offence are minimal.
- (2) If charges have already been preferred, the court, with the consent of the public prosecution office and the indicted accused, may terminate the proceedings at any stage thereof under the conditions in subsection (1). The consent of the indicted accused shall not be required if the main hearing cannot be conducted for the reasons stated in Section 205, or is conducted in his absence in the cases referred

to in Section 231 subsection (2) and Sections 232 and 233. The decision shall be given in a ruling. The ruling shall not be contestable.

Section 153a

[Provisional Dispensing with Court Action; Provisional Termination of Proceedings]

(1) In a case involving a misdemeanour, the public prosecution office may, with the consent of the accused and of the court competent to order the opening of the main proceedings, dispense with preferment of public charges and concurrently impose conditions and instructions upon the accused if these are of such a nature as to eliminate the public interest in criminal prosecution and if the degree of guilt does not present an obstacle. In particular, the following conditions and instructions may be applied:

1. to perform a specified service in order to make reparations for damage caused by the offence;
2. to pay a sum of money to a non-profit-making institution or to the Treasury;
3. to perform some other service of a non-profit-making nature;
4. to comply with duties to pay a specified amount in maintenance;
5. to make a serious attempt to reach a mediated agreement with the aggrieved person (perpetrator-victim mediation) thereby trying to make reparation for his offence, in full or to a predominant extent, or to strive therefor;
6. to participate in a social skills training course; or
7. to participate in a course pursuant to section 2b subsection (2), second sentence, or a driver's competence course pursuant to section 4a of the Road Traffic Act.

The public prosecution office shall set a time limit within which the accused is to comply with the conditions and instructions, and which, in the cases referred to in numbers 1 to 3, 5 and 7 of the second sentence, shall be a maximum of six months and, in the cases referred to in numbers 4 and 6 of the second sentence, a maximum of one year. The public prosecution office may subsequently revoke the conditions and instructions and may extend the time limit once for a period of three months; with the consent of the accused it may subsequently impose or change conditions and instructions. If the accused complies with the conditions and instructions, the offence can no longer be prosecuted as a misdemeanour. If the accused fails to comply with the conditions and instructions, no compensation shall be given for any contribution made towards compliance. Section 153 subsection (1), second sentence, shall apply *mutatis mutandis* in the cases referred to in numbers 1 to 6 of the second sentence. Section 246a subsection (2) shall apply *mutatis mutandis*.

(2) If public charges have already been preferred, the court may, with the approval of the public prosecution office and of the indicted accused, provisionally terminate the proceedings up until the end of the main hearing in which the findings of fact can last be examined, and concurrently impose the conditions and instructions referred to in subsection (1), first and second sentences, on the indicted accused. Subsection (1), third to sixth and eighth sentences, shall apply *mutatis mutandis*.

The decision pursuant to the first sentence shall be given in a ruling. The ruling shall not be contestable. The fourth sentence shall also apply to a finding that conditions and instructions imposed pursuant to the first sentence have been met.

(3) The running of the period of limitation shall be suspended for the duration of the time limit set for compliance with the conditions and instructions.

(4) In the case referred to in subsection (1), second sentence, number 6, also in conjunction with subsection (2), Section 155b shall apply *mutatis mutandis*, subject to the proviso that personal data from the criminal proceedings that do not concern the accused may only be transmitted to the agency in charge of conducting the social skills training course insofar as the affected persons have consented to such transmission. The first sentence shall apply *mutatis mutandis* if an instruction to participate in a social skills training course is given pursuant to other criminal law provisions.

Section 153b

[Dispensing with Court Action; Termination]

(1) If the conditions under which the court may dispense with imposing a penalty apply, the public prosecution office may, with the consent of the court which would have jurisdiction over the main hearing, dispense with preferment of public charges.

(2) If charges have already been preferred the court may, with the consent of the public prosecution office and of the indicted accused, terminate proceedings at any time prior to commencement of the main hearing.

Section 153c

[Non-Prosecution of Offences Committed Abroad]

(1) The public prosecution office may dispense with prosecuting criminal offences

1. which have been committed outside the territorial scope of this statute, or which an inciter or an accessory before the fact to an act committed outside the territorial scope of this statute has committed within the territorial scope thereof;
2. which a foreigner committed in Germany on a foreign ship or aircraft;
3. if in the cases referred to in sections 129 and 129a, in each case also in conjunction with section 129b subsection (1) of the Criminal Code, the group does not, or does not mainly, exist in Germany and the participatory acts committed in Germany are of lesser importance or are limited to mere membership.

Offences for which there is criminal liability pursuant to the Code of Crimes against International Law shall be subject to Section 153f.

(2) The public prosecution office may dispense with prosecuting a criminal offence if a sentence for the offence has already been executed against the accused abroad, and the sentence which is to be expected in Germany would be negligible after taking the foreign sentence into account or if the accused has already been acquitted abroad by a final judgment in respect of the offence.

(3) The public prosecution office may also dispense with prosecuting criminal offences committed within, but through an act committed outside, the territorial scope of this statute, if the conduct of proceedings poses the risk of serious detriment to the Federal Republic of Germany or if other public interests of overriding importance present an obstacle to prosecution.

(4) If charges have already been preferred, the public prosecution office may, in the cases referred to in subsection (1), numbers 1 and 2, and in subsection (3), withdraw the charges at any stage of the proceedings and terminate the proceedings if the conduct of proceedings poses the risk of serious detriment to the Federal Republic of Germany, or if other public interests of overriding importance present an obstacle to prosecution.

(5) If criminal offences of the nature designated under section 74a subsection (1), numbers 2 to 6, and under section 120 subsection (1), numbers 2 to 7, of the Courts Constitution Act are the subject of the proceedings, such powers shall be vested in the Federal Public Prosecutor General.

Section 153d

[Dispensing with Court Action on Political Grounds]

(1) The Federal Public Prosecutor General may dispense with prosecuting criminal offences of the nature designated under section 74a subsection (1), numbers 2 to 6, and under section 120 subsection (1), numbers 2 to 7, of the Courts Constitution Act, if the conduct of proceedings poses a risk of serious detriment to the Federal Republic of Germany, or if other overriding public interests present an obstacle to prosecution.

(2) If charges have already been preferred, the Federal Public Prosecutor General may withdraw the charges under the conditions listed in subsection (1) at any stage of the proceedings and terminate the proceedings.

Section 153e

[Dispensing with Court Action in National Security Cases]

(1) If criminal offences of the nature designated under section 74a subsection (1), numbers 2 to 4, and section 120 subsection (1), numbers 2 to 7, of the Courts Constitution Act are the subject of the proceedings, the Federal Public Prosecutor General, with the approval of the Higher Regional Court competent pursuant to section 120 of the Courts Constitution Act, may dispense with prosecuting such an offence if the perpetrator, subsequently to the offence, and before he has learned of the discovery thereof, contributed towards averting a danger to the existence or the security of the Federal Republic of Germany or its constitutional order. The same shall apply if the perpetrator has made such contribution by disclosing to an agency after the offence such knowledge as he had with respect to endeavours involving high treason, endangering the democratic state based on the rule of law, treason, and endangering external security.

(2) If charges have already been preferred, the Higher Regional Court competent pursuant to section 120 of the Courts Constitution Act may, with the approval of the Federal Public Prosecutor General, terminate the proceedings if the conditions designated under subsection (1) are met.

Section 153f

[Dispensing with Prosecution of Criminal Offences under the Code of Crimes against International Law]

(1) The public prosecution office may dispense with prosecuting a criminal offence for which there is criminal liability pursuant to sections 6 to 14 of the Code of Crimes against International Law in the cases referred to in Section 153c subsection (1), numbers 1 and 2, if the accused is not resident in Germany and is not expected to so reside. If, in the cases referred to in Section 153c subsection (1), number 1, the accused is a German, however, this shall only apply if the offence is being

prosecuted before an international court of justice or by a state on whose territory the offence was committed or a citizen of which was injured by the offence.

(2) The public prosecution office may dispense with prosecuting an offence for which there is criminal liability pursuant to sections 6 to 14 of the Code of Crimes against International Law in the cases referred to in Section 153c subsection (1), numbers 1 and 2, in particular if

1. no German is suspected of having committed the crime;
2. the offence was not committed against a German;
3. no suspect is, or is expected to be, resident in Germany;
4. the offence is being prosecuted by an international court of justice or by a country on whose territory the offence was committed, a citizen of which is either suspected of the offence, or suffered injury as a result of the offence.

The same shall apply if a foreigner who is accused of a criminal offence that was committed abroad is resident in Germany but the requirements of the first sentence, numbers 2 and 4, are met and transfer to an international court of justice or extradition to the prosecuting state is admissible and intended.

(3) If, in the cases referred to in subsections (1) or (2) public charges have already been preferred, the public prosecution office may, at any stage of the proceedings, withdraw the charges and terminate the proceedings.

Section 154

[Insignificant Secondary Penalties]

(1) The public prosecution office may dispense with prosecuting an offence

1. if the penalty or the measure of reform and prevention in which the prosecution might result is not particularly significant in addition to a penalty or measure of reform and prevention which has been imposed with binding effect upon the accused for another offence, or which he may expect for another offence, or
2. beyond that, if a judgment is not to be expected for such offence within a reasonable time, and if a penalty or measure of reform and prevention which was imposed with binding effect upon the accused, or which he may expect for another offence, appears sufficient to have an influence on the perpetrator and to defend the legal order.

(2) If public charges have already been preferred, the court may, upon the application of the public prosecution office, provisionally terminate the proceedings at any stage.

(3) If the proceedings were provisionally terminated on account of a penalty or measure of reform and prevention already imposed with binding effect for another offence, the proceedings may be resumed, unless barred by limitation in the meantime, if the penalty or measure of reform and prevention imposed with binding effect is subsequently not executed.

(4) If the proceedings were provisionally terminated on account of a penalty or measure of reform and prevention which is to be expected for another offence, the proceedings may be resumed, unless barred by limitation in the meantime, within three months after the judgment imposed for the other offence has entered into force.

(5) If the court has provisionally terminated the proceedings, a court order shall be required for their resumption.

Section 154a

[Limitation of Prosecution]

(1) If individual severable parts of an offence or some of several violations of law committed as a result of the same offence are not particularly significant

1. for the penalty or measure of reform and prevention to be expected, or
2. in addition to a penalty or measure of reform and prevention which has been imposed with binding effect upon the accused for another offence or which he may expect to be imposed for another offence,

prosecution may be limited to the other parts of the offence or the other violations of law. Section 154 subsection (1), number 2, shall apply *mutatis mutandis*. The limitation shall be included in the records.

(2) After the bill of indictment has been filed, the court, with the consent of the public prosecution office, may introduce this limitation at any stage of the proceedings.

(3) At any stage of the proceedings the court may reintroduce into the proceedings those parts of the offence or violations of law which were not considered. An application by the public prosecution office for reintroduction shall be granted. If parts of an offence which were not considered are reintroduced, Section 265 subsection (4) shall apply *mutatis mutandis*.

Section 154b

[Extradition and Expulsion]

(1) Preferment of public charges may be dispensed with if the accused is extradited to a foreign government because of the offence.

(2) The same shall apply if he is to be extradited to a foreign government or transferred to an international criminal court of justice because of another offence and the penalty or the measure of reform and prevention which might be the result of the domestic prosecution is negligible in comparison to the penalty or measure of reform and prevention which has been imposed on him with binding effect abroad or which he may expect to be imposed abroad.

(3) Preferment of public charges may also be dispensed with if the accused is expelled from the territorial scope of this Federal statute.

(4) If in the cases referred to in subsections (1) to (3) public charges have already been preferred, the court, upon application by the public prosecution office, shall provisionally terminate the proceedings. Section 154 subsections (3) to (5) shall apply *mutatis mutandis*, subject to the proviso that the time limit in subsection (4) shall be one year.

Section 154c

[Victim of Coercion or Extortion]

(1) If coercion or extortion (sections 240 and 253 of the Criminal Code) was committed by threats to reveal a criminal offence, the public prosecution office may dispense with prosecuting the offence, the disclosure of which was threatened, unless expiation is imperative because of the seriousness of the offence.

(2) If the victim of coercion or extortion (sections 240 and 253 of the Criminal Code) files charges in respect thereof (Section 158) and if as a result a misdemeanour committed by the victim comes to light, the public prosecution office may dispense

with prosecution of the misdemeanour unless expiation is imperative because of the seriousness of the offence.

Section 154d

[Decision of a Prior Issue Involving Civil Law or Administrative Law]

If the preferring of public charges for a misdemeanour depends on the evaluation of a question which must be determined according to civil law or administrative law, the public prosecution office may set a time limit to decide the question in civil proceedings or in administrative court proceedings. The person who reported the criminal offence shall be notified thereof. After this time limit has expired without any result, the public prosecution office may terminate the proceedings.

Section 154e

[Criminal or Disciplinary Proceedings Concerning Erroneous Suspicion or Insult]

- (1) Public charges shall not be preferred for an erroneous suspicion or insult (sections 164, 185 to 188 of the Criminal Code) as long as criminal or disciplinary proceedings are pending for the reported or alleged offence.
- (2) If public charges have already been preferred or a private prosecution has been filed, the court shall terminate the proceedings until the criminal or disciplinary proceedings for the reported or alleged offence are concluded.
- (3) Pending the conclusion of the criminal or disciplinary proceedings for the reported or alleged offence, the statute of limitation shall not run in respect of prosecution for the erroneous suspicion or insult.

Section 154f

[Provisional Termination Prior to Main Proceedings]

If the absence of the accused or some other personal impediment prevents the opening or conduct of the main proceedings for a considerable time, and if public charges have not yet been preferred, the public prosecution office may provisionally terminate the proceedings after it has clarified the facts so far as possible and secured the evidence so far as necessary.

Section 155

[Scope of the Investigation]

- (1) The investigation and decision shall extend only to the offence specified, and to the persons accused, in the charges.
- (2) Within these limits, the courts shall be authorized and obliged to act independently; in particular, they shall not be bound by the parties' applications when applying a penal norm.

Section 155a

[Perpetrator-Victim Mediation]

At every stage of the proceedings the public prosecution office and the court are to examine whether it is possible to reach a mediated agreement between the accused and the aggrieved person. In appropriate cases they are to work towards such mediation. An agreement may not be accepted against the express will of the aggrieved person.

Section 155b

[Transmission of Personal Data]

- (1) For the purposes of a perpetrator-victim mediation or reparation of damage, the public prosecution office and the court may transmit the necessary personal data, *proprio motu* or upon application by an agency they have commissioned to carry out

the mediation concerned. The files may also be sent to the commissioned agency for inspection if provision of information requires disproportionate effort. A non-public agency shall be informed that the transmitted information may be used solely for the purposes of the perpetrator-victim mediation or for reparation of damage.

(2) The commissioned agency may only process and use the personal data transmitted pursuant to subsection (1) to the extent that this is necessary for carrying out the perpetrator-victim mediation or the reparation of damage and provided that interests of the person concerned that are worthy of protection do not present an obstacle thereto. The commissioned agency may only collect personal data, and only process and use such information, to the extent that the person concerned has given his consent and that this is necessary for carrying out the perpetrator-victim mediation or the reparation of damage. Upon conclusion of their activity they shall report to the public prosecution office or the court to the necessary extent.

(3) Where the commissioned agency is not a public agency, the provisions of Chapter III of the Federal Data Protection Act shall also apply if the information is not processed in, or from, data files.

(4) The documents containing the personal data referred to in subsection (2), first and second sentences, shall be destroyed by the commissioned agency upon expiry of one year following conclusion of the criminal proceedings. The public prosecution office or the court shall inform the commissioned agency of its own motion and without delay of the time when proceedings are concluded.

Section 156

[No Withdrawal of the Indictment]

The public charges may not be withdrawn after the opening of the main proceedings.

Section 157

[Definition of the Terms “Indicted Accused” and “Defendant”]

Within the meaning of this statute,

the indicted accused shall be an accused person against whom public charges have been preferred,

the defendant shall be an accused person or indicted accused in respect of whom a decision has been taken to open the main proceedings.

CHAPTER II

PREPARATION OF THE PUBLIC CHARGES

Section 158

[Criminal Informations; Applications for Prosecution]

(1) Information of a criminal offence or an application for criminal prosecution may be filed orally or in writing with the public prosecution office, with authorities and officials in the police force, and with the Local Courts. An oral information shall be recorded in writing.

(2) In the case of criminal offences which may be prosecuted only upon application, the application shall be made in writing or orally for the record to a court or to the public prosecution office; where the application is made to another authority, it shall be made in writing.

(3) If an aggrieved person resident in Germany files information of a criminal offence committed in another Member State of the European Union, the public prosecution

office shall, upon the application of the aggrieved person, transmit the information to the competent criminal prosecuting authority of the other Member State if the offence is not subject to German criminal law or if prosecution of the offence is dispensed with pursuant to Section 153c subsection (1), first sentence, number 1, also in conjunction with Section 153f. Transmission may be dispensed with if

1. the offence and the circumstances of relevance for its prosecution are already known to the competent foreign authority or
2. the injustice done through the offence is minimal and it would have been possible for the aggrieved person to file the information abroad.

Section 159

[Unnatural Death; Discovery of a Corpse]

- (1) If there are indications that a person has died an unnatural death, or if the corpse of an unknown person is found, the police and municipal authorities shall be obliged to inform the public prosecution office or the Local Court immediately.
- (2) The written permission of the public prosecution office shall be required for the burial.

Section 160

[Investigation Proceedings]

- (1) As soon as the public prosecution office obtains knowledge of a suspected criminal offence either through a criminal information or by other means it shall investigate the facts to decide whether public charges are to be preferred.
- (2) The public prosecution office shall ascertain not only incriminating but also exonerating circumstances, and shall ensure that evidence, the loss of which is to be feared, is taken.
- (3) The investigations of the public prosecution office shall extend also to the circumstances which are important for the determination of the legal consequences of the act. For this purpose it may avail itself of the service of the court assistance agency.
- (4) A measure shall be inadmissible where special provisions regulating its application, being provisions under Federal law or under the corresponding *Land* law, present an obstacle thereto.

Section 160a

[Investigation Measures Where Person Has Right to Refuse Testimony]

- (1) An investigation measure directed at a person named in Section 53 subsection (1), first sentence, numbers 1, 2 or 4, an attorney, a person who has been admitted to a Bar Association pursuant to section 206 of the Federal Regulations for Practising Lawyers or a non-attorney provider of legal services who has been admitted to a Bar Association shall be inadmissible if it is expected to produce information in respect of which such person would have the right to refuse to testify. Any information which is obtained nonetheless may not be used. Any recording of such information is to be deleted without delay. The fact that the information was obtained and deleted shall be documented. Where information about a person referred to in the first sentence is obtained through an investigation measure that is not aimed at such person and in respect of which such person may refuse to testify, the second to fourth sentences shall apply *mutatis mutandis*.
- (2) Insofar as a person named in Section 53 subsection (1), first sentence, numbers 3 to 3b or number 5, might be affected by an investigation measure and it is to be

expected that information would thereby be obtained in respect of which the person would have the right to refuse to testify, this shall be given particular consideration in the context of examining proportionality; if the proceedings do not concern a criminal offence of substantial importance, then, in principle, no overriding interest in prosecuting the criminal offence should be presumed. Insofar as is expedient, the measure should be dispensed with or, to the extent possible for this type of measure, restricted. The first sentence shall apply *mutatis mutandis* to the use of information for evidential purposes. The first to third sentences shall not apply to attorneys, persons who have been admitted to a Bar Association pursuant to section 206 of the Federal Regulations for Practising Lawyers and non-attorney providers of legal services who have been admitted to a Bar Association.

(3) Subsections (1) and (2) are to be applied *mutatis mutandis*, insofar as the persons named in Section 53a would have the right to refuse to testify.

(4) Subsections (1) to (3) shall not apply where certain facts substantiate the suspicion that the person who is entitled to refuse to testify participated in the offence or in accessoryship after the fact, obstruction of justice or handling stolen goods. If the offence may only be prosecuted upon application or with authorization, the first sentence shall apply in the cases referred to in Section 53 subsection (1), first sentence, number 5, as soon as and insofar as the application for prosecution has been filed or the authorization granted.

(5) Section 97 and Section 100c subsection (6) shall remain unaffected.

Section 160b

[Discussion of the Status of Proceedings]

The public prosecution office may discuss the status of the proceedings with the participants, insofar as this appears suitable to expedite the proceedings. The essential content of this discussion shall be documented.

Section 161

[Information and Investigations]

(1) For the purpose indicated in Section 160 subsections (1) to (3), the public prosecution office shall be entitled to request information from all authorities and to make investigations of any kind, either itself or through the authorities and officials in the police force provided there are no other statutory provisions specifically regulating their powers. The authorities and officials in the police force shall be obliged to comply with the request or order of the public prosecution office and shall be entitled, in such cases, to request information from all authorities.

(2) Where measures pursuant to this statute are only admissible where the commission of particular criminal offences is suspected, personal data that has been obtained as a result of a corresponding measure taken pursuant to another statute may be used as evidence in criminal proceedings without the consent of the person affected by the measure only to clear up one of the criminal offences in respect of which such a measure could have been ordered to clear up the offence pursuant to this statute. Section 100d, subsection (5), number 3 shall remain unaffected.

(3) Personal data obtained in or from private premises by technical means for the purpose of personal protection during a clandestine investigation based on police law may be used as evidence, having regard to the principle of proportionality (Article 13 paragraph (5) of the Basic Law), only after determination of the lawfulness of the measure by the Local Court (Section 162 subsection (1)) in whose

district the authority making the order is located; in exigent circumstances a judicial decision is to be sought without delay.

Section 161a

[Witnesses and Experts Before the Public Prosecution Office]

(1) Witnesses and experts shall be obliged to appear before the public prosecution office upon being summoned and to make a statement on the subject matter or to render their opinion. Unless otherwise provided, the provisions of Chapters VI and VII of Part One concerning witnesses and experts shall apply *mutatis mutandis*.

Examination under oath shall be reserved for the judge.

(2) If a witness or expert fails, or refuses, to appear without justification, the public prosecution office shall have the authority to take the measures provided in Sections 51, 70 and 77. However, the imposition of detention shall remain reserved for the court competent pursuant to Section 162.

(3) A decision by the court competent pursuant to Section 162 may be requested against decisions of the public prosecution office pursuant to subsection (2), first sentence. The same shall apply where the public prosecution office has taken decisions within the meaning of Section 68b. Sections 297 to 300, 302, 306 to 309, 311a and 473a shall each apply *mutatis mutandis*. Court decisions pursuant to the first and second sentences shall not be contestable.

(4) If the public prosecution office requests another public prosecution office to examine a witness or expert, the powers pursuant to subsection (2), first sentence, shall also be vested in the requested public prosecution office.

Section 162

[Court Investigations]

(1) If the public prosecution office considers a court investigation to be necessary, it shall submit its applications prior to preferment of public charges to the Local Court in the district of which it is located or in which its branch submitting the application is located. If the public prosecution office additionally considers it necessary that an arrest or detention order be issued, it may also, without prejudice to Sections 125 and 126a, submit such an application before the court designated in the first sentence. The Local Court in the district of which the investigation procedures are to be carried out shall be competent to undertake court examinations and inspections if the public prosecution office submits its application to such court in order to speed up proceedings or to avoid inconvenience to the persons concerned.

(2) The court shall examine whether the investigation applied for is permitted by statute, given the circumstances of the case.

(3) After preferment of public charges, the court seized of the matter shall be the competent court. During appellate proceedings on law, the court whose judgment is contested shall be the competent court. After final conclusion of the proceedings, subsections (1) and (2) shall apply *mutatis mutandis*. Following an application for reopening of proceedings, the court competent to decide in the reopened proceedings shall be the competent court.

Section 163

[Duties of the Police]

(1) The authorities and officials in the police force shall investigate criminal offences and shall take all measures that may not be deferred, in order to prevent concealment of facts. To this end they shall be entitled to request, and in exigent circumstances to demand, information from all authorities, as well as to conduct

investigations of any kind insofar as there are no other statutory provisions specifically regulating their powers.

(2) The authorities and officials in the police force shall transmit their records to the public prosecution office without delay. Where it appears necessary that a judicial investigation be performed promptly, transmission directly to the Local Court shall be possible.

(3) Section 52 subsection (3), Section 55 subsection (2), Section 57 subsection (1) and Sections 58, 58a, 58b and 68 to 69 shall apply *mutatis mutandis* to the examination of a witness by officials in the police force. The decision on permission pursuant to Section 68 subsection (3), first sentence, and on the assignment of counsel to a witness shall be taken by the public prosecution office; in all other cases the necessary decisions shall be taken by the person in charge of the examination. Section 161a subsection (3), second to fourth sentences, shall apply *mutatis mutandis* to decisions by officials in the police force pursuant to Section 68b subsection (1), third sentence. Section 52 subsection (3) and Section 55 subsection (2) shall apply *mutatis mutandis* to the instruction of an expert by officials in the police force. In the cases referred to in Section 81c subsection (3), first and second sentences, Section 52 subsection (3) shall also apply *mutatis mutandis* to examinations by officials in the police force.

Section 163a

[Examination of the Accused]

(1) The accused shall be examined prior to conclusion of the investigations, unless the proceedings result in termination. Section 58a subsection (1), first sentence, subsections (2) and (3) and Section 58b shall apply *mutatis mutandis*. In simple matters it shall be sufficient to give him the opportunity to respond in writing.

(2) If the accused applies for evidence to be taken in his defence, such evidence shall be taken if it is of importance.

(3) The accused shall be obliged to appear before the public prosecution office if summoned. Sections 133 to 136a and Section 168c subsections (1) and (5) shall apply *mutatis mutandis*. On application by the accused, the court competent pursuant to Section 162 shall decide on the lawfulness of his being made to appear. Sections 297 to 300, 302, 306 to 309, 311a and 473a shall apply *mutatis mutandis*. The decision of the court shall be incontestable.

(4) The accused shall be informed of the offence with which he is charged when he is first examined by officials in the police force. In all other cases Section 136 subsection (1), second to fourth sentences, subsections (2) and (3) and Section 136a shall apply to the examination of the accused by officials in the police force.

Section 163b

[Establishing Identity]

(1) If somebody is suspected of a criminal offence the public prosecution office and the officials in the police force may take the measures which are necessary to establish his identity; Section 163a subsection (4), first sentence, shall apply *mutatis mutandis*. The suspect may be kept in custody if the identity cannot be established by other means or only with considerable difficulty. Under the prerequisites of the second sentence, it shall be admissible to search the suspect and the objects found on him as well as to carry out measures for identification purposes.

(2) If and so far as this is necessary to clear up a criminal offence, the identity of a person who is not suspected of an offence may also be established; Section 69 subsection (1), second sentence, shall apply *mutatis mutandis*. Measures of the kind designated in subsection (1), second sentence, may not be taken if they are disproportionate to the importance of the matter; measures of the kind designated in subsection (1), third sentence, may not be taken against the will of the person concerned.

Section 163c

[Duration of Custody; Judicial Review]

(1) A person affected by a measure pursuant to Section 163b may not under any circumstances be kept in custody longer than is necessary to establish his identity. The arrested person shall be brought without delay before the judge at the Local Court in the district of which he has been apprehended for the purpose of deciding on the admissibility and continuation of the deprivation of liberty, unless it would presumably take longer to obtain a decision by the judge than would be necessary to establish his identity. Sections 114a to 114c shall apply *mutatis mutandis*.

(2) Deprivation of liberty for the purpose of establishing identity shall not exceed a total period of twelve hours.

(3) If identity has been established the records prepared in connection with the establishment shall be destroyed in the cases referred to in Section 163b subsection (2).

Section 163d

[Computer-Assisted Search]

(1) Where certain facts give rise to the suspicion that

1. a criminal offence referred to in Section 111, or
2. a criminal offence referred to in Section 100a, subsection (2), numbers 6 to 9 and 11,

has been committed, the data concerning the identity of persons obtained at a check by the border police, in the case of number 1 also obtained at checkpoints pursuant to Section 111, as well as the circumstances which may be important for clearing up the criminal offence or for apprehending the perpetrator, may be electronically stored if facts justify the assumption that the evaluation of the data may lead to the apprehension of the perpetrator, or to the clearing up of the criminal offence, and the measure is not disproportionate to the importance of the matter. This shall also apply if, in the case of the first sentence, passports and identity cards are automatically machine-read. The data may be transmitted to criminal prosecuting authorities only.

(2) Measures of the nature designated in subsection (1) may be ordered only by the judge, in exigent circumstances also by the public prosecution office and the officials assisting it (section 152 of the Courts Constitution Act). If the public prosecution office or one of the officials assisting it has made the order, the public prosecution office shall apply for judicial confirmation of the order without delay. Section 100b subsection (1), third sentence shall apply *mutatis mutandis*.

(3) The order shall be given in writing. It shall describe the person whose data are to be stored as precisely as possible, by reference to particular features or characteristics, in the light of the information available about the suspect or suspects at the time of the order. The order shall specify the nature and duration of the

measures. It shall be limited to a particular area and to a maximum period of three months. One extension of not more than three further months shall be admissible if the conditions designated in subsection (1) continue to apply.

(4) If the conditions for issuance of the order no longer exist, or if the purpose of the measures resulting from the order has been fulfilled, the measures shall be terminated without delay. The personal data obtained by the measures shall be deleted without delay as soon as they are not, or are no longer, required for the criminal proceedings; storage of the data exceeding the duration of the measures (subsection (3)) by more than three months, shall be inadmissible. The public prosecution office shall be notified about the deletion.

(5) (Deleted)

Section 163e **[Police Observation]**

(1) An order may be made for police observation during police checks, allowing personal identification data to be taken if there are sufficient factual indications to show that a criminal offence of substantial significance has been committed. The order may be directed only against the accused person and only where other means of establishing the facts or determining the perpetrator's whereabouts would offer much less prospect of success or be much more difficult. The measure shall be admissible against other persons if it can be assumed on the basis of certain facts that they are linked to the perpetrator or that such a link is being established, that the measure will lead to establishment of the facts or to determination of the perpetrator's whereabouts, and that using other means would offer much less prospect of success or be much more difficult.

(2) The license plate number of a motor vehicle or the identification number or external marking of a watercraft, aircraft or container may be included in the notice if the vehicle, watercraft or aircraft is registered to a person in respect of whom a notice has been issued pursuant to subsection (1), or if the vehicle, watercraft, aircraft or container is being used by that person or by another person whose identity is yet unknown and who is suspected of having committed a criminal offence of substantial significance.

(3) Should such a person be encountered, personal data about an individual accompanying the person in the notice or about a person operating a vehicle, watercraft or aircraft included in the notice pursuant to subsection (2) or about a person using a container included in the notice pursuant to subsection (2) may also be communicated.

(4) The order for police observation may be given only by the court. In exigent circumstances, the order may also be made by the public prosecution office. Where the public prosecution office has made the order, it shall apply for court confirmation without delay. Section 100b subsection (1), third sentence, shall apply *mutatis mutandis*. The order shall be limited to a maximum of one year. It may be extended by not more than three months in each case, insofar as the conditions for making the order continue to apply.

Section 163f **[Longer-Term Observation]**

(1) Where there are sufficient factual indications showing that a criminal offence of substantial significance has been committed, an order may be made for planned observation of the accused

1. to last for a continuous period exceeding twenty-four hours or
2. to take place on more than two days.

The measure may be ordered only where other means of establishing the facts or determining the perpetrator's whereabouts would offer much less prospect of success or be much more difficult. The measure shall be admissible against other persons if it can be assumed on the basis of certain facts that they are linked to the perpetrator or that such a link is being established, that the measure will lead to establishment of the facts or to determination of the perpetrator's whereabouts, and that using other means would offer much less prospect of success or be much more difficult.

(2) The measure may be implemented even if it unavoidably affects third persons.

(3) Such measures may be ordered only by the court, and in exigent circumstances also by the public prosecution office or the officials assisting it (section 152 of the Courts Constitution Act). An order issued by the public prosecution office or the officials assisting it shall become ineffective if not confirmed by the court within three working days. Section 100b subsection (1), fourth and fifth sentences, and subsection (2), second sentence, shall apply *mutatis mutandis*.

(4) (Deleted)

Section 164

[Apprehension of Persons Disrupting Official Activities]

The official directing official activities on the spot shall be authorized to apprehend persons who wilfully disturb his official activity or oppose orders given by him within the scope of his authority, and to have them kept in custody until termination of his official tasks, but not beyond the next day.

Section 165

[Judicial Action in an Emergency]

In exigent circumstances, the judge may, even without an application, undertake the necessary investigatory acts if a public prosecutor is not available.

Section 166

[Applications by the Accused to Obtain Evidence]

(1) If the accused is examined by the judge and if at this hearing he applies for the taking of certain exonerating evidence, the judge shall, so far as he considers it of importance, take such evidence if loss of evidence is to be feared or if the taking of the evidence may justify the release of the accused.

(2) If the evidence is to be taken in another district, the judge may request the judge in that district to take this evidence.

Section 167

[Further Directions by the Public Prosecution Office]

In the cases referred to in Sections 165 and 166 the authority to give further directions shall lie with the public prosecution office.

Section 168

[Recording Clerk]

A record shall be made of each judicial investigatory act. A registry clerk shall be called in to make such records; the judge may dispense with this if he considers the presence of a recording clerk not to be necessary. In urgent cases the judge may call in a person to be sworn in by him as recording clerk.

Section 168a

[Recording of Judicial Investigatory Acts]

- (1) The record shall indicate the place and date of the hearing as well as the names of the persons who were involved and participated and must state whether the essential procedural formalities have been observed. Section 68 subsections (2) and (3) shall remain unaffected.
- (2) The contents of the record may be provisionally recorded in regular shorthand, by stenotype or tape recorder or by comprehensible abbreviations. In this case the record shall be produced without delay after conclusion of the hearing. The provisional records shall be placed on file or, if they are not suitable for such purpose, they shall be kept together with the files, at the registry. Tape recordings may be erased once the proceedings have been concluded with binding effect or have been otherwise terminated.
- (3) The record shall be read for approval to the persons participating in the hearing, insofar as it concerns them, or shall be submitted to them for inspection. The fact of their approval shall be noted down. The record shall be signed by the participants or a note shall be made therein as to why the signature was not added. If the contents of the record have only been recorded provisionally, it shall be sufficient for the records to be read out or played back. The record shall indicate that this happened and that approval was given, or what objections were raised. The reading or submission for inspection or the playing back may be omitted if the participating persons, insofar as it concerns them, dispense with this after the recording; the record shall indicate that such waiver was pronounced.
- (4) The record shall be signed by the judge as well as by the recording clerk. If the contents of the record have been wholly or partly recorded by means of a tape recorder and without involving a recording clerk, the judge and the person who produced the record shall sign it. The latter shall sign with the addendum that he confirms the accuracy of the transcript. Proof of inaccuracy of the transcript shall be admissible.

Section 168b

[Recording of Investigatory Acts of the Investigating Authorities]

- (1) The result of investigatory acts of the investigating authorities shall be recorded on the file.
- (2) The examination of the accused, the witnesses and the experts shall be recorded pursuant to Sections 168 and 168a insofar as this can be done without considerably delaying the investigations.
- (3) The information of the accused prior to his examination pursuant to Section 136 subsection (1) and Section 163a shall be documented.

Section 168c

[Presence During Judicial Examination]

- (1) The public prosecutor and defence counsel shall be permitted to be present during the judicial examination of the accused.
- (2) The public prosecutor, the accused and defence counsel shall be permitted to be present during the judicial examination of a witness or an expert.
- (3) The judge may exclude an accused from being present at the hearing if his presence would endanger the purpose of the investigation. This shall apply in particular if it is to be feared that a witness will not tell the truth in the presence of the accused.

(4) If an accused, not being at liberty, has defence counsel, he shall be entitled to be present only at such hearings held at the place where he is in custody.

(5) The persons entitled to be present shall be given prior notice of the dates set down for the hearings. The notification shall be dispensed with if it endangers the success of the investigation. Persons entitled to be present shall not have the right to request a change of the date set down for a hearing when prevented from being present.

Section 168d

[Presence During Judicial Inspection]

(1) The public prosecutor, the accused and defence counsel shall be permitted to be present at the hearing when a judicial inspection is made. Section 168c subsection (3), first sentence, and subsections (4) and (5) shall apply *mutatis mutandis*.

(2) If at the judicial inspection experts are consulted, the accused may request that the experts to be proposed by him for the main hearing be summoned to the hearing and if the judge rejects the application, the accused may have them summoned himself. The experts named by the accused shall be permitted to participate in the inspection and the required investigation to the extent that the activity of the experts appointed by the judge is not impeded thereby.

Section 168e

[Separate Examination]

If there is an imminent risk of serious detriment to the well-being of the witness in the event of his being examined in the presence of persons entitled to be present and if that risk cannot be averted in some other way, the judge shall carry out the examination separately from those entitled to be present. There shall be simultaneous audio-visual transmission of the examination to the latter. Their rights of participation shall otherwise remain unaffected. Sections 58a and 241a shall apply *mutatis mutandis*. The decision pursuant to the first sentence shall be incontestable.

Section 169

[Investigating Judges of the Higher Regional Courts and the Federal Court of Justice]

(1) In cases under the jurisdiction of the Higher Regional Court as the court of first instance pursuant to sections 120 or 120b of the Courts Constitution Act, the duties incumbent upon the judge at the Local Court in preparatory proceedings may also be performed by investigating judges of the Higher Regional Court concerned. If the Federal Public Prosecutor General is conducting the investigations, the investigating judges of the Federal Court of Justice shall take their place.

(2) The investigating judge of the Higher Regional Court competent for a case may also order investigatory acts although they are not to be performed in the district of such court.

Section 169a

[Conclusion of Investigation]

If the public prosecution office is considering preferment of public charges, it shall make a note of the conclusion of the investigation in the files.

Section 170

[Conclusion of the Investigation Proceedings]

(1) If the investigations offer sufficient reason for preferring public charges, the public prosecution office shall prefer them by submitting a bill of indictment to the competent court.

(2) In all other cases the public prosecution office shall terminate the proceedings. The public prosecutor shall notify the accused thereof if he was examined as such or a warrant of arrest was issued against him; the same shall apply if he requested such notice or if there is a particular interest in the notification.

Section 171

[Notification of the Applicant]

If the public prosecution office does not grant an application for preferring public charges, or after conclusion of the investigation it orders the proceedings to be terminated, it shall notify the applicant, indicating the reasons. The decision shall inform the applicant, if he is at the same time the aggrieved person, of the possibility of contesting the decision and of the time limit provided therefor (Section 172 subsection (1)).

Section 172

[Proceedings to Compel Public Charges]

(1) Where the applicant is also the aggrieved person, he shall be entitled to lodge a complaint against the notification made pursuant to Section 171 to the official superior of the public prosecution office within two weeks after receipt of such notification. On the filing of the complaint with the public prosecution office the time limit shall be deemed to have been observed. Time shall not start to run if no instruction was given pursuant to Section 171, second sentence.

(2) The applicant may, within one month of receipt of notification, apply for a court decision in respect of the dismissal of the complaint by the official superior of the public prosecution office. He shall be instructed as to this right and as to the form such application shall take; the time limit shall not run if no instruction has been given. The application shall be inadmissible where the sole subject of the proceedings is a criminal offence which may be prosecuted by the aggrieved person by way of a private prosecution, or where the public prosecution office has dispensed with preferring public charges in accordance with Section 153 subsection (1), Section 153a subsection (1), first and seventh sentences, or Section 153b subsection (1); the same shall apply in the cases referred to in Sections 153c to 154 subsection (1), as well as in Sections 154b and 154c.

(3) The application for a court decision must indicate the facts which are intended to substantiate preferment of public charges, as well as the evidence. The application must be signed by an attorney; legal aid shall be governed by the same provisions as in civil litigation. The application shall be submitted to the court competent to decide.

(4) The Higher Regional Court shall be competent to decide on the application. Sections 120 and 120b of the Courts Constitution Act shall be applied *mutatis mutandis*.

Section 173

[Procedure by the Court]

(1) Upon request of the court the public prosecution office shall submit to the court the records of the hearings conducted so far.

(2) The court may inform the accused of the application setting him a time limit for making a statement in reply.

(3) The court may order investigations to prepare its decision and may entrust such investigations to a commissioned or requested judge.

Section 174

[Dismissal of Application]

(1) The court shall dismiss the application if there are no sufficient grounds for preferring public charges and shall notify the applicant, the public prosecution office and the accused of the dismissal.

(2) If the application has been dismissed, public charges may be preferred only on the basis of new facts or evidence.

Section 175

[Order to Prefer Public Charges]

If after hearing the accused, the court considers the application to be well-founded, it shall order preferment of public charges. This order shall be carried out by the public prosecution office.

Section 176

[Furnishing Security]

(1) Prior to deciding on the application, the court may issue an order requiring the applicant to furnish security for the costs which are likely to be incurred by the Treasury and the accused in respect of the proceedings concerning the application. Security shall be furnished by depositing cash, shares or bonds. Any diverging provisions in a statutory instrument issued under the Act on Payments to and from Courts and Judicial Authorities shall remain unaffected. The court shall, at its discretion, determine the amount of security to be furnished. At the same time the court shall specify a time limit within which the security is to be furnished.

(2) If the security is not furnished within the time limit specified, the court shall declare the application withdrawn.

Section 177

[Costs]

The costs resulting from the proceedings on the application shall be imposed on the applicant in the cases referred to under Section 174 and Section 176 subsection (2).

CHAPTER III

(Deleted)

Sections 178 to 197

(Deleted)

CHAPTER IV

DECISION CONCERNING THE OPENING OF THE MAIN PROCEEDINGS

Section 198

(Deleted)

Section 199

[Decision to Open the Main Proceedings]

(1) The court which is competent for the main hearing shall decide whether main proceedings are to be opened or whether proceedings are to be provisionally terminated.

(2) The bill of indictment shall contain the application to open the main proceedings. The file shall be submitted to the court with the bill of indictment.

Section 200

[Contents of the Bill of Indictment]

(1) The bill of indictment shall indicate the indicted accused, the criminal offence with which he is charged, the time and place of its commission, its statutory elements and the penal provisions which are to be applied (the charges). In addition, the evidence, the court before which the main hearing is to be held, and defence counsel shall be indicated. If witnesses are designated, their place of residence or whereabouts shall be indicated, whereby indication of the full address shall not be required. In the cases referred to in Section 68 subsection (1), second sentence, and subsection (2), first sentence, indication of the name of the witness shall be sufficient. Where a witness is mentioned whose identity is not to be revealed either wholly or in part, this fact shall be indicated; the same shall apply *mutatis mutandis* to the confidentiality of the witness's place of residence or whereabouts.

(2) The bill of indictment shall also set out the relevant results of the investigation. This may be dispensed with if the charges are preferred before the criminal court judge.

Section 201

[Communication of the Bill of Indictment]

(1) The presiding judge shall communicate the bill of indictment to the indicted accused and at the same time shall summon him to state, within a time limit to be set, whether he wants to apply for individual evidence to be taken before the decision on opening main proceedings, or whether he wants to raise objections to the opening of main proceedings. The bill of indictment shall also be communicated to the private accessory prosecutor and to the person entitled to private accessory prosecution who has applied therefor; Section 145a subsections (1) and (3) shall apply *mutatis mutandis*.

(2) The court shall decide on the applications and objections. The decision shall not be contestable.

Section 202

[Supplementary Investigations]

Before the court decides on the opening of main proceedings, it may order individual evidence to be taken to help to clear up the case. The order shall be incontestable.

Section 202a

[Discussion of the Status of Proceedings]

Where the court is considering the opening of main proceedings, it may discuss the status of the proceedings with the participants, insofar as this appears suitable to expedite the proceedings. The essential content of this discussion shall be documented.

Section 203

[Condition for Opening Main Proceedings]

The court shall decide to open main proceedings if in the light of the results of the preparatory proceedings there appear to be sufficient grounds to suspect that the indicted accused has committed a criminal offence.

Section 204

[Refusal to Open Main Proceedings]

(1) If the court decides not to open main proceedings, the order must show whether its decision is based on factual or on legal grounds.

(2) The indicted accused shall be notified of the order.

Section 205

[Provisional Termination]

The court may, by order, provisionally terminate the proceedings if the absence of the indicted accused or some other personal impediment prevents the holding of the main hearing for a considerable time. The presiding judge shall secure the evidence, so far as this is necessary.

Section 206

[Applications Not Binding]

The court shall not be bound in the formulation of its decision by the public prosecution office's application.

Section 206a

[Termination in the Case of Impediments]

(1) Where a procedural impediment arises after the main proceedings have been opened, the court may terminate the proceedings by an order made outside the main hearing.

(2) The order shall be contestable by immediate complaint.

Section 206b

[Termination on Amendment of the Law]

If a penal norm applicable at the time the offence was committed is amended prior to the decision and if pending criminal court proceedings concern an offence which was punishable under the former law but which is no longer punishable under the new law, the court shall terminate the proceedings by an order made outside the main hearing. The order shall be contestable by immediate complaint.

Section 207

[Order Opening Main Proceedings]

(1) In the order opening main proceedings, the court shall admit the charges for the main hearing and designate the court before which the main hearing is to take place.

(2) The court shall specify in the order the amendments subject to which it admits the charges for the main hearing, if

1. charges have been preferred for more than one offence and for some of them the opening of the main proceedings is refused;
2. in accordance with Section 154a, prosecution is to be limited to individual severable parts of an offence, or such parts are to be reintroduced into the proceedings;
3. the act is legally evaluated differently from the bill of indictment; or,
4. in accordance with Section 154a, prosecution is limited to some of several violations of the law committed through the same criminal offence, or such violations of law are reintroduced into the proceedings.

(3) In the case of subsection (2), numbers 1 and 2, the public prosecution office shall submit a new bill of indictment corresponding to the order. The presentation of the relevant results of investigations may be dispensed with.

(4) At the same time the court shall decide *proprio motu* whether remand detention or provisional placement shall be ordered or continued.

**Section 208
(Deleted)**

**Section 209
[Competent Court]**

(1) If the court with which the bill of indictment has been filed considers the jurisdiction of a court of lower rank in its district to be established, it shall open the main proceedings before such court.

(2) If the court with which the bill of indictment has been filed considers that the jurisdiction of a court of higher rank in its district to have jurisdiction, it shall submit the files through the public prosecution office to such court for decision.

**Section 209a
[Special Functional Jurisdictions]**

Within the meaning of Section 4 subsection (2), Section 209, as well as Section 210 subsection (2),

1. the special criminal divisions, pursuant to section 74 subsection (2), sections 74a and 74c of the Courts Constitution Act, shall, in relation to the general criminal divisions and inter se, rank in their district in the order designated in section 74e of the Courts Constitution Act, and
2. the Youth Courts, for the decision on whether cases
 - a) under section 33 subsection (1), section 103 subsection (2), first sentence, and section 107 of the Youth Courts Act, or
 - b) as youth protection matters (section 26 subsection (1), first sentence, section 74b, first sentence, of the Courts Constitution Act)

are to be tried before the Youth Courts,
shall be deemed equivalent to courts of a higher rank compared to the courts of the same rank competent for general criminal cases.

**Section 210
[Appellate Remedies]**

(1) The order by which the main proceedings were opened cannot be contested by the defendant.

(2) The public prosecution office shall be entitled to lodge an immediate complaint against an order refusing the opening of the main proceedings or an order by which, in deviation from the application of the public prosecution office, the proceedings have been referred to a court of lower rank.

(3) If the court hearing the complaint allows the complaint, it may at the same time decide that the main hearing is to be held before another chamber of the court which issued the order pursuant to subsection (2), or by a neighbouring court of the same rank and in the same *Land*. In proceedings in which a Higher Regional Court has decided in the first instance the Federal Court of Justice may decide that the main hearing shall be held before another panel of the same court.

**Section 211
[Effect of the Order Refusing to Open Main Proceedings]**

If the opening of the main proceedings was refused by an order which is no longer contestable, the charges may be resumed only on the basis of new facts or evidence.

CHAPTER V PREPARATION OF THE MAIN HEARING

Section 212 [Applicability of Section 202a]

Section 202a shall apply *mutatis mutandis* after the opening of the main proceedings.

Sections 212a and 212b (Deleted)

Section 213 [Setting the Date for the Main Hearing]

The date for the main hearing shall be set down by the presiding judge.

Section 214 [Summonses]

(1) The summonses required for the main hearing shall be ordered by the presiding judge. At the same time, the presiding judge shall order the notifications of the date of the hearing required pursuant to Section 397 subsection (2), third sentence, Section 406g subsection (1), fourth sentence, and Section 406g subsection (2), second sentence; Section 406d subsection (3) shall apply *mutatis mutandis*. The registry shall ensure that the summonses are issued and the notifications dispatched.

(2) If it is to be expected that the main hearing will continue over a long period, the presiding judge shall order that all, or individual, witnesses and expert witnesses be summoned to appear on a date later than the beginning of the main hearing.

(3) The public prosecution office shall be entitled to summon additional persons directly.

(4) The public prosecution office shall ensure that the objects serving as evidence are produced. This may also be done by the court.

Section 215 [Service of the Order Opening the Main Proceedings]

The order concerning the opening of the main proceedings shall be served on the defendant at the latest with the summons. In the cases referred to in Section 207 subsection (3) this shall apply *mutatis mutandis* to the bill of indictment subsequently submitted.

Section 216 [Summoning the Defendant]

(1) A defendant who is at liberty shall be summoned in writing with the admonition that he shall be arrested and brought before the court if he fails to appear without excuse. In the cases referred to in Section 232 the warning may be omitted.

(2) A defendant who is not at liberty shall be summoned by being notified of the date of the main hearing pursuant to Section 35. The defendant shall then be asked what applications, if any, he wants to make for his defence at the main hearing.

Section 217 [Time Limit for Summons]

(1) A time limit of at least one week must elapse between service of the summons (Section 216) and the day of the main hearing.

- (2) If this time limit has not been observed, the defendant may request suspension of the hearing at any time prior to commencement of his examination on the charge.
- (3) The defendant may waive observance of this time limit.

Section 218

[Summoning Defence Counsel]

In addition to the defendant, court-appointed defence counsel shall always be summoned; defence counsel of choice shall be summoned if the court was notified of such choice. Section 217 shall apply *mutatis mutandis*.

Section 219

[Defendant's Applications to Take Evidence]

- (1) If the defendant requests that witnesses or experts be summoned or that other evidence be produced for the main hearing, he shall make his applications to the presiding judge, indicating the facts on which evidence is to be taken. He shall be notified of the direction made following this request.
- (2) If the defendant's applications concerning evidence are granted, they shall be communicated to the public prosecution office.

Section 220

[Summons by the Defendant]

- (1) If the presiding judge rejects the application to summon a person, the defendant may have him summoned directly. He shall be authorized to do so even without a previous application.
- (2) A person directly summoned shall be obliged to appear only if, at the time of the summons, the statutory reimbursement for travel expenses and absence from work is offered him in cash or proven to have been deposited at the registry.
- (3) If it appears at the main hearing that the examination of a person directly summoned was useful for the purpose of clearing up the case, the court shall, upon application, order that statutory reimbursement from the Treasury be granted to such person.

Section 221

[Taking of Evidence *Ex Officio*]

The presiding judge may also order *ex officio* the production of further items serving as evidence.

Section 222

[Naming Witnesses]

- (1) The court shall provide the public prosecution office and the defendant with the names of the summoned witnesses and experts in good time, indicating their place of residence or whereabouts. If the public prosecution office makes use of its right pursuant to Section 214 subsection (3), it shall provide to the court and to the defendant the names of the summoned witnesses and experts in good time, indicating their place of residence or whereabouts. Section 200 subsection (1), third to fifth sentences, shall apply *mutatis mutandis*.
- (2) The defendant shall indicate to the court and to the public prosecution office in good time, the names of the witnesses and experts directly summoned by him or to be brought to the main hearing, indicating their place of residence or whereabouts.

Section 222a

[Information as to Composition of the Court]

(1) If the main hearing at first instance is held before the Regional Court or the Higher Regional Court, the composition of the court shall be communicated no later than on commencement of the main hearing, indicating the presiding judge and the additional judges and additional lay judges called in. The composition may, by order of the presiding judge, be communicated prior to the main hearing; for the defendant, such communication shall be made to his defence counsel. If the composition, as communicated, changes this shall be indicated no later than on commencement of the main hearing.

(2) If the communication about composition or about a change of composition is received less than one week prior to the commencement of the main hearing the court may, upon application by the defendant, defence counsel or the public prosecution office, interrupt the main hearing to examine the composition, if this is requested at the latest prior to the commencement of the examination of the first defendant on the charges.

(3) The documents which determine the composition may be inspected on behalf of the defendant only by his defence counsel or by an attorney, on behalf of the private accessory prosecutor only by an attorney.

Section 222b

[Objections Concerning Composition of the Court]

(1) If the composition of the court was communicated pursuant to Section 222a, an objection that the court is composed contrary to the rules may be raised only up to commencement of the examination of the first defendant on the charges at the main hearing. The facts on the basis of which the composition is alleged to be contrary to the rules shall be indicated. All objections shall be raised at the same time. Outside the main hearing the objection shall be raised in writing; Section 345 subsection (2), and for the private accessory prosecutor Section 390 subsection (2), shall apply *mutatis mutandis*.

(2) The court, in the composition required for decisions made outside the main hearing, shall decide on the objection. If it considers the objection to be well-founded it shall declare that itself not to be properly composed. If an objection results in a change in the composition, Section 222a shall not apply to the new composition.

Section 223

[Witness Examination on Commission or By Request]

(1) The court may order that a witness or expert be examined by a commissioned or requested judge if illness or infirmity or other insurmountable impediments prevent him from appearing at the main hearing for a long or indefinite period of time.

(2) The same rule shall apply if a witness or an expert cannot reasonably be expected to appear because of the great distance involved.

(3) (Deleted)

Section 224

[Notification of Participants]

(1) The public prosecution office, the defendant, and defence counsel shall be notified in advance of the dates set down for the examination; their presence at the examination shall not be required. Notification may be dispensed with if it would endanger the success of the investigation. The record made thereof shall be submitted to the public prosecution office and defence counsel.

(2) If a defendant, not being at liberty, has defence counsel, he shall be entitled to be present only at court hearings held at the place where he is in custody.

Section 225

[Judicial Inspection on Commission]

The provisions of Section 224 shall apply if a judicial inspection is to be made in preparation of the main hearing.

Section 225a

[Change of Jurisdiction Prior to the Main Hearing]

(1) If a court, prior to the commencement of a main hearing, considers the substantive jurisdiction of a court of higher rank to be established, it shall submit the files to this court through the public prosecution office; Section 209a, number 2, letter a, shall apply *mutatis mutandis*. The court to which the matter has been referred shall decide in a ruling whether it accepts the case.

(2) If the files are submitted to a court of higher rank by a criminal court judge or by a court with lay judges, the defendant may request the taking of specific evidence within a certain time limit to be determined at the time of submission. The presiding judge at the court to which the case has been referred shall decide on the application.

(3) The defendant and the court before which the main hearing is to be held shall be named in the ruling accepting the case. Section 207 subsection (2), numbers 2 to 4, subsection (3) and subsection (4) shall apply *mutatis mutandis*. The contestability of the ruling shall be governed by Section 210.

(4) The procedure pursuant to subsections (1) to (3) shall also apply if the court, prior to commencement of the main hearing, considers an objection of the defendant pursuant to Section 6a to be well-founded, and a special criminal division that has priority pursuant to section 74e of the Courts Constitution Act, has jurisdiction. If the court that considers the jurisdiction of another criminal division to be established has priority over the latter pursuant to section 74e of the Courts Constitution Act, it shall refer the case to that chamber with binding effect; the contestability of the decision on the referral shall be governed by Section 210.

CHAPTER VI MAIN HEARING

Section 226

[Uninterrupted Presence]

(1) The main hearing shall be held during the uninterrupted presence of the persons called upon to reach a judgment, as well as of the public prosecution office and a registry clerk.

(2) The criminal court judge may dispense with the requirement that a registry clerk attend. The decision shall be incontestable.

Section 227

[More Than One Public Prosecutor and Defence Counsel]

More than one official of the public prosecution office and more than one defence counsel may participate in the main hearing and share their duties.

Section 228

[Suspension and Interruption]

(1) The court shall decide on the suspension of a main hearing and on its interruption pursuant to Section 229 subsection (2). The presiding judge shall be competent to order brief interruptions.

(2) An impediment to defence counsel's appearance shall, without prejudice to the provision in Section 145, not entitle the defendant to request suspension of the hearing.

(3) If the time limit set in Section 217 subsection (1) has not been complied with, the presiding judge shall inform the defendant of his right to request suspension of the hearing due to defence counsel's inability to attend.

Section 229

[Maximum Duration of an Interruption]

(1) A main hearing may be interrupted for a period of up to three weeks.

(2) A main hearing may be interrupted for a period of up to one month if it has been conducted for at least ten days prior thereto.

(3) If a defendant or a person called upon to reach a judgment is unable, due to sickness, to appear at a main hearing which has already continued for at least ten days, the running of the time limits referred to in subsections (1) and (2) shall be suspended for the duration of the incapacity, up to a maximum of six weeks; these time periods shall expire no earlier than ten days after the suspension has ended. The court shall determine the commencement and end date of the suspension in an incontestable ruling.

(4) If the main hearing has not been re-continued at the latest by the day following expiry of the time limit referred to in the previous subsections, the main hearing shall commence *de novo*. If the day following expiry of the time limit is a Sunday, a public holiday or a Saturday, the main hearing may be re-continued on the next working day.

Section 230

[Failure of the Defendant to Appear]

(1) No main hearing shall be held against a defendant who fails to appear.

(2) If there is no sufficient excuse for the defendant's failure to appear, an order shall be made to bring him before the court, or a warrant of arrest shall be issued.

Section 231

[Defendant's Duty to Be Present]

(1) A defendant who has appeared may not absent himself from the hearing. The presiding judge may take appropriate measures to prevent the defendant from absenting himself; he may also have the defendant kept in custody during an interruption of the hearing.

(2) If the defendant nevertheless absents himself, or fails to appear when an interrupted main hearing is continued, the main hearing may be concluded in his absence if he has already been examined on the indictment and the court does not consider his further presence to be necessary.

Section 231a

[Unfitness to Stand Trial Caused with Intent]

(1) If the defendant wilfully and culpably placed himself in a condition precluding his fitness to stand trial, and if, as a result, he knowingly prevents the proper conduct or continuation of the main hearing in his presence, the main hearing shall, in a case where he has not yet been heard on the charges, be conducted or continued in his absence, unless the court considers his presence to be indispensable. The procedure pursuant to the first sentence shall only apply if the defendant, after the

opening of main proceedings, has had the opportunity to make a statement on the charges before the court or a commissioned judge.

(2) As soon as the defendant is again fit to stand trial, the presiding judge shall inform him of the essential contents of the proceedings during his absence unless pronouncement of judgment has commenced.

(3) The court shall decide whether to hold the hearing in the absence of the defendant pursuant to subsection (1) after hearing a physician as an expert. The decision may already be given prior to the beginning of the main hearing. An immediate complaint against the decision shall be admissible; it shall have suspensive effect. A main hearing which has already been commenced shall be interrupted until a decision on the immediate complaint is made; the interruption may last up to thirty days even if the requirements of Section 229 subsection (2) have not been fulfilled.

(4) Defence counsel shall be appointed for any defendant who is not represented by defence counsel as soon as a hearing in the absence of the defendant is being considered pursuant to subsection (1).

Section 231b

[Absence Because of Disorderly Conduct]

(1) If the defendant is removed from the courtroom or committed to prison because of disorderly conduct (section 177 of the Courts Constitution Act), the hearing may be conducted in his absence if the court does not consider his further presence to be indispensable and as long as it is to be feared that the defendant's presence would be seriously detrimental to the progress of the main hearing. In any event, the defendant shall be given the opportunity to make a statement on the charges.

(2) As soon as the defendant is allowed back, the procedure pursuant to Section 231a subsection (2) shall apply.

Section 231c

[Absence During Parts of the Proceedings]

If the main hearing is held in respect of more than one defendant, the court may order that individual defendants – in the case of mandatory defence also their defence counsel – be permitted, upon application, to absent themselves during individual parts of the hearing unless they are affected by these parts of the hearing. The order shall indicate those parts of the hearing for which permission is given. The permission may be revoked at any time.

Section 232

[Main Hearing Despite the Defendant's Failure to Appear]

(1) The main hearing may be held in the defendant's absence if he was properly summoned and the summons referred to the fact that the hearing may take place in his absence and if only a fine up to 180 daily units, a warning with sentence reserved, a driving ban, forfeiture, confiscation, destroying or making an item unusable, or a combination thereof, is to be expected. A higher penalty or a measure of reform and prevention may not be imposed in these proceedings. Withdrawal of permission to drive shall be admissible if the defendant has been made aware of this possibility in the summons.

(2) The main hearing shall not take place without the defendant if the summons was effected by publication.

(3) The record of a judicial examination of the defendant shall be read out at the main hearing.

(4) A judgment given in the defendant's absence must be served on him personally, together with reasons for the judgment, if it is not served on his defence counsel pursuant to Section 145a subsection (1).

Section 233

[Releasing the Defendant from the Duty to Appear]

(1) The defendant may, upon his application, be released from the obligation to appear at the main hearing if only imprisonment up to six months, a fine up to 180 daily units, a warning with sentence reserved, a driving ban, forfeiture, confiscation, destroying or making an item unusable, or a combination thereof, is expected to be imposed. A higher penalty or a measure of reform and prevention may not be imposed in his absence. Withdrawal of permission to drive shall be admissible.

(2) If the defendant is released from the obligation to appear at the main hearing, he shall be examined on the charges by a commissioned or requested judge. In this connection he shall be advised of the legal consequences admissible at the hearing in his absence and be asked whether he maintains his application to be released from the obligation to appear at the main hearing. In lieu of a request or a commission pursuant to the first sentence, the court may also conduct the examination on the charges outside the main hearing in such a way that the defendant is located in another place than the court and the examination is simultaneously transmitted audio-visually to the place where the defendant is located and to the courtroom.

(3) The public prosecution office and defence counsel shall be informed of the date set down for the examination; their presence at the examination shall not be required. The records of the examination shall be read out at the main hearing.

Section 234

[Representation of Absent Defendant]

If the main hearing may be held in the defendant's absence, he shall be entitled to be represented by defence counsel with a written power of attorney.

Section 234a

[Defence Counsel's Rights of Information and Consent]

If the main hearing is held in the defendant's absence, it shall be sufficient for the information required under Section 265 subsections (1) and (2) to be given to defence counsel; the defendant's consent pursuant to Section 245 subsection (1), second sentence, and pursuant to Section 251 subsection (1), number 1, and subsection (2), number 3, shall not be required if defence counsel takes part at the main hearing.

Section 235

[Restoration of the *Status Quo Ante*]

If the main hearing was held in the absence of the defendant pursuant to Section 232, he may apply for restoration of the *status quo ante* in respect of the judgment and within one week of its service, subject to the same conditions as apply in the case of failure to comply with a time limit; he may at any time request restoration of the *status quo ante* if he did not obtain knowledge of the summons to the main hearing. The defendant shall be instructed of this right when the judgment is served on him.

Section 236

[Ordering the Defendant's Personal Appearance]

The court shall always have the power to order the defendant's appearance in person and to enforce this by an order to bring him before the court or by a warrant of arrest.

Section 237

[Joinder of More Than One Criminal Case]

If there is a connection between more than one criminal case pending at the same court, the court may order that they be joined for the purpose of being heard together, even if this connection is not the one specified in Section 3.

Section 238

[Conduct of the Hearing]

- (1) The presiding judge shall conduct the hearing, examine the defendant and take the evidence.
- (2) The court shall decide on an objection by a participant in the proceedings that an order by the presiding judge relating to the conduct of the hearing is inadmissible.

Section 239

[Cross-Examination]

- (1) The presiding judge shall leave the examination of witnesses and experts named by the public prosecution office and by the defendant to the public prosecution office and defence counsel upon concurring application by both. Witnesses and experts named by the public prosecution office shall first be examined by the public prosecution office. Those named by the defendant shall first be examined by defence counsel.
- (2) After this examination the presiding judge shall also ask the witnesses and experts such questions as he deems necessary for further clarification in the case.

Section 240

[Right to Ask Questions]

- (1) The presiding judge shall permit the associate judges, upon request, to address questions to the defendant, witnesses and experts.
- (2) The presiding judge shall give similar permission to the public prosecution office, to the defendant, and to defence counsel, as well as to the lay judges. Direct questioning of a defendant by a co-defendant shall be inadmissible.

Section 241

[Rejection of Questions]

- (1) A person who abuses his right, pursuant to Section 239 subsection (1), to examine a witness, may be deprived of this right by the presiding judge.
- (2) In the cases referred to in Section 239 subsection (1) and Section 240 subsection (2) the presiding judge may reject inappropriate or irrelevant questions.

Section 241a

[Examination of Witnesses under 18 Years of Age]

- (1) The examination of witnesses under 18 years of age shall be conducted solely by the presiding judge.
- (2) The persons referred to in Section 240 subsection (1) and subsection (2), first sentence, may request the presiding judge to ask the witnesses further questions. The presiding judge may permit these persons to put questions to witnesses directly if, according to his duty-bound discretion, no detriment to the well-being of the witness is to be expected.
- (3) Section 241 subsection (2) shall apply *mutatis mutandis*.

Section 242

[Doubts Concerning Admissibility of Questions]

In the case of any doubt relating to the admissibility of a question, the court shall decide.

Section 243

[Course of the Main Hearing]

(1) The main hearing shall begin when the case is called up. The presiding judge shall determine whether the defendant and defence counsel are present and whether the evidence has been produced and, in particular, whether the summoned witnesses and experts are present.

(2) The witnesses shall leave the courtroom. The presiding judge shall examine the defendant on his personal situation.

(3) Thereupon the public prosecutor shall read out the charges. In the case of Section 207 subsection (3) he shall base these on the new bill of indictment. In the case of Section 207 subsection (2), number 3, the public prosecutor shall read out the charges and submit the legal assessment on which the order to open the main hearing was based; he may, in addition, express his own divergent legal opinion. In the cases referred to in Section 207 subsection (2), number 4, he shall take into account the amendments ordered by the court when admitting the case for a main hearing.

(4) The presiding judge shall state whether discussions pursuant to Sections 202a or 212 have taken place, whether their subject matter has been the possibility of a negotiated agreement (Section 257c) and, if so, their essential content. This duty shall also obtain in the further course of the main hearing, insofar as changes have occurred in regard to the information given at the commencement of the main hearing.

(5) The defendant shall then be informed that he may choose to respond to the charges or not to make any statement on the charges. If the defendant is prepared to respond, he shall be examined on the charges in accordance with Section 136 subsection (2). Previous convictions of the defendant shall be disclosed only insofar as they are relevant to the decision. The presiding judge shall decide when such convictions are to be disclosed.

Section 244

[Taking of Evidence]

(1) After examination of the defendant, evidence shall be taken.

(2) In order to establish the truth, the court shall, *proprio motu*, extend the taking of evidence to all facts and means of proof relevant to the decision.

(3) An application to take evidence shall be rejected if the taking of such evidence is inadmissible. In all other cases, an application to take evidence may be rejected only if the taking of such evidence is superfluous because the matter is common knowledge, the fact to be proved is irrelevant to the decision or has already been proved, the evidence is wholly inappropriate or unobtainable, the application is made to protract the proceedings, or an important allegation which is intended to offer proof in exoneration of the defendant may be treated as if the alleged fact were true.

(4) Except as otherwise provided, an application to take evidence by examining an expert may also be rejected if the court itself possesses the necessary specialist knowledge. Hearing another expert may also be refused if the opposite of the

alleged fact has already been proved by the first expert opinion; this rule shall not apply to cases where the professional competence of the first expert is in doubt, where his opinion is based upon incorrect factual suppositions, where the opinion contains contradictions, or where the new expert has means of research at his disposal which seem to be superior to the ones of an earlier expert.

(5) An application to take evidence by inspection *in loco* may be rejected if the court, in the exercise of its duty-bound discretion, deems the inspection not to be necessary for establishing the truth. Under the same condition an application to take evidence by examining a witness may be rejected if the witness has to be summoned from abroad.

(6) A court ruling shall be required if an application to take evidence is rejected.

Section 245

[Extent of Evidence Taken]

(1) The taking of evidence shall be extended to all witnesses and experts who were summoned by the court and who appeared, as well as to the other evidence produced by the court or the public prosecution office pursuant to Section 214 subsection (4), unless the taking of evidence is inadmissible. The taking of certain evidence may be dispensed with if the public prosecution office, defence counsel and the defendant agree.

(2) The court shall be obliged to extend the taking of evidence to the witnesses and experts who appeared upon being summoned by the defendant or the public prosecution office, as well as to other evidence produced, only if an application to take evidence is submitted. The application shall be rejected if the taking of evidence is inadmissible. It may otherwise be rejected only if the fact for which evidence is to be furnished has already been proved or is common knowledge, if there is no connection between the fact and the matter being adjudicated, if the evidence is completely unsuitable, or if the application has been filed for the purpose of protracting the proceedings.

Section 246

[Belated Applications to Take Evidence]

(1) The taking of evidence may not be refused on the grounds that the evidence or the fact which is to be proved was submitted too late.

(2) Until such time as all evidence has been taken, the applicant's opponent may, however, apply for suspension of the main hearing for the purpose of collecting information if a witness or an expert who is to be examined was named so late, or a fact which is to be proved was submitted so late that the opponent lacked the time needed to collect information.

(3) The public prosecution office and the defendant shall have the same right in respect of witnesses and experts summoned at the direction of the presiding judge or the court.

(4) The court shall decide on these applications in the exercise of its unfettered discretion.

Section 246a

[Medical Expert]

(1) Where it is expected that placement of the defendant in a psychiatric hospital or to preventive detention may be ordered or reserved, an expert shall be examined at the main hearing on the defendant's condition and his treatment prospects. The

same shall apply where the court is considering an order committing the defendant to an institution for withdrawal treatment.

(2) If charges have been preferred in respect of a criminal offence to the detriment of a minor referred to in section 181b of the Criminal Code and if the imposition of instructions pursuant to Section 153a of this statute or pursuant to section 56c, section 59a subsection (2), first sentence, number 4, or section 68b subsection (2), second sentence, of the Criminal Code is conceivable to the effect that the defendant receive psychiatric, psychotherapeutic or sociotherapeutic care and treatment (therapy instructions), an expert shall be examined on the defendant's condition and his treatment prospects, insofar as this is necessary in order to determine whether the defendant needs such care and treatment.

(3) If the expert has not previously examined the defendant, he shall be given the opportunity to do so before the main hearing.

Section 247

[Removal of the Defendant from the Courtroom]

The court may order that the defendant leave the courtroom during an examination if it is to be feared that a co-defendant or a witness will not tell the truth when examined in the presence of the defendant. The same shall apply if, on examination of a person under 18 years of age as a witness in the defendant's presence, considerable detriment to the well-being of such witness is to be feared or if an examination of another person as a witness in the defendant's presence poses an imminent risk of serious detriment to that person's health. The defendant's removal may be ordered for the duration of discussions concerning the defendant's condition and his treatment prospects, if substantial detriment to his health is to be feared. When the defendant is present again the presiding judge shall inform him of the essential contents of the proceedings, including the testimony, during his absence.

Section 247a

[Witness Examination in Another Place]

(1) If there is an imminent risk of serious detriment to the well-being of the witness were he to be examined in the presence of those attending the main hearing, the court may order that the witness remain in another place during the examination; such an order shall also be admissible under the conditions set out in Section 251 subsection (2), insofar as this is necessary to establish the truth. The decision shall be incontestable. A simultaneous audio-visual transmission of the testimony shall be provided in the courtroom. The testimony shall be recorded if there is a concern that the witness will not be available for examination at a future main hearing and the recording is necessary for establishing the truth. Section 58a subsection (2) shall apply *mutatis mutandis*.

(2) The court may order that the examination of an expert be conducted in such a way that the expert is located in another place than the court and the examination is simultaneously transmitted audio-visually to the place where the expert is located and to the courtroom. This shall not apply in the cases referred to in Section 246a. The decision pursuant to the first sentence shall not be contestable.

Section 248

[Dismissal of Witnesses and Experts]

The witnesses and experts who have been examined may absent themselves from the place where the court is sitting only with permission or upon instruction of the

presiding judge. The public prosecution office and the defendant shall be heard beforehand.

Section 249

[Reading Out Documents]

(1) Certificates and other documents serving as evidence shall be read out at the main hearing. This rule shall apply in particular to previous criminal judgments, criminal records and extracts from parish registers and registers of births, deaths and marriages and to written records of a judicial inspection.

(2) Except in the cases referred to in Sections 253 and 254, the reading may be dispensed with if the judges and the lay judges have taken cognizance themselves of the wording of the certificate or the document and the other participants have had an opportunity to do so. If the public prosecutor, the defendant or the defence counsel objects without delay to the presiding judge's order to proceed in accordance with the first sentence, the court shall decide. A record shall be made of the presiding judge's order, the findings as to cognizance and opportunity, and of the objection.

Section 250

[Principle of Examination in Person]

If the proof of a fact is based on the observation of a person, such person shall be examined at the main hearing. The examination shall not be replaced by reading out the record of a previous examination or reading out a written statement.

Section 251

[Reading Out Records]

(1) Examination of a witness, expert or co-accused may be replaced by reading out a record of another examination or a certificate containing a written statement originating from him

1. if the defendant has defence counsel, and the public prosecutor, defence counsel and defendant agree;
2. if the witness, expert or co-accused has died or cannot be examined by the court for another reason within a foreseeable period of time;
3. insofar as the written record or certificate concerns the presence or the level of asset loss.

(2) Examination of a witness, expert, or co-accused may also be replaced by reading out the written record of his previous examination by a judge if

1. illness, infirmity, or other insurmountable impediments prevent the witness, expert or co-accused from appearing at the main hearing for a long or indefinite period;
2. the witness or expert cannot reasonably be expected to appear at the main hearing given the great distance involved, having regard to the importance of his statement;
3. the public prosecutor, defence counsel and the accused agree to the reading out.

(3) Where the reading is to serve purposes other than specifically reaching a judgment, particularly the purpose of preparing the decision as to whether an

individual is to be summoned and examined, records of examinations, certificates and other documents serving as evidence may otherwise be read out too.

(4) In the cases referred to in subsections (1) and (2), the court shall decide whether reading out shall be ordered. The reason for reading out shall be indicated. If the written record of a judicial examination is read out, it shall be stated whether the person concerned was examined under oath. If not, an oath shall be administered retrospectively where the court deems this necessary and an oath can still be administered.

Section 252

[Prohibition of Reading Out of Statement Following Refusal to Testify]

The statement of a witness examined prior to the main hearing who does not make use of his right to refuse to testify until the main hearing may not be read out.

Section 253

[Reading Out a Statement to Refresh Memory]

(1) If a witness or an expert states that he can no longer remember a fact, the pertinent part of the record of his previous examination may be read out to refresh his memory.

(2) The same procedure may be followed if a contradiction to the previous statement arises during the examination and cannot otherwise be established or eliminated without the main hearing being interrupted.

Section 254

[Reading Out Confessions; Contradictions]

(1) Statements of the defendant which are contained in a judicial record may be read out for the purpose of taking evidence regarding a confession.

(2) The same may occur if a contradiction to the previous statement arises during the examination and cannot otherwise be established or eliminated without interrupting the main hearing.

Section 255

[Recording of Statements Read Out]

In the cases referred to in Sections 253 and 254, upon application by the public prosecution office or by the defendant, the reading out and reason therefor shall be mentioned in the record.

Section 255a

[Showing Audio-Visual Recordings]

(1) The provisions relating to the reading of a transcript of an examination pursuant to Sections 251, 252, 253 and 255 shall apply *mutatis mutandis* to the showing of an audio-visual recording of a witness examination.

(2) In proceedings relating to criminal offences against sexual self-determination (sections 174 to 184g of the Criminal Code) or against life (sections 211 to 222 of the Criminal Code) or for ill-treatment of an individual placed in the charge of another (section 225 of the Criminal Code) or to criminal offences against personal liberty pursuant to sections 232 to 233a of the Criminal Code, the examination of a witness under 18 years of age may be replaced by the showing of an audio-visual recording of his previous judicial examination if the defendant and his defence counsel were given the opportunity to participate in such examination. This shall also apply to witnesses who have been aggrieved by one of these criminal offences

and were under the age of 18 at the time of the offence. When taking its decision the court shall also consider the interests of the witness meriting protection and shall give the reason for showing the recording. Supplementary witness examination shall be admissible.

Section 256

[Reading Out Official and Medical Statements]

(1) The following documents may be read out:

1. statements containing a certificate or an opinion from
 - a) public authorities,
 - b) experts who have been sworn generally to render opinions of the kind concerned, and
 - c) physicians of the court medical services, excluding certificates of conduct;
2. medical certificates concerning minor bodily injuries;
3. medical reports on the taking of blood samples;
4. expert opinions with regard to the evaluation of a log book, the determination of the blood group or the blood alcohol content including its conversion; as well as
5. records and statements from criminal prosecuting authorities as contained in a certificate about investigatory acts, insofar as their subject is not a witness examination.

(2) If the opinion of a specialist authority was commissioned, the court may request the authority to appoint one of its staff to present the opinion at the main hearing, and to designate such person to the court.

Section 257

[Questioning the Defendant, the Public Prosecutor and Defence Counsel]

- (1) After each co-defendant has been examined and after evidence has been taken in each individual case the defendant shall be asked whether he has anything to add.
- (2) Upon request, the public prosecutor and defence counsel shall also be given the opportunity to make their statements after the examination of the defendant and after evidence has been taken in each individual case.
- (3) The statements shall not anticipate the closing speech.

Section 257a

[Written Form]

The court may require participants in the proceedings to file applications and proposals regarding questions of procedure in written form. This shall not apply to the applications referred to in Section 258. Section 249 shall apply *mutatis mutandis*.

Section 257b

[Discussion of the Status of Proceedings]

At the main hearing the court may discuss the status of the proceedings with the participants, insofar as this appears suitable to expedite the proceedings.

Section 257c
[Negotiated Agreement]

- (1) In suitable cases the court may, in accordance with the following subsections, reach an agreement with the participants on the further course and outcome of the proceedings. Section 244 subsection (2) shall remain unaffected.
- (2) The subject matter of this agreement may only comprise the legal consequences that could be the content of the judgment and of the associated rulings, other procedural measures relating to the course of the underlying adjudication proceedings, and the conduct of the participants during the trial. A confession shall be an integral part of any negotiated agreement. The verdict of guilt, as well as measures of reform and prevention, may not be the subject of a negotiated agreement.
- (3) The court shall announce what content the negotiated agreement could have. It may, on free evaluation of all the circumstances of the case as well as general sentencing considerations, also indicate an upper and lower sentence limit. The participants shall be given the opportunity to make submissions. The negotiated agreement shall come into existence if the defendant and the public prosecution office agree to the court's proposal.
- (4) The court shall cease to be bound by a negotiated agreement if legal or factually significant circumstances have been overlooked or have arisen and the court therefore becomes convinced that the prospective sentencing range is no longer appropriate to the gravity of the offence or the degree of guilt. The same shall apply if the further conduct of the defendant at the trial does not correspond to that upon which the court's prediction was based. The defendant's confession may not be used in such cases. The court shall notify any deviation without delay.
- (5) The defendant shall be instructed as to the prerequisites for and consequences of a deviation by the court from the prospective outcome pursuant to subsection (4).

Section 258
[Closing Speeches]

- (1) After the taking of evidence has been concluded, the public prosecutor and subsequently the defendant shall be given the opportunity to present their arguments and to file applications.
- (2) The public prosecutor shall have the right to reply; the defendant shall have the last word.
- (3) The defendant shall be asked, even if defence counsel has spoken for him, whether he himself has anything to add to his defence.

Section 259
[Interpreter]

- (1) A defendant who does not speak the language of the court shall be informed by the interpreter at least of the applications made in the closing speeches by the public prosecutor and by defence counsel.
- (2) The same rule shall apply in accordance with section 186 of the Courts Constitution Act to a hearing or speech impaired defendant.

Section 260
[Judgment]

- (1) The main hearing shall close with delivery of judgment following the deliberations.

(2) If an order is made prohibiting pursuit of an occupation, the judgment shall specify the occupation, profession, trade, or branch thereof, the exercise of which is prohibited.

(3) Termination of the proceedings shall be pronounced in the judgment if there is a procedural impediment.

(4) The operative provisions of the judgment shall indicate the legal designation of the offence of which the defendant has been convicted. If a criminal offence has a statutory title, it shall be used for the legal designation of the offence. If a fine is imposed, the number and the amount of daily units shall be included in the operative provisions of the judgment. If a decision on preventive detention is reserved, or if the sentence or the measure of reform and prevention is suspended on probation, or if the defendant has been warned with sentence reserved, or if imposition of a penalty is dispensed with, this shall be indicated in the operative provisions of the judgment. The wording of the operative provisions of the judgment shall otherwise be left to the discretion of the court.

(5) Following the operative provisions of the judgment, the provisions applied shall be listed according to section, subsection, number and letter together with the designation of the statute. If, in the case of a conviction imposing a sentence of imprisonment or an aggregate sentence of imprisonment not exceeding two years, the offence or, where there is more than one offence, the predominant offence(s), having regard to their gravity, were committed on the basis of a drug addiction, reference shall also be made to section 17 subsection (2) of the Federal Central Criminal Register Act.

Section 261

[Free Evaluation of Evidence]

The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole.

Section 262

[Preliminary Civil Law Questions]

(1) If the criminal liability for an act depends on the evaluation of a legal relationship under civil law, the criminal court shall also decide thereon according to the provisions applicable to procedure and evidence in criminal cases.

(2) The court, however, shall be entitled to suspend the investigation and to set a time limit within which one of the participants is to bring a civil action, or to await the judgment of the civil court.

Section 263

[Voting]

(1) A majority of two-thirds of the votes shall be required for any decision against a defendant which concerns the question of guilt and the legal consequences of the offence.

(2) The question of guilt shall also cover such circumstances as are specially provided by the penal norm to exclude, diminish, or increase criminal liability.

(3) The question of guilt shall not cover the conditions applying to the period of limitations.

Section 264

[Subject Matter of the Judgment]

- (1) The subject of adjudication shall be the offence specified in the charges and apparent in the light of the outcome of the hearing.
- (2) The court shall not be bound by the evaluation of the offence which formed the basis of the order opening the main proceedings.

Section 265

[Change in Legal Reference]

- (1) The defendant may not be sentenced on the basis of a penal norm other than the one referred to in the charges admitted by the court without first having his attention specifically drawn to the change in the legal reference and without having been afforded an opportunity to defend himself.
- (2) The same procedure shall be followed if special circumstances appear only at the hearing which in accordance with the penal norm increase criminal liability or justify an order imposing a measure of reform and prevention.
- (3) The main hearing shall be suspended upon the defendant's application if, alleging insufficient preparation for defence, he contests newly discovered circumstances which admit the application of a more severe penal norm against the defendant than the one referred to in the charges admitted by the court, or which forms part of the circumstances indicated in subsection (2).
- (4) Where as a result of a change in circumstances it appears reasonable to do so for the adequate preparation of the charges or of the defence, the court shall suspend the main hearing upon an application or *proprio motu*.

Section 265a

[Conditions; Instructions]

If conditions or instructions (section 56b, 56c, 59a subsection (2) of the Criminal Code) are conceivable, the defendant shall be asked in appropriate cases whether he will make efforts towards atonement for the wrong committed by him or give undertakings in respect of his future conduct. If an instruction is conceivable to the effect that the defendant undergo curative or withdrawal treatment or take up residence in a suitable home or institution, he shall be asked whether he consents to this.

Section 266

[Supplementary Charges]

- (1) If, at the main hearing, the public prosecutor at the main hearing adds new charges in respect of further criminal offences committed by the defendant, the court may, in an order, include them in the proceedings if it has jurisdiction and the defendant consents thereto.
- (2) The supplementary charges may be preferred orally. Their contents shall correspond to Section 200 subsection (1). They shall be included in the record made at the sitting. The presiding judge shall give the defendant the opportunity to defend himself.
- (3) The hearing shall be interrupted if the presiding judge considers it necessary or if the defendant so applies and the application is not clearly vexatious or solely dilatory. The defendant shall be instructed of his right to apply for an interruption.

Section 267

[Reasons for the Judgment]

- (1) If the defendant is convicted, the reasons for the judgment must specify the facts deemed to be proven and establishing the statutory elements of the criminal

offence. So far as evidence is inferred from other facts, these facts shall also be specified. With regard to details, reference may be made to pictures which are included in the files.

(2) If the penal norm mentions special circumstances which would exclude, diminish, or increase criminal liability and these were alleged at the hearing, the reasons for the judgment must state whether or not such circumstances were deemed to have been established.

(3) The criminal judgment shall further specify in its reasons the penal norm which was applied and shall set out the circumstances which were decisive in assessing the penalty. If the penal norm makes mitigation dependent on the existence of a less serious case, the reasons for the judgment must indicate why these circumstances are deemed to exist or are denied contrary to an application filed at the hearing; this shall apply *mutatis mutandis* to the imposition of a sentence of imprisonment in the cases referred to in section 47 of the Criminal Code. The judgment shall also indicate in the reasons why a particularly serious case is deemed not to exist when the prerequisites generally applying to such a case pursuant to the penal norm are fulfilled; where these prerequisites have not been met but a particularly serious case is nonetheless deemed to exist, the second sentence shall apply *mutatis mutandis*. In its reasons the judgment shall further indicate the grounds for suspending the penalty on probation, or for not doing so contrary to an application filed at the hearing; this shall apply *mutatis mutandis* to a warning with sentence reserved and to dispensing with punishment. If a negotiated agreement (Section 257c) has preceded the judgment, this shall also be indicated in the reasons for the judgment.

(4) If all parties entitled to an appellate remedy waive their right of appellate remedy or if no appellate remedy is sought within the given time limit, the proven facts establishing the statutory elements of the criminal offence and the penal norm must be indicated; in the case of judgments imposing only a fine or a fine plus a driving ban or withdrawal of permission to drive and in connection therewith confiscation of the driver's licence, or in the case of warnings with sentence reserved, reference may be made to charges admitted, to the charges pursuant to Section 418 subsection (3), second sentence, or to the penal order as well as to the application for a penal order. Subsection (3), fifth sentence, shall apply *mutatis mutandis*. The further content of the reasons for the judgment shall be determined by the court, taking into consideration – at its discretion – the circumstances of the individual case. The reasons for the judgment may be supplemented within the time limit provided in Section 275 subsection (1), second sentence, if restoration of the *status quo ante* is granted in respect of the failure to observe the time limit for seeking an appellate remedy.

(5) If the defendant is acquitted, the reasons for the judgment shall show whether the defendant's guilt was deemed not proven or whether, and on what basis, the act deemed proven was considered not to give rise to criminal liability. If all parties entitled to an appellate remedy waive their right of appellate remedy or if no appellate remedy is sought within the given time limit, it shall only be necessary to state whether it was for factual or legal reasons that the criminal offence with which the defendant is charged was not established. Subsection (4), third sentence, shall apply.

(6) The reasons for the judgment must also indicate why a measure of reform and prevention was ordered, a decision on preventive detention was reserved, or why either was not ordered or reserved contrary to an application filed at the hearing. If

permission to drive has not been withdrawn or a bar pursuant to section 69a subsection (1), third sentence, of the Criminal Code was not ordered although such measure was conceivable given the nature of the criminal offence, the reasons for the judgment must always indicate why such measure was not ordered.

Section 268

[Pronouncement of the Judgment]

- (1) The judgment shall be pronounced in the name of the people.
- (2) The judgment shall be pronounced by reading out the operative provisions of the judgment and disclosing the reasons for the judgment. Reasons for the judgment shall be disclosed by their being read out or by oral communication of their essential content. When deciding whether the reasons for the judgment shall be read out or whether their essential content shall be orally communicated, as well as in the event of oral communication of the essential content of the reasons for the judgment, consideration should be given to the interests meriting protection of participants in the proceedings, of witnesses or of aggrieved persons. Reading the operative provisions of the judgment shall in each case precede communication of the reasons for the judgment.
- (3) The judgment should be pronounced at the end of the hearing. It must be pronounced no later than on the eleventh day thereafter, or else the main hearing shall be recommenced. Section 229 subsection (3) and subsection (4), second sentence, shall apply *mutatis mutandis*.
- (4) If pronouncement of judgment has been postponed, the reasons for the judgment shall, if possible, be stated in writing beforehand.

Section 268a

[Probationary Suspension of Sentence; Warning with Sentence Reserved]

- (1) If a judgment provides for the suspension of sentence on probation or if the defendant is warned with sentence reserved, the court shall give the decisions designated in sections 56a to 56d and 59a of the Criminal Code in an order which shall be pronounced together with the judgment.
- (2) Subsection (1) shall apply *mutatis mutandis* if, in the judgment, a measure of reform and prevention has been suspended on probation or if, in addition to the sentence, supervision of conduct is ordered and the court gives decisions pursuant to sections 68a to 68c of the Criminal Code.
- (3) The presiding judge shall inform the defendant of the meaning of probationary suspension of the sentence or of the measure, of the warning with sentence reserved or of the supervision of conduct, of the duration of the probation period or of supervision of conduct, of conditions and instructions as well as of the possibility of revoking the suspension or imposing the sentence reserved (section 56f subsection (1), sections 59b, 67g subsection (1) of the Criminal Code). If the court gives the defendant instructions pursuant to section 68b subsection (1) of the Criminal Code, the presiding judge shall also inform him that a penalty pursuant to section 145a of the Criminal Code is also possible. The instruction shall, as a rule, be given following pronouncement of the order pursuant to subsection (1) or (2). If placement in a psychiatric hospital is suspended on probation, the presiding judge may dispense with the notification regarding the possibility of revoking suspension.

Section 268b

[Continuation of Remand Detention]

When passing judgment the court shall, *proprio motu*, decide on continuation of remand detention or provisional placement. The order shall be pronounced with the judgment.

Section 268c

[Information on a Driving Ban]

If a driving ban is ordered in the judgment, the presiding judge shall inform the defendant of the commencement of the duration of the ban (section 44 subsection (3), first sentence, of the Criminal Code). This information shall be given following pronouncement of judgment. If the judgment is pronounced in the defendant's absence, he shall be informed in writing.

Section 268d

[Instruction Where Preventive Detention Is Reserved]

If in the judgment the order of preventive detention pursuant to section 66a subsection (1) or (2) of the Criminal Code is reserved, the presiding judge shall instruct the defendant as to the meaning of the reservation as well as about the period of time for which the reservation applies.

Section 269

[Lack of Substantive Jurisdiction]

The court may not decline jurisdiction on the grounds that the case should be brought before a court of lower rank.

Section 270

[Referral to a Higher Competent Court]

- (1) If after the commencement of a main hearing a court deems a court of higher rank to have substantive jurisdiction, it shall, in an order, refer the case to the competent court; Section 209a, number 2, letter a, shall apply *mutatis mutandis*. The same procedure shall apply if the court considers a timely objection by the defendant pursuant to Section 6a to be well-founded.
- (2) In the order, the court shall name the defendant and the criminal offence pursuant to Section 200 subsection (1), first sentence.
- (3) The order shall have the effect of an order opening the main proceedings. The possibility of contesting the order shall be governed by Section 210.
- (4) If the order referring the case to a higher court was made by a criminal court judge or a court with lay judges, the defendant may apply, within a time limit to be determined when the order is pronounced, for certain evidence to be taken prior to the main hearing. The judge presiding over the court to which the case has been referred shall decide on the application.

Section 271

[Record of Proceedings]

- (1) A record shall be made of the main hearing and signed by the presiding judge and, insofar as he or she was present during the main hearing, by the registry clerk. The date of its completion shall be stated therein.
- (2) If the presiding judge is prevented from signing, the most senior associate judge shall sign for him. Where the presiding judge is the only judge of the court, the signature of the registry clerk shall suffice if the former is prevented from signing.

Section 272

[Content of the Record]

The record of the main hearing shall contain

1. the place and the day of the hearing;
2. the names of the professional judges and lay judges, of the official of the public prosecution office, of the registry clerk of the court registry, and of the assisting interpreter;
3. the designation of the criminal offence in the charges;
4. the names of the defendants, their defence counsel, the private prosecutors, the private accessory prosecutors, the aggrieved persons asserting claims arising from the criminal offence, the other persons involved, the statutory representatives, the legal representatives, and the persons rendering assistance;
5. an indication that the hearing is being held in public or that the public have been excluded.

Section 273

[Additional Contents of the Record]

(1) The record shall indicate the course and the results of the main hearing in essence, and shall show that all essential formalities have been observed; it shall also specify the documents read out or the documents the reading of which was dispensed with pursuant to Section 249 subsection (2), as well as the applications filed during the course of the hearing, the decisions given, and the operative provisions of the judgment. The record must also include, in essence, the course and content of a discussion pursuant to Section 257b.

(1a) The record must also indicate, in essence, the course and content as well as the outcome of a negotiated agreement pursuant to Section 257c. The same shall apply to the observance of the information and instruction requirements set out in Section 243 subsection (4), Section 257c subsection (4), fourth sentence, and Section 257 subsection (5). If no agreement was negotiated, this shall also be noted in the record.

(2) The main outcome of examinations at the main hearing before the criminal court judge and in a court with lay judges shall also be included in the record; this shall not apply if all those entitled to an appellate remedy have waived their right of appellate remedy or if no appellate remedy has been sought within the given time limit. The presiding judge may order that individual examinations be recorded on tape in order of succession, instead of recording the essential results of the examinations. The tape is to be filed or kept in the registry with the files. Section 58a subsection (2), first sentence, and sentences three to six, shall apply *mutatis mutandis*.

(3) If it is important that an occurrence at the main hearing or the wording of testimony or of a statement be registered, the presiding judge *ex officio* or upon application by a participant in the hearing shall order that a complete record be made and that it be read out. If the presiding judge refuses to make the order, the court, upon application by a participant in the hearing, shall decide. It shall be noted in the record that the reading took place and that approval was given or whether, and if so, what objections were raised.

(4) The judgment may not be served until the record has been drawn up.

Section 274

[Probative Value of the Record]

Observance of the formalities required for the main hearing can be proved only by the record. Only proof of forgery shall be admissible in respect of the content of that part of the record relating to these formalities.

Section 275

[Written Judgment; Official Copy]

(1) If the judgment including reasons has not been fully incorporated in the record, it shall be placed on file without delay. This must be done no later than five weeks after pronouncement; this time limit shall be extended by two weeks if the main hearing lasted longer than three days, and, if the main hearing lasted longer than ten days, by another two weeks for every ten days of the main hearing or part thereof. Once the time limit has expired the reasons for the judgment may no longer be amended. The time limit may be exceeded only if and so long as the court, due to a circumstance which cannot be anticipated or averted in the particular case, has been prevented from observing it. The date of receipt and any amendment of the reasons shall be noted by the registry.

(2) The judgment shall be signed by the judges who participated in the decision. If a judge is prevented from adding his signature, this fact, and the reason therefore, shall be noted under the judgment by the presiding judge and, if he is prevented from doing so, by the most senior associate judge. The signatures of the lay judges are not required.

(3) The day of the sitting and the names of the judges, of the lay judges, of the official of the public prosecution office, of defence counsel, and of the registry clerk who took part in the sitting shall be included in the judgment.

(4) Copies and extracts of judgments shall be signed by the registry clerk and shall be stamped with the court's seal.

CHAPTER VII

DECISION CONCERNING AN ORDER OF PREVENTIVE DETENTION RESERVED IN THE JUDGMENT OR A SUBSEQUENT ORDER OF PREVENTIVE DETENTION

Section 275a

[Decision Concerning Reserved or Subsequent Orders of Preventive Detention]

(1) Where the order of preventive detention has been reserved in the judgment (section 66a of the Criminal Code), the executing authority shall send the files in good time to the public prosecution office of the competent court. The public prosecution office shall hand over the files to the presiding judge of the court in time for a decision to be given by the time stated in subsection (5). Where placement in a psychiatric hospital has been declared disposed of pursuant to section 67d subsection (6), first sentence, of the Criminal Code, the executing authority shall send the files without delay to the public prosecution office of the court competent to make a subsequent order of preventive detention (section 66b of the Criminal Code). If the public prosecution office intends to apply for a subsequent order of preventive detention, it shall notify the affected person thereof. The public prosecution office shall submit its application for a subsequent order of preventive detention without delay and shall hand it over to the presiding judge with the files.

(2) Subject to any contrary provisions below, Sections 213 to 275 shall apply *mutatis mutandis* to the preparation and conduct of the main hearing.

(3) After commencement of the main hearing in accordance with Section 243 subsection (1), a rapporteur shall report in the absence of the witnesses on the results of the proceedings up to that point. The presiding judge shall read out the previous judgment, insofar as it is of relevance for the decision on the reserved or subsequent order of preventive detention. Thereafter the convicted person shall be examined and the evidence taken.

(4) Prior to arriving at a decision the court shall obtain an expert's opinion. Where a decision is to be taken as to whether a subsequent order of preventive detention is to be made, two expert's opinions shall be obtained. The experts may not be persons who have been involved in the treatment of the convicted person in relation to the imprisonment or placement.

(5) The court shall give a decision on the reserved order of preventive detention not later than six months before full execution of the prison sentence.

(6) Where there are cogent reasons to assume that preventive detention will be subsequently ordered, the court may issue a placement order until the judgment becomes final. The court competent to decide pursuant to section 67d subsection (6) of the Criminal Code shall remain responsible for the issue of the placement order until the application for an order of subsequent preventive detention is received by the court responsible for this decision. In the cases referred to in section 66a of the Criminal Code, the court may issue a placement order until the judgment becomes final if it ordered reserved preventive detention at first instance prior to the time specified in section 66a subsection (3), first sentence, of the Criminal Code. Sections 114 to 115a, 117 to 119a and 126a subsection (3) shall apply *mutatis mutandis*.

CHAPTER VIII PROCEEDINGS AGAINST ABSENT ACCUSED

Section 276

[Definition]

An accused person shall be deemed to be absent if his whereabouts are unknown, or if he is abroad and his presence before the competent court does not appear to be feasible or reasonable.

Sections 277 to 284 (Deleted)

Section 285

[Securing Evidence]

(1) No main hearing shall be held in respect of a person who is absent. Proceedings instituted against an absent accused shall serve the purpose of securing evidence in anticipation of his future presence in court.

(2) The provisions of Sections 286 to 294 shall apply to these proceedings.

Section 286

[Defence Counsel]

Defence counsel may represent the defendant. Relatives of the defendant shall also be permitted to act as representatives, even without a power of attorney.

Section 287

[Notification of the Absent Accused]

(1) The absent accused shall not be entitled to notifications about the course of the proceedings.

(2) The judge shall, however, be authorized to have notifications sent to an absent accused whose whereabouts are known.

Section 288
[Request to Appear]

An absent accused whose whereabouts are unknown may, through one or more newspapers, be requested to appear before the court or to report his whereabouts.

Section 289
[Reception of Evidence]

If the absence of the defendant becomes apparent only after the main proceedings have been opened, evidence that remains to be taken shall be taken by a commissioned or requested judge.

Section 290
[Seizure Instead of Warrant of Arrest]

- (1) The property of an absent defendant against whom public charges have been preferred, which is located within the territorial scope of this Federal statute, may be seized by order of the court if there are grounds for suspicion against him which would justify issuing a warrant of arrest.
- (2) There shall be no seizure of property for criminal offences carrying imprisonment not exceeding six months or a fine not exceeding 180 daily units.

Section 291
[Publication of Seizure Order]

The seizure order shall be published in the Federal Gazette and, at the discretion of the court, may also be published in some other suitable manner.

Section 292
[Effect of Publication]

- (1) The indicted accused shall lose the right to dispose of the seized property *inter vivos* at the time of first publication in the Federal Gazette.
- (2) The seizure order shall be communicated to the authority competent to establish a curatorship over absent persons. This authority shall establish a curatorship.

Section 293
[Revocation of Seizure]

- (1) Seizure shall be revoked if the reasons therefore no longer apply.
- (2) Revocation of seizure shall be made public in the same manner in which the seizure was published. If it was published in the Federal Gazette pursuant to Section 291, its deletion shall also be ordered; publication of revocation of the seizure in the Federal Gazette shall be deleted after expiry of one month.

Section 294
[Proceedings After Preferment of Charges]

- (1) The provisions on the opening of main proceedings shall apply *mutatis mutandis* to proceedings following preferment of the public charges.
- (2) In the order made after conclusion of these proceedings (Section 199), a decision shall at the same time be given on continuation or revocation of seizure.

Section 295
[Safe Conduct]

- (1) The court may grant safe conduct to an absent accused; it may attach conditions to such grant.

(2) Safe conduct shall entail exemption from remand detention, but only in respect of the criminal offence for which it is granted.

(3) It shall expire if a sentence of imprisonment is imposed or if the accused takes steps to prepare to flee or does not fulfil the conditions under which the safe conduct was granted.

PART THREE APPELLATE REMEDIES

CHAPTER I GENERAL PROVISIONS

Section 296

[Persons Entitled to Appellate Remedy]

(1) Both the public prosecution office and the accused shall be entitled to file the appellate remedies admissible against court decisions.

(2) The public prosecution office may also make use of them for the benefit of the accused.

Section 297

[Defence Counsel]

Defence counsel may file an appellate remedy on behalf of the accused, but not against the latter's express will.

Section 298

[Statutory Representative]

(1) The statutory representative of an accused may make use of the admissible appellate remedies independently, within the time limit applying to the accused.

(2) The provisions applicable to the appellate remedies available to the accused shall apply *mutatis mutandis* to such appellate remedies and to the proceedings.

Section 299

[Arrested Accused]

(1) An accused who is not at liberty may make oral statements relating to appellate remedies to be recorded by the registry of the Local Court in whose district the institution where he is detained upon official order is located.

(2) For observance of a time limit it shall be sufficient for the record to be made within the time limit.

Section 300

[Incorrect Designation]

An error in the designation of the admissible appellate remedy shall not be prejudicial.

Section 301

[Public Prosecution Office's Power of Appellate Remedy]

Any appellate remedy filed by the public prosecution office shall have the effect that the contested decision may be amended or revoked, also for the accused's benefit.

Section 302

[Withdrawal; Waiver]

(1) Withdrawal of an appellate remedy as well as waiver of the right to file such appellate remedy may also take effect before expiry of the time limit for filing. If a negotiated agreement (Section 257c) has preceded the judgment, a waiver shall be

excluded. An appellate remedy filed by the public prosecution office for the benefit of the accused may not be withdrawn without his consent.

(2) Defence counsel shall require express authorization for such withdrawal.

Section 303

[Opponent's Consent]

If the decision on the appellate remedy has to be given on the basis of an oral hearing, withdrawal after the beginning of the main hearing may be effected only with the consent of the opposing party. Withdrawal of the defendant's appellate remedy shall not, however, require the consent of the private accessory prosecutor.

CHAPTER II COMPLAINT

Section 304

[Admissibility]

(1) A complaint shall be admissible against all orders made by the courts at first instance or in appellate proceedings on fact and law and against directions given by the presiding judge, the judge in preliminary proceedings, and by a commissioned or a requested judge, unless such orders are expressly exempted from appellate remedy by law.

(2) Witnesses, experts, and other persons may also lodge a complaint against orders and directions by which they are affected.

(3) A complaint against decisions on costs or necessary expenses shall be admissible only if the value of the subject matter of the complaint exceeds two hundred Euros.

(4) No complaint shall be admissible against orders and directions given by the Federal Court of Justice. The same shall apply to orders and directions given by the Higher Regional Courts; in cases in which the Higher Regional Courts have jurisdiction at first instance, a complaint shall, however, be admissible against orders and directions

1. concerning arrest, provisional placement, placement for observation, seizure, search or the measures designated in Section 101 subsection (1);
2. declining to open the main proceedings or terminating the proceedings because of a procedural impediment;
3. ordering the main hearing in the defendant's absence (Section 231a) or referring a case to a court of lower rank;
4. concerning inspection of files; or
5. concerning revocation of suspension of sentence, revocation of remission of sentence and imposition of the reserved sentence (Section 453 subsection (2), third sentence), an order for interim measures to secure revocation (Section 453c), suspension of the remainder of sentence and its revocation (Section 454 subsections (3) and (4)), the reopening of proceedings (Section 372, first sentence), or forfeiture, confiscation or making an item unusable pursuant to Sections 440, 441 subsection (2), Section 442.

Section 138d subsection (6) shall remain unaffected.

(5) A complaint against the directions of the investigating judge at the Federal Court of Justice or the Higher Regional Court (Section 169 subsection (1)) shall be

admissible only if it concerns arrest, provisional placement, seizure, search or the measures designated in Section 101 subsection (1).

Section 305
[Inadmissibility]

Decisions of the adjudicating courts prior to judgment shall not be subject to complaint. Excepted are decisions concerning arrest, provisional placement, seizure, provisional withdrawal of permission to drive, provisional prohibition of pursuit of an occupation, or imposition of regulatory or coercive measures, as well as all decisions affecting third parties.

Section 305a
[Complaint Against Order Suspending Sentence]

(1) A complaint shall be admissible against an order given pursuant to Section 268a subsections (1) and (2). It may be based only on the ground that the order made was illegal.

(2) If a complaint is lodged against an order and an admissible appeal on law is filed against the judgment, the court hearing the appeal on law shall also be competent to decide on the complaint.

Section 306
[Filing; Redress or Submission]

(1) The complaint shall be lodged at the court which, or the presiding judge of which, gave the contested decision, either orally to be recorded by the registry or in writing.

(2) If the court which, or the presiding judge who, gave the contested decision considers the complaint to be well-founded, they shall redress it; in all other cases the complaint shall be submitted immediately, at the latest within three days, to the court hearing the complaint.

(3) These provisions shall also be applicable to the decisions of the judge in the preliminary proceedings and of the commissioned or the requested judge.

Section 307
[No Obstacle to Enforcement]

(1) Lodging a complaint shall not constitute an obstacle to enforcement of the contested decision.

(2) The court, the presiding judge, or the judge whose decision is contested, as well as the court hearing the complaint, may, however, order that enforcement of the contested decision be suspended.

Section 308
[Powers of the Court Hearing the Complaint]

(1) The court hearing the complaint may not amend the contested decision to the detriment of the complainant's opponent without having communicated the complaint to him for submissions in response. This shall not apply in the cases referred to in Section 33 subsection (4), first sentence.

(2) The court hearing the complaint may order investigations or conduct them itself.

Section 309
[Decision]

(1) The decision on the complaint shall be made without an oral hearing, in appropriate cases after hearing the public prosecution office.

(2) If the complaint is considered to be well-founded, the court hearing the complaint shall simultaneously decide on the merits.

Section 310
[Further Complaint]

(1) Orders made upon a complaint by the Regional Court or by the Higher Regional Court competent pursuant to section 120 subsection (3) of the Courts Constitution Act may be contested by further complaint so far as they concern

1. arrests,
2. provisional placement or
3. an order of attachment of an asset *in rem* pursuant to Section 111b subsection (2) in conjunction with Section 111d, in respect of an amount exceeding 20,000 Euros.

(2) In all other cases the decision given upon a complaint shall not be contestable.

Section 311
[Immediate Complaint]

(1) The following special provisions shall apply to cases of immediate complaint.

(2) The complaint shall be lodged within one week; the time limit shall begin to run upon notification (Section 35) of the decision.

(3) The court shall not be competent to amend its decision contested by a complaint. It shall, however, redress the complaint if, to the detriment of the complainant, it has used facts or evidentiary conclusions in respect of which the complainant has not yet been heard and if, as a result of subsequent submissions, it considers the complaint to be well-founded.

Section 311a
[Subsequent Hearing of the Opponent]

(1) If the court hearing the complaint has granted redress without having heard the complainant's opponent, and if its decision is not contestable and the resulting detriment to the opponent still exists, the court, *proprio motu* or upon application, shall give him a subsequent hearing and upon application, decide. The court hearing the complaint may amend its decision even if no application has been made.

(2) Section 307, Section 308 subsection (2) and Section 309 subsection (2) shall apply to the proceedings *mutatis mutandis*.

CHAPTER III
APPEAL ON POINTS OF FACT AND LAW

Section 312
[Admissibility]

An appeal on fact and law shall be admissible against judgments of the criminal court judge and of the court with lay judges.

Section 313
[Acceptance of Appeal on Fact and Law]

(1) Where the defendant has been sentenced to a fine not exceeding fifteen daily units, where in the case of a warning the reserved fine does not exceed fifteen daily units, or where a regulatory fine has been imposed, an appeal on fact and law shall be admissible only if accepted for adjudication. The same shall apply where the defendant has been acquitted or the proceedings terminated and the public prosecution office had applied for a fine not exceeding thirty daily units.

(2) The appeal on fact and law shall be accepted for adjudication if it is not manifestly ill-founded. In other cases it shall be rejected as inadmissible.

(3) An appeal on fact and law against a judgment imposing a regulatory fine, acquitting the defendant or terminating the proceedings in respect of a regulatory offence shall always be accepted for adjudication if a legal complaint is admissible pursuant to section 79 subsection (1) of the Regulatory Offences Act or has to be admitted pursuant to section 80 subsections (1) and (2) of the Regulatory Offences Act. In other cases subsection (2) shall apply.

Section 314

[Form and Time Limits]

(1) An appeal on fact and law shall be filed with the court of first instance either orally to be recorded by the registry or in writing within one week after pronouncement of the judgment.

(2) If judgment was not pronounced in the defendant's presence, the time limit shall begin to run for him upon service thereof, with the exception of the cases referred to in Section 234, 387 subsection (1), Section 411 subsection (2) and Section 434 subsection (1), first sentence, where judgment was pronounced in the presence of defence counsel bearing a written power of attorney from the defendant.

Section 315

[Appeal on Fact and Law and Application for Restoration of the *Status Quo Ante*]

(1) Commencement of the time limit for filing an appeal on fact and law shall not be excluded by the fact that an application for restoration of the *status quo ante* may be made in respect of a judgment pronounced in the defendant's absence.

(2) If the defendant files an application for restoration of the *status quo ante*, the appeal on fact and law shall be available if immediately filed in time in the event of this application being rejected. Further directions with regard to the appeal on fact and law shall then be suspended pending the decision on the application for restoration of the *status quo ante*.

(3) Filing an appeal on fact and law not in conjunction with an application for restoration of the *status quo ante* shall be deemed to be a waiver of the latter.

Section 316

[Obstacle to Entry into Force]

(1) Where an appeal on fact and law is filed in time, the judgment shall not enter into force so far as it is contested.

(2) If the judgment including reasons has not yet been served on the complainant, it shall immediately be served on him after he has filed an appeal on fact and law.

Section 317

[Grounds for an Appeal on Fact and Law]

The grounds for appeal on fact and law may be given at the court of first instance orally to be recorded by the registry or in a notice of complaint within a further week after expiry of the time limit for seeking an appellate remedy or, if at that time the judgment has not yet been served, after the service thereof.

Section 318

[Restriction of Appeal on Fact and Law]

An appeal on fact and law may be restricted to certain points of complaint. If this was not done, or no grounds at all were given, the entire judgment shall be deemed to be contested.

Section 319
[Filing Too Late]

- (1) If an appeal on fact and law is filed too late, the court of first instance shall dismiss the appeal as inadmissible.
- (2) Within a week after service of the ruling, the complainant may apply for a decision of the court hearing the appeal. In this case, the files shall be sent to the court hearing the appeal; this, however, shall form no obstacle to execution of judgment. The provision in Section 35a shall apply *mutatis mutandis*.

Section 320
[Submitting Files to the Public Prosecution Office]

If the appeal on fact and law was filed in time, the court registry, after expiry of the time limit for giving the grounds, shall submit the files to the public prosecution office regardless of whether grounds were given or not. If the appeal on fact and law was filed by the public prosecution office, it shall serve upon the defendant the documents concerning the filing of the appeal and the grounds therefor.

Section 321
[Transmission of Files to the Court Hearing the Appeal]

The public prosecution office shall transmit the files to the public prosecution office at the court hearing the appeal. The latter shall pass the files to the presiding judge within one week.

Section 322
[Dismissal Without Main Hearing]

- (1) Where the court hearing the appeal on fact and law considers that the provisions on filing the appeal have not been observed it may, in a ruling, dismiss the appeal as inadmissible. In all other cases it shall decide in the form of a judgment; Section 322a shall remain unaffected.
- (2) The ruling may be contested by immediate complaint.

Section 322a
[Ruling by the Court Hearing the Appeal]

The court hearing the appeal on fact and law shall decide in a ruling whether to accept the appeal (Section 313). The decision shall be incontestable. No reasons need to be given for the ruling accepting the appeal on fact and law.

Section 323
[Preparation of the Main Hearing]

- (1) The provisions of Sections 214 and 216 to 225 shall apply to the preparation of the main hearing. The summons shall expressly advise the defendant of the consequences of non-appearance.
- (2) Summoning the witnesses and experts examined at first instance may be dispensed with only if their repeated examination does not seem to be necessary for clearing up the case. Insofar as it appears necessary, the appeal court shall order the transposition of a tape recording of an examination pursuant to Section 273 subsection (2), second sentence, into a written transcript. The person who produced the transposition shall affix his or her signature with additional wording confirming the accuracy of the transposition. The public prosecution office, the defence counsel and the defendant shall be given a copy of the written transcript. Proof that the transposition is inaccurate shall be admissible. The written transcript may be read out in accordance with Section 325.

- (3) New evidence shall be admissible.
- (4) When selecting the witnesses and experts to be summoned, consideration shall be given to those persons named by the defendant in the grounds for the appeal on fact and law.

Section 324

[Course of the Main Hearing]

- (1) After the main hearing has commenced in accordance with the provisions of Section 243 subsection (1), a rapporteur shall, in the absence of the witnesses, report on the outcome of the previous proceedings. The judgment of the court of first instance shall be read out insofar as it is of relevance to the appeal on fact and law; the reasons for the judgment need not be read out if the public prosecution office, defence counsel and defendant dispense with reading out.
- (2) Thereafter, the defendant shall be examined and evidence taken.

Section 325

[Reading Out Documents]

- (1) Documents may be read out when the rapporteur is giving his report and when evidence is being taken; records concerning statements of the witnesses and experts examined during the main hearing at first instance, apart from the cases referred to in Sections 251 and 253, may not be read out without the consent of the public prosecution office and of the defendant, provided the witnesses or experts have been summoned again or an application to do so was made by the defendant in time prior to the main hearing.

Section 326

[Closing Speeches]

After concluding the taking of evidence, the arguments and applications of the public prosecution office as well as of the defendant and his defence counsel shall be heard, with the complainant being heard first. The defendant shall have the last word.

Section 327

[Extent of Review of the Judgment]

The judgment shall be subject to the court's review only to the extent contested.

Section 328

[Content of the Appellate Decision]

- (1) If the appeal on fact and law is held to be well-founded, the court hearing the appeal shall quash the judgment and decide on the merits.
- (2) If the court of first instance erroneously assumed jurisdiction, the court hearing the appeal shall quash the judgment and refer the case to the competent court.

Section 329

[Defendant's Non-Appealance]

- (1) If at the beginning of a main hearing neither the defendant nor, in cases where this is admissible a representative of the defendant, has appeared, and if there is no sufficient excuse for their failure to appear, the court shall dismiss an appeal by the defendant on fact and law without hearing the merits. This shall not apply if the court hearing the appeal on fact and law holds a new hearing after the case has been referred back to it by the court hearing the appeal on law. If a conviction for individual offences has been overturned, the content of that part of the judgment that has been upheld shall be clearly identified when the appeal on fact and law is

dismissed; the penalties imposed may be combined into a new aggregate sentence by the court hearing the appeal on fact and law.

(2) Subject to the requirements of subsection (1), first sentence, an appeal on fact and law filed by the public prosecution office may also be heard in the absence of the defendant. An appeal on fact and law filed by the public prosecution office may also be withdrawn in such cases without the defendant's consent unless the conditions in subsection (1), second sentence, prevail.

(3) Within one week after service of the judgment, the defendant may request restoration of the *status quo ante* under the conditions specified in Sections 44 and 45.

(4) If the procedure pursuant to subsection (1) or (2) is not followed, an order shall be made for the defendant to be brought before the court or to be arrested. This shall be dispensed with if it is to be expected that he will appear at the new main hearing without the need for coercive measures.

Section 330

[Appeal on Fact and Law by Statutory Representative]

(1) If the appeal on fact and law was filed by a statutory representative, the court shall also summon the defendant to the main hearing and may have him forcibly brought before the court in the event of his non-appearance.

(2) If only the statutory representative fails to appear at the main hearing, the main hearing shall be conducted without him. If at the beginning of a hearing neither the statutory representative nor the defendant has appeared, Section 329 subsection (1) shall apply *mutatis mutandis*; if only the defendant has failed to appear, Section 329 subsection (2), first sentence, shall apply *mutatis mutandis*.

Section 331

[Prohibition of *Reformatio in Peius*]

(1) The judgment, insofar as it relates to the type and degree of the legal consequences of the offence, may not be amended to the defendant's detriment where only the defendant or his statutory representative filed the appeal on fact and law, or the public prosecution office appealed on fact and law in his favour.

(2) This provision shall not prevent an order committing the defendant to a psychiatric hospital or an institution for withdrawal treatment.

Section 332

[Procedural Provisions]

The provisions concerning the main hearing, set forth in Chapter VI of Part Two, shall otherwise apply.

CHAPTER IV

APPEAL ON POINTS OF LAW ONLY

Section 333

[Admissibility]

An appeal on law shall be admissible against judgments of the criminal divisions and of the criminal divisions with lay judges and against judgments of the Higher Regional Courts pronounced at first instance.

Section 334

(Deleted)

Section 335

[Immediate Appeal on Law in Lieu of an Appeal on Fact and Law]

- (1) A judgment against which an appeal on fact and law is admissible may be contested by an appeal on law in lieu of an appeal on fact and law.
- (2) The court which would have been competent to decide if an appeal on law were filed after an appeal on fact and law had been heard, shall decide on the appeal on law.
- (3) If one of the participants files an appeal on law against the judgment, and another participant files an appeal on fact and law, the appeal on law, if filed in time and in the prescribed form, shall be treated as an appeal on fact and law as long as the appeal on fact and law is not withdrawn or dismissed as inadmissible. Notices of appeal on law including the grounds therefor shall nevertheless be submitted in the form and within the time limit provided and served on the opponent (Sections 344 to 347). An appeal on law against a judgment given in an appeal on fact and law shall be admissible pursuant to the provisions generally applicable.

Section 336

[Review of Decisions Preceding the Judgment]

Decisions which preceded the judgment, insofar as the judgment is based on them, shall also be subject to review by the court hearing the appeal on law. This shall not apply to decisions which have been expressly declared to be incontestable, or which may be contested by immediate complaint.

Section 337

[Grounds for Appeal on Law]

- (1) An appeal on law may be filed only on the ground that the judgment was based upon a violation of the law.
- (2) Failure to apply a legal norm or erroneous application of a legal norm shall constitute a violation of the law.

Section 338

[Absolute Grounds for Appeal on Law]

A judgment shall always be considered to be based on a violation of the law

1. if the adjudicating court was not composed in the prescribed form; where pursuant to Section 222a notification of composition is required, the appeal on law may be based on composition not being in the prescribed form only so far as
 - a) the provisions governing notification have been violated,
 - b) an objection, made in time and in the proper form, to a composition not being in the prescribed form has been disregarded or rejected,
 - c) the main hearing was not interrupted pursuant to Section 222a subsection (2) to review composition, or
 - d) the court gave its decision while not composed in the prescribed form and has determined, pursuant to Section 222b subsection (2), second sentence, that it was not composed in the prescribed form;
2. if a professional judge or a lay judge barred by operation of law from exercising judicial office, participated in drafting the judgment;

3. if a professional judge or a lay judge participated in drafting the judgment after he was challenged for bias and the motion for challenge was either declared to be well-founded or erroneously rejected;
4. if the court erroneously assumed jurisdiction;
5. if the main hearing was held in the absence of the public prosecutor or of a person whose presence is required by law;
6. if the judgment was given on the basis of an oral hearing and the provisions concerning the public nature of the proceedings were violated;
7. if the judgment contains no reasons for the decision or the reasons have not been placed on the file within the time limit applicable pursuant to Section 275 subsection (1), second and fourth sentences;
8. if the defence was inadmissibly restricted by an order of the court on a question important for the decision.

Section 339

[Legal Norms for the Defendant's Benefit]

The violation of legal norms existing solely for the defendant's benefit may not be invoked by the public prosecution office for the purpose of quashing the judgment to the defendant's detriment.

Section 340 (Deleted)

Section 341

[Form and Time Limits]

(1) The appeal on law shall be filed with the court whose judgment is being contested, either orally to be recorded by the registry or in writing, within one week after pronouncement of judgment.

(2) If the defendant was not present when judgment was pronounced, the time limit in respect of the defendant shall begin to run upon service of the judgment, with the exception of the cases referred to in Section 234, Section 387 subsection (1), Section 411 subsection (2), and Section 434 subsection (1), first sentence, where judgment was pronounced in the presence of defence counsel bearing a written power of attorney from the defendant.

Section 342

[Appeal on Law and Application for Restoration of the *Status Quo Ante*]

(1) Commencement of the time limit for filing an appeal on law shall not be excluded by the fact that an application for restoration of the *status quo ante* may be filed against a judgment pronounced in the defendant's absence.

(2) If the defendant files an application for restoration of the *status quo ante*, the appeal on law shall be available if immediately filed in time to cover the eventuality of this application being rejected. Further disposition with regard to the appeal on law shall then be suspended pending the decision on the application for restoration of the *status quo ante*.

(3) Filing an appeal on law without linking it to an application for restoration of the *status quo ante* shall be deemed to be a waiver of the latter.

Section 343

[Obstacle to Entry into Force]

- (1) Where an appeal on law is filed in time, the judgment shall not enter into force insofar while it is being contested.
- (2) If the judgment including reasons has not yet been served on the complainant it shall be served on him after he has filed an appeal on law.

Section 344

[Grounds for an Appeal on Law]

- (1) The complainant shall make a statement concerning the extent to which he contests the judgment and is applying for it to be quashed (notices of appeal on law) and shall specify the grounds.
- (2) The grounds must show whether the judgment is being contested because of violation of a legal norm concerning the proceedings or because of violation of another legal norm. In the former case the facts containing the defect must be indicated.

Section 345

[Time Limit for Stating Grounds]

- (1) Notices of appeal on law including the grounds for the appeal shall be submitted to the court whose judgment is being contested no later than one month after expiry of the time limit for seeking the appellate remedy. If the judgment has not been served by expiry of that time limit, the time limit shall start to run upon service thereof.
- (2) In the case of the defendant this may only be done in the form of a notice signed by defence counsel or by an attorney, or orally to be recorded by the court registry.

Section 346

[Late and Improper Filing]

- (1) The court whose judgment is being contested shall, in an order, dismiss the appellate remedy as inadmissible if the appeal on law was filed too late or the notices of appeal on law were not submitted in time or not in the form prescribed in Section 345 subsection (2).
- (2) The complainant may, within one week after service of the order, apply for a decision of the court hearing the appeal on law. In this case the files shall be sent to the court hearing the appeal on law; this, however, shall not constitute an obstacle to execution of the judgment. Section 35a shall apply *mutatis mutandis*.

Section 347

[Service; Response; Submission of Files]

- (1) The notice of appeal on law including the grounds therefor shall be served on the complainant's opponent if the appeal on law and the notices of appeal on law were submitted in time and in the prescribed form. The opponent may submit a written response within one week. The defendant may also submit his response orally to be recorded by the court registry.
- (2) The public prosecution office shall send the files to the court hearing the appeal on law after receipt of the response or after expiry of the time limit.

Section 348

[Lack of Jurisdiction]

- (1) If the court to which the files are sent finds that a hearing and decision on the appellate remedy fall under the jurisdiction of another court, it shall declare, in an order, that it lacks jurisdiction.
- (2) This order, which shall indicate the court competent to hear the appeal on law, shall not be contestable and shall be binding on the court specified therein.
- (3) Transmission of the files shall be effected by the public prosecution office.

Section 349

[Dismissal Without Main Hearing]

- (1) The court hearing the appeal on law may, in an order, dismiss the appellate remedy as inadmissible, if it is of the opinion that the provisions on filing an appeal on law or on submission of the notices of appeal on law have not been complied with.
- (2) Upon the public prosecution office's application, for which grounds have to be given, the court hearing the appeal on law may also decide in an order if it unanimously deems the appeal on law to be manifestly ill-founded.
- (3) The public prosecution office shall inform the complainant of the application pursuant to subsection (2) and of the grounds therefor. The complainant may submit a written response to the court hearing the appeal on law within two weeks.
- (4) If the court hearing the appeal on law unanimously deems an appeal on law filed for the defendant's benefit to be well-founded, it may set aside the contested judgment in an order.
- (5) If the court hearing the appeal on law does not apply subsection (1), (2) or (4) it shall decide on the appellate remedy in a judgment.

Section 350

[Main Hearing]

- (1) The place and time of the main hearing shall be communicated to the defendant and to defence counsel. If communication to the defendant is not feasible, notification of defence counsel shall be sufficient.
- (2) The defendant may appear at the main hearing or may be represented by defence counsel bearing a written power of attorney. A defendant who is not at liberty shall not be entitled to be present.
- (3) If the defendant who is not at liberty is not brought before the court for the main hearing and has not chosen defence counsel, the presiding judge, upon the defendant's application, shall appoint defence counsel for the main hearing. The application shall be filed within one week after the defendant has been notified of the date and time of the main hearing and advised of his right to have defence counsel appointed.

Section 351

[Course of the Main Hearing]

- (1) The main hearing shall begin with submissions by a rapporteur.
- (2) Thereafter, the arguments and applications of the public prosecution office as well as of the defendant and his defence counsel shall be heard, with the complainant being heard first. The defendant shall have the last word.

Section 352

[Extent of Review]

- (1) Only the notices of appeal on law and, insofar as the appeal on law is based on defects in the proceedings, only the facts specified when the notices of appeal on law were submitted, shall be subject to review by the court hearing the appeal.
- (2) Substantiation of the notices of appeal on law going beyond what is required by Section 344 subsection (2) shall not be necessary and, if incorrect, shall not be prejudicial.

Section 353

[Content of the Appellate Judgment on Law]

- (1) The contested judgment shall be quashed insofar as the appeal on law is considered well-founded.
- (2) At the same time, the findings on which the judgment is based shall be quashed insofar as they are affected by the violation of law by virtue of which the judgment is quashed.

Section 354

[Decision on the Merits; Referral to a Lower Court]

- (1) Where the judgment is quashed solely because of a violation of the law occurring on its application to the findings on which the judgment was based, the court hearing the appeal on law shall itself decide on the merits if, without further discussion of the facts, the judgment is to take the form of an acquittal or termination of proceedings or imposition of a mandatory penalty, or if, in accordance with the public prosecution office's application, the court hearing the appeal on law deems the statutory minimum penalty or dispensing with punishment to be reasonable.
 - (1a) Because of a violation of the law merely in respect of assessment of the legal consequences, the court hearing the appeal on law may dispense with revocation of the contested judgment insofar as the legal consequences imposed are appropriate. Upon application by the public prosecution office the court hearing the appeal on law may reduce the legal consequences as appropriate.
 - (1b) Where the court hearing the appeal on law quashes the judgment solely because of a violation of the law in its formation of an aggregate sentence (sections 53, 54, 55 of the Criminal Code) this may be done subject to the proviso that a subsequent court decision on the aggregate sentence shall be taken in accordance with Sections 460 and 462. Where the court hearing the appeal in law decides itself in respect of an individual sentence pursuant to subsection (1) or subsection (1a), the first sentence shall apply *mutatis mutandis*. Otherwise subsections (1) and (1a) shall remain unaffected.
- (2) In all other cases, the matter shall be referred back to another division or chamber of the court whose judgment is being quashed or to another court of the same rank located in the same *Land*. In proceedings in which the decision at first instance was given by a Higher Regional Court, the case shall be referred back to a different panel of the same court.
- (3) The case may be referred back to a court of a lower rank if such court has jurisdiction over the criminal act still to be dealt with.

Section 354a

[Decision in the Event of Amendment of the Law]

The court hearing the appeal on law shall also proceed in accordance with Section 354 when quashing the judgment on the ground that at the time of its decision a legal norm applied which is different from the one applying at the time of the contested decision.

Section 355

[Referral to the Competent Court]

If a judgment is quashed because the court of the previous instance erroneously assumed jurisdiction, the court hearing the appeal on law shall simultaneously refer the case to the competent court.

Section 356

[Pronouncement of Judgment]

Judgment shall be pronounced in accordance with the provisions of Section 268.

Section 356a

[Violation of the Right To Be Heard]

Where a court, in deciding on an appeal on a point of law, has violated a participant's right to be heard in such a manner as to affect the outcome of the case, then upon application it shall issue an order restoring the proceedings to the situation applying prior to the decision. The application is to be filed with the court hearing the appeal on law within one week after gaining knowledge of the violation of the right to be heard either in writing or orally to be recorded by the court registry, and giving reasons. *Prima facie* evidence of the time notice was obtained shall be furnished. Section 47 shall apply *mutatis mutandis*.

Section 357

[Effect on Persons Convicted in the Same Proceedings]

Where the judgment is quashed in favour of one defendant because of a violation of law occurring on application of a penal norm and where that part of the judgment which was quashed also affects other defendants who have not filed an appeal on law, the court shall give its decision as if these persons had also filed an appeal on law. Section 47 subsection (3) shall apply *mutatis mutandis*.

Section 358

[Binding Effect on Lower Court; Prohibition of *Reformatio in Peius*]

(1) The court to which the case was referred for another hearing and decision shall also base its decision on the legal assessment which formed the basis for quashing the judgment.

(2) The contested judgment, insofar as it relates to the type and degree of the legal consequences of the offence, may not be amended to the defendant's detriment where only the defendant or his statutory representative filed the appeal on law or the public prosecution office appealed on law in his favour. If an order of placement in a psychiatric hospital is quashed, this provision shall not prevent imposition of a sentence in lieu of placement. Nor shall the first sentence present an obstacle to an order committing the defendant to a psychiatric hospital or an institution for withdrawal treatment.

PART FOUR

REOPENING OF PROCEEDINGS CONCLUDED BY A FINAL JUDGMENT

Section 359

[Reopening for the Convicted Person's Benefit]

Reopening of the proceedings concluded by a final judgment shall be admissible for the benefit of the convicted person

1. if a document produced as genuine, to his detriment, at the main hearing was false or forged;

2. if a witness or expert, when giving testimony or an opinion to the convicted person's detriment, was guilty of wilful or negligent breach of the duty imposed by the oath, or of wilfully making a false, unsworn statement;
3. if a judge or lay judge who participated in drafting the judgment was guilty of a criminal violation of his official duties in relation to the case, unless the violation was caused by the convicted person himself;
4. if a civil court judgment on which the criminal judgment is based is quashed by another final judgment;
5. if new facts or evidence were produced, which, independently or in connection with the evidence previously taken, tend to support the defendant's acquittal or, upon application of a less severe penal norm, a lesser sentence or a fundamentally different decision on a measure of reform and prevention;
6. if the European Court of Human Rights has held that there has been a violation of the European Convention on the Protection of Human Rights and Fundamental Freedoms or of its Protocols and the judgment was based on that violation.

Section 360

[No Obstacle to Execution]

- (1) An application for reopening of proceedings shall not constitute an obstacle to execution of the judgment.
- (2) The court may, however, order postponement or interruption of execution.

Section 361

[Execution or Death No Bar to Reopening]

- (1) An application for reopening of proceedings shall not be barred either by the fact that the full sentence has been served or by the convicted person's death.
- (2) In the event of death, the spouse, the civil partner, the relatives in ascending and descending line, as well as the brothers and sisters of the deceased person, shall be entitled to file the application.

Section 362

[Reopening to the Defendant's Detriment]

Reopening of proceedings concluded by a final judgment shall be admissible to the defendant's detriment

1. if a document produced as genuine, for his benefit, at the main hearing was false or forged;
2. if a witness or expert, when giving testimony or an opinion for the defendant's benefit, was guilty of wilful or negligent violation of the duty imposed by the oath, or of wilfully making a false, unsworn statement;
3. if a judge or lay judge participated in drafting the judgment who was guilty of a criminal violation of his official duties in relation to the case;
4. if the person acquitted makes a credible confession, in or outside the court, that he committed the criminal offence.

Section 363
[Inadmissibility]

- (1) Reopening the proceedings shall not be admissible for the purpose of imposing another sentence on the basis of the same penal norm.
- (2) Reopening of the proceedings for the purpose of mitigating sentence on account of diminished criminal responsibility (section 21 of the Criminal Code) shall also be excluded.

Section 364
[Allegation of a Criminal Offence]

An application for reopening of proceedings which is to be based upon an allegation of a criminal offence shall only be admissible if a final conviction has been imposed for this offence, or if criminal proceedings cannot be commenced or conducted for reasons other than lack of evidence. This shall not apply in the case of Section 359, number 5.

Section 364a
[Appointment of Defence Counsel]

The court competent to decide in the reopened proceedings shall, upon application, appoint defence counsel for the reopened proceedings to represent a convicted person who has no defence counsel, if due to the complexity of the factual or legal position the participation of defence counsel appears to be necessary.

Section 364b
[Appointment of Defence Counsel to Prepare Proceedings]

- (1) The court competent to give decisions in the reopened proceedings shall, upon application, appoint defence counsel for the convicted person who has no defence counsel, also for the purpose of preparing the proceedings to be reopened, where
1. there are sufficient factual indications that certain investigations will result in facts or evidence which may substantiate the admissibility of an application to reopen the proceedings;
 2. due to the complexity of the factual or legal position the participation of defence counsel appears to be necessary; and
 3. the convicted person is unable to engage defence counsel at his own expense without detriment to his and his family's necessary maintenance.

If defence counsel has already been appointed for the convicted person, the court shall, upon application, determine, in an order, that the conditions in numbers 1 to 3 of the first sentence have been fulfilled.

(2) Section 117 subsections (2) to (4) and section 118 subsection (2), first, second and fourth sentences, of the Code of Civil Procedure shall apply *mutatis mutandis* to proceedings to determine whether the conditions in subsection (1), first sentence, number 3, have been fulfilled.

Section 365
[General Provisions on the Application]

The general provisions on appellate remedies shall also be applicable to the application to reopen proceedings.

Section 366
[Content and Form of the Application]

- (1) The application must specify the statutory ground for reopening proceedings, as well as the evidence.
- (2) The defendant and the persons specified in Section 361 subsection (2) may submit the application only in the form of a document signed by defence counsel or by an attorney, or orally to be recorded by the court registry.

Section 367

[Court Jurisdiction; Procedure]

- (1) Jurisdiction of the court to give decisions in the reopened proceedings and on the application for the preparation of the proceedings to be reopened shall be governed by the special provisions of the Courts Constitution Act. The convicted person may also submit applications pursuant to Sections 364a and 364b or an application to admit the reopening of the proceedings to the court whose judgment is contested; the latter court shall forward the application to the competent court.
- (2) The decisions on applications pursuant to Sections 364a and 364b and the application for leave to reopen proceedings shall be given without an oral hearing.

Section 368

[Dismissal for Inadmissibility]

- (1) The application shall be dismissed as inadmissible if it is not submitted in the prescribed form or does not invoke a statutory ground for reopening proceedings or does not adduce appropriate evidence.
- (2) In all other cases it shall be served on the applicant's opponent with a time limit being set for a response.

Section 369

[Taking Evidence]

- (1) If the application is found to be admissible, the court shall, where necessary, commission a judge to take the evidence adduced.
- (2) It shall be left to the court's discretion whether the witnesses and experts are to be examined under oath.
- (3) The public prosecution office, the defendant, and defence counsel shall be allowed to be present at the examination of a witness or expert and at a judicial inspection. Section 168c subsection (3), Section 224 subsection (1) and Section 225 shall apply *mutatis mutandis*. If the defendant is not at liberty, he shall not be entitled to be present if the hearing is not held at the court of the place where he is in custody and if his assistance will not serve to clarify the matter for which evidence is being taken.
- (4) After the taking of evidence has been concluded, the public prosecution office and the defendant shall be called upon to make further statements with a time limit being set.

Section 370

[Decision on Well-Foundedness]

- (1) The application to reopen proceedings shall be dismissed as unfounded, without an oral hearing, if the allegations made therein are not sufficiently substantiated or if in the cases referred to in Section 359, numbers 1 and 2, or in Section 362, numbers 1 and 2, the assumption that the act specified in such provisions influenced the decision can be ruled out given the circumstances that pertain.
- (2) In all other cases the court shall order the reopening of the proceedings and the recommencement of the main hearing.

Section 371

[Acquittal With No Main Hearing]

- (1) If the convicted person dies, the court shall, without recommencing the main hearing and after taking any evidence that may still be needed, either enter an acquittal or dismiss the application to reopen the proceedings.
- (2) In other cases, too, the court may acquit the convicted person immediately if there already is sufficient evidence thereof; where public charges are preferred however, it may only do so with the consent of the public prosecution office.
- (3) The acquittal shall be combined with the quashing of the original judgment. If there was solely a decision imposing a measure of reform and prevention, the original judgment shall be quashed in lieu of entering an acquittal.
- (4) Upon request by the applicant the fact that the judgment has been quashed shall be published in the Federal Gazette and, at the court's discretion, may also be published in some other appropriate manner.

Section 372

[Immediate Complaint]

All decisions given by the court at first instance in connection with an application to reopen the proceedings may be contested by immediate complaint. The decision of the court ordering the reopening of proceedings and recommencement of the main hearing may not be contested by the public prosecution office.

Section 373

[Judgment After New Main Hearing; No *Reformatio in Peius*]

- (1) In the new main hearing, the original judgment shall be either upheld or quashed with a new decision being given on the merits.
- (2) The original judgment, insofar as it relates to the type and degree of the legal consequences of the offence, may not be amended to the convicted person's detriment where only the defendant, or on his behalf the public prosecution office or his statutory representative applied to reopen the proceedings. This provision shall not prevent an order committing the defendant to a psychiatric hospital or an institution for withdrawal treatment.

Section 373a

[Procedure for a Penal Order]

- (1) Reopening of proceedings concluded by a final penal order to the convicted person's detriment shall also be admissible if new facts or evidence have been produced which, either alone or in conjunction with earlier evidence, tend to substantiate conviction for a felony.
- (2) In all other cases Sections 359 to 373 shall apply *mutatis mutandis* to the reopening of the proceedings concluded by a final penal order.

PART FIVE

PARTICIPATION OF THE AGGRIEVED PERSON IN THE PROCEEDINGS

CHAPTER I

PRIVATE PROSECUTION

Section 374

[Admissibility; Persons Entitled to Prosecute]

- (1) An aggrieved person may bring a private prosecution in respect of the following offences without needing to have recourse to the public prosecution office first:

1. trespass (section 123 of the Criminal Code);
 2. defamation (sections 185 to 189 of the Criminal Code) unless it is directed against one of the political bodies specified in section 194 subsection (4) of the Criminal Code;
 3. violation of the privacy of correspondence (section 202 of the Criminal Code);
 4. bodily injury (sections 223 and 229 of the Criminal Code);
 5. stalking (section 238 subsection (1) of the Criminal Code) or threat (section 241 of the Criminal Code);
 - 5a. taking or offering a bribe in business transactions (section 299 of the Criminal Code);
 6. criminal damage to property (section 303 of the Criminal Code);
 - 6a. a criminal offence pursuant to section 323a of the Criminal Code, where the offence, having been committed during a state of intoxication, is a misdemeanour referred to in numbers 1 to 6;
 7. a criminal offence pursuant to sections 16 to 19 of the Act against Unfair Competition;
 8. criminal offences pursuant to section 142 subsection (1) of the Patent Act, section 25 subsection (1) of the Utility Models Act, section 10 subsection (1) of the Semi-Conductor Protection Act, section 39 subsection (1) of the Plant Variety Protection Act, section 143 subsection (1), section 143a subsection (1) and section 144 subsections (1) and (2) of the Trade Mark Act, section 51 subsection (1) and section 65 subsection (1) of the Designs Act, sections 106 to 108 and section 108b subsections (1) and (2) of the Copyright and Related Rights Act and section 33 of the Act on the Copyright of Works of Fine Art and Photography.
- (2) A person who, in addition to the aggrieved person or on his behalf, is entitled to file an application for criminal prosecution may also file a private prosecution. The persons designated in section 77 subsection (2) of the Criminal Code may also bring a private prosecution if the person with prior entitlement has filed the application for criminal prosecution.
- (3) If the aggrieved person has a statutory representative, the right to bring a private prosecution shall be exercised by the latter or, if the aggrieved person is a corporation, a company, or another association which as such may sue in civil litigation, by the same persons who represent them in civil litigation.

Section 375

[More Than One Person Entitled]

- (1) If more than one person is entitled to bring a private prosecution in respect of the same criminal offence, each such person shall be independent of the others when exercising this right.
- (2) If, however, one of those entitled has brought a private prosecution, the others shall only be entitled to join the initiated proceedings at the stage they have reached at the time the declaration of joinder is made.

(3) Any decision on the merits shall, for the accused's benefit, also take effect in respect of entitled persons who did not bring a private prosecution.

Section 376

[Preferring Public Charges]

In respect of the criminal offences specified in Section 374 the public prosecution office shall prefer public charges only if it is in the public interest.

Section 377

[Participation of the Public Prosecutor; Taking Over the Proceedings]

- (1) The public prosecutor shall not be obliged to participate in private prosecution proceedings. The court shall submit the files to him if it is of the opinion that he should take over the prosecution.
- (2) The public prosecution office may assume the prosecution by making an express statement at any stage of the proceedings before the judgment enters into force. Seeking an appellate remedy shall entail taking over the prosecution.

Section 378

[Assistance and Representation of the Private Prosecutor]

The private prosecutor may be assisted by an attorney or may be represented by an attorney provided with a written power of attorney. In the latter case, service on the private prosecutor may legally be effected on the attorney.

Section 379

[Furnishing Security; Legal Aid]

- (1) The private prosecutor shall furnish security for the costs expected to arise for the accused under the same conditions applying to the plaintiff in civil litigation who, at the defendant's request, is required to furnish security for the costs of litigation.
- (2) Security shall be furnished by depositing cash, shares or bonds. Any diverging provisions in a statutory instrument issued under the Act on Payments to and from the Courts and Judicial Authorities shall remain unaffected.
- (3) The amount of security and the time limit for furnishing security, as well as legal aid shall be governed by the same provisions as apply in civil litigation.

Section 379a

[Advance for Fees]

- (1) The court shall set a time limit for payment of the advance for fees pursuant to section 16 subsection (1) of the Court Costs Act, unless the private prosecutor has been granted legal aid or is exempted from payment of fees; in this regard, reference shall be made to the consequences arising under subsection (3).
- (2) No court action shall be taken before the advance payment is made, unless a *prima facie* case is established that the delay would cause the private prosecutor a detriment which cannot be undone or can only be undone with difficulty.
- (3) The private prosecution shall be dismissed once the time limit set under subsection (1) has expired with no result. The order may be contested by immediate complaint. The court which made the order shall quash it of its own motion if it turns out that the payment was received within the time limit set.

Section 380

[Conciliation Attempt]

- (1) Prosecution for trespass, defamation, violation of privacy of correspondence, bodily injury (sections 223 and 229 of the Criminal Code), threats and criminal damage to property, may be brought only after conciliation was unsuccessfully

attempted by a conciliation board which is to be designated by the *Land* department of justice. The same shall apply to a criminal offence pursuant to section 323a of the Criminal Code, where the offence, having been committed during a state of intoxication, is a misdemeanour referred to in the first sentence. When bringing his private prosecution, the plaintiff shall submit a certificate showing that conciliation has been attempted.

(2) The *Land* department of justice may stipulate that the conciliation board may make its involvement conditional upon payment of a reasonable advance on costs.

(3) The provisions of subsections (1) and (2) shall not apply where an official superior has the authority to apply for criminal prosecution pursuant to section 194 subsection (3) or section 230 subsection (2) of the Criminal Code.

(4) If the parties do not live in the same municipal district, a conciliation attempt may be dispensed with in a specific order by the *Land* department of justice.

Section 381

[Preferring the Charges]

The charges shall be preferred orally to be recorded by the court registry or by submitting a bill of indictment. The charges must comply with the requirements specified in Section 200 subsection (1). The bill of indictment shall be submitted with two copies.

Section 382

[Communication of the Charges]

If the charges were properly preferred, the court shall communicate them to the accused with a time limit being set for a response.

Section 383

[Order Opening the Main Hearing; Dismissal; Termination]

(1) After receiving the accused's response, or after expiry of the time limit, the court shall decide whether to open the main proceedings or to dismiss the charges, in accordance with the provisions which are applicable when charges are directly preferred by the public prosecution office. In an order opening the main proceedings the court shall specify the defendant and the offence in accordance with Section 200 subsection (1), first sentence.

(2) The court may terminate the proceedings if the perpetrator's guilt is negligible. The proceedings may be terminated even during the main hearing. The order may be contested by immediate complaint.

Section 384

[Further Procedure]

(1) The further procedure shall be governed by the provisions which govern the proceedings for preferred public charges. Measures of reform and prevention, however, may not be ordered.

(2) Section 243 shall apply subject to the proviso that the presiding judge shall read out the order opening the main proceedings.

(3) The court shall determine the extent to which evidence shall be taken notwithstanding Section 244 subsection (2).

(4) The provision in Section 265 subsection (3) on the right to request a suspension of the main hearing shall not be applicable.

(5) A private prosecution cannot be heard at the same time as a public prosecution before a criminal division with lay judges.

Section 385

[Status of the Private Prosecutor; Summonses; Inspection of the Files]

- (1) To the same extent as the public prosecution office shall participate and be heard in the proceedings on preferred public charges, the private prosecutor shall participate and be heard in the proceedings on the private charges brought. All decisions which are brought to the attention of the public prosecution office in the former case shall be brought to the attention of the private prosecutor in the latter case.
- (2) A period of at least one week must elapse between service of the summons on the private prosecutor to attend the main hearing and the day of the main hearing.
- (3) The private prosecutor may exercise the right to inspect the files through an attorney only. Section 147 subsections (4) and (7), as well as Section 477 subsection (5) shall apply *mutatis mutandis*.
- (4) In the cases referred to in Sections 154a and 430, the second sentence of subsection (3) of those Sections shall not apply.
- (5) In appellate proceedings on a point of law no application by the private prosecutor pursuant to Section 349 subsection (2) shall be necessary. Section 349 subsection (3) shall not apply.

Section 386

[Summoning Witnesses and Experts]

- (1) The presiding judge shall decide which persons are to be summoned to the hearing as witnesses or experts.
- (2) The private prosecutor and the defendant shall have the right to summon such persons directly.

Section 387

[Representation at the Main Hearing]

- (1) At the main hearing the defendant may also be assisted by an attorney or may be represented by an attorney on the basis of a written power of attorney.
- (2) The provision in Section 139 shall apply to the private prosecutor's attorney as well as to the defendant's attorney.
- (3) The court shall have the authority to order the personal appearance of the private prosecutor as well as of the defendant, and shall also have the authority to have the defendant brought before the court.

Section 388

[Countercharges]

- (1) Where the private prosecution was brought by the aggrieved person, the accused may, until completion of the last word (Section 258 subsection (2), second part of the sentence) at first instance, apply for imposition of a penalty on the prosecutor by bringing countercharges if the accused was likewise aggrieved by the latter's commission of a criminal offence that can form the subject of a private prosecution and which is connected with the criminal offence giving rise to the charges.
- (2) Where the prosecutor is not the aggrieved person (Section 374 subsection (2)), the accused may bring countercharges against the aggrieved person. In that case the countercharges shall be served on the aggrieved person and he shall be summoned to the main hearing insofar as countercharges are not preferred at the main hearing in the presence of the aggrieved person.

- (3) The decision on the countercharges shall be given at the same time as the decision on the charges.
- (4) Withdrawal of the charges shall have no influence on the proceedings on the countercharges.

Section 389

[Judgment Terminating Proceedings]

- (1) If after hearing the case the court finds that the facts which are deemed to have been established constitute a criminal offence to which the procedure provided in this Chapter is not applicable, it shall terminate the proceedings in a judgment in which these facts must be clearly indicated.
- (2) The public prosecution office shall be informed of the hearings in such cases.

Section 390

[Appellate Remedy for Private Prosecutor]

- (1) A private prosecutor may avail himself of the same appellate remedies as the public prosecution office in proceedings on preferred public charges. The same shall apply to the application to reopen the proceedings in the cases referred to in Section 362. Section 301 shall apply to the private prosecutor's appellate remedy.
- (2) Notices of appeal on law and applications to reopen proceedings concluded by a final judgment may be filed by the private prosecutor only in a document signed by an attorney.
- (3) Submission and transmission of the files in accordance with Sections 320, 321, and 347 shall be made to and by the public prosecution office as in proceedings on preferred public charges. Service of the notices of appeal on fact and law and of appeal on law on the complainant's opponent shall be effected by the court registry.
- (4) The provision in Section 379a on payment of an advance for fees and the consequences of late payment shall apply *mutatis mutandis*.
- (5) The provision in Section 383 subsection (2), first and second sentences, on termination of proceedings in view of negligibility shall also apply to appellate proceedings on fact and law. The order shall not be contestable.

Section 391

[Withdrawal of Charges; Restoration of the *Status Quo Ante*]

- (1) A private prosecution may be withdrawn at any stage of the proceedings. The withdrawal shall be subject to the consent of the defendant after commencement of his examination at the main hearing at first instance.
- (2) The private prosecutor shall be deemed to have withdrawn the charges if in proceedings at first instance and, where the defendant has filed an appeal on fact and law, in proceedings at second instance, he fails to appear at the main hearing or is not represented by an attorney, or, although the court has ordered his personal appearance, he fails to appear at the main hearing or at another hearing, or fails to comply with a time limit set for him, and in respect of which he has been warned that non-compliance shall result in termination of proceedings.
- (3) If the appeal on fact and law was filed by the private prosecutor it shall be immediately dismissed in the event of the defects referred to above notwithstanding Section 301.
- (4) The private prosecutor may demand restoration of the *status quo ante* within one week after the default subject to the conditions specified in Sections 44 and 45.

Section 392
[Effect of Withdrawal]

A private prosecution once withdrawn may not be brought a second time.

Section 393
[Death of the Private Prosecutor]

- (1) The private prosecutor's death shall result in termination of the proceedings.
- (2) A private prosecution may, however, be continued after the private prosecutor's death by the persons entitled to bring a private prosecution pursuant to Section 374 subsection (2).
- (3) The person entitled shall notify the court of the continuation within two months after the private prosecutor's death; if no such notification is made this right shall be lost.

Section 394
[Notification to the Accused]

The accused shall be notified of the withdrawal of the private prosecution, of the private prosecutor's death, and of continuation of the private prosecution.

CHAPTER II
PRIVATE ACCESSORY PROSECUTION

Section 395
[Right to Join as a Private Accessory Prosecutor]

- (1) Whoever is aggrieved by an unlawful act pursuant to
 1. sections 174 to 182 of the Criminal Code,
 2. sections 211 and 212 of the Criminal Code, that was attempted,
 3. sections 221, 223 to 226a and 340 of the Criminal Code,
 4. sections 232 to 238, section 239 subsection (3), sections 239a and 239b, and section 240 subsection (4) of the Criminal Code,
 5. section 4 of the Act on Civil Law Protection against Violent Acts and Stalking,
 6. section 142 of the Patent Act, section 25 of the Utility Models Act, section 10 of the Semi-Conductor Protection Act, section 39 of the Plant Variety Protection Act, sections 143 to 144 of the Trade Mark Act, sections 51 and 65 of the Designs Act, sections 106 to 108b of the Copyright and Related Rights Act, section 33 of the Act on the Copyright of Works of Fine Art and Photography, and sections 16 to 19 of the Act against Unfair Competitionmay join a public prosecution or an application in proceedings for preventive detention as private accessory prosecutor.
- (2) The same right shall vest in persons
 1. whose children, parents, siblings, spouse or civil partner were killed through an unlawful act, or
 2. who, through an application for a court decision (Section 172), have initiated the preferment of public charges.
- (3) Whoever is aggrieved by another unlawful act, in particular pursuant to sections 185 to 189, section 229, section 244 subsection (1), number 3, sections 249 to 255

and section 316a of the Criminal Code, may join the public prosecution as private accessory prosecutor if, for particular reasons, especially because of the serious consequences of the act, this appears to be necessary to safeguard his interests.

(4) Joinder shall be admissible at any stage of the proceedings. It may also be effected for the purpose of seeking an appellate remedy after judgment has been given.

(5) If prosecution is limited pursuant to Section 154a, this shall not affect the right to join the public prosecution as private accessory prosecutor. If the private accessory prosecutor is admitted to the proceedings, a limitation pursuant to Section 154a subsection (1) or (2) shall not apply insofar as it concerns the private accessory prosecution.

Section 396

[Declaration of Joinder]

(1) The declaration of joinder shall be submitted to the court in writing. A declaration of joinder received by the public prosecution office or the court prior to preferment of public charges shall take effect on preferment of public charges. In the proceedings involving penal orders the joinder shall take effect when a date for the main hearing has been set down (Section 408 subsection (3), second sentence, Section 411 subsection (1)) or the application for issuance of a penal order has been refused.

(2) After hearing the public prosecution office the court shall decide whether a person is entitled to join as a private accessory prosecutor. In the cases under Section 395 subsection (3) it shall decide, after also hearing the indicted accused, whether joinder is imperative on the grounds referred to there; this decision shall be incontestable.

(3) If the court is considering terminating the proceedings pursuant to Section 153 subsection (2), Section 153a subsection (2), Section 153b subsection (2), or Section 154 subsection (2), it shall first decide on entitlement to joinder.

Section 397

[Rights of the Private Accessory Prosecutor]

(1) The private accessory prosecutor shall be entitled to be present at the main hearing even if he is to be examined as a witness. He shall be summoned to the main hearing; Section 145a subsection (2), first sentence, and Section 217 subsections (1) and (3) shall apply *mutatis mutandis*. The private accessory prosecutor shall also be entitled to challenge a judge (Sections 24 and 31) or an expert (Section 74), to ask questions (Section 240 subsection (2)), to object to orders by the presiding judge (Section 238 subsection (2)) and to object to questions (Section 242), to apply for evidence to be taken (Section 244 subsections (3) to (6)), and to make statements (Sections 257 and 258). Unless otherwise provided by law, he shall be called in and heard to the same extent as the public prosecution office. Decisions which are notified to the public prosecution office shall also be notified to the private accessory prosecutor; Section 145a subsections (1) and (3) shall apply *mutatis mutandis*.

(2) The private accessory prosecutor may avail himself of the assistance of an attorney or be represented by such attorney. The attorney shall be entitled to be present at the main hearing. He shall be notified of the date set down for the main hearing if his selection has been notified to the court or if he has been appointed as counsel.

Section 397a

[Appointment of an Attorney as Counsel]

(1) Upon application of the private accessory prosecutor an attorney shall be appointed as his counsel if he

1. has been aggrieved by a felony pursuant to sections 176a, 177, 179, 232 and 233 of the Criminal Code;
2. has been aggrieved by an attempted unlawful act pursuant to sections 211 and 212 of the Criminal Code or is a relative of a person killed through an unlawful act within the meaning of Section 395 subsection (2), number 1;
3. has been aggrieved by a felony pursuant to sections 226, 226a, 234 to 235, 238 to 239b, 249, 250, 252, 255 and 316a of the Criminal Code which has caused or is expected to cause him serious physical or mental harm;
4. has been aggrieved by an unlawful act pursuant to sections 174 to 182 and 225 of the Criminal Code and had not attained the age of 18 at the time of the act or cannot sufficiently safeguard his own interests himself; or
5. has been aggrieved by an unlawful act pursuant to sections 221, 226, 226a, 232 to 235, 237, 238 subsections (2) and (3), 239a, 239b, 240 subsection (4), 249, 250, 252, 255 and 316a of the Criminal Code and has not attained the age of 18 at the time of his application or cannot sufficiently safeguard his own interests himself.

(2) Where the conditions for an appointment pursuant to subsection (1) have not been fulfilled, the private accessory prosecutor shall, upon application, be granted legal aid for calling in an attorney subject to the same provisions as apply in civil litigation if he cannot sufficiently safeguard his own interests or if this cannot reasonably be expected of him. Section 114, subsection (1), second part of the first sentence, and subsection (2) as well as section 121 subsections (1) to (3) of the Code of Civil Procedure shall not be applicable.

(3) Applications pursuant to subsections (1) and (2) may already be made prior to the declaration of joinder. The presiding judge of the court seized of the case shall decide on the appointment of the attorney, to which Section 142 subsection (1) shall apply *mutatis mutandis*, and on the granting of legal aid.

Section 398

[Procedure]

(1) The course of the proceedings shall not be held up by joinder.

(2) A main hearing which has already been scheduled, as well as other scheduled hearings, shall be held on the dates set down, even if the private accessory prosecutor could not be summoned or notified at short notice.

Section 399

[Notification of Previous Decisions]

(1) Notification to the private accessory prosecutor of the decisions made and brought to the attention of the public prosecution office prior to joinder shall not be required except in the cases referred to in Section 401 subsection (1), second sentence.

(2) Once the time limit has expired for the public prosecution office to contest such decisions, the private accessory prosecutor shall not be entitled to contest them either.

Section 400

[Private Accessory Prosecutor's Right to Appellate Remedy]

- (1) The private accessory prosecutor may not contest the judgment with the objective of another legal consequence of the offence being imposed, or of the defendant being sentenced for a violation of the law which does not justify joinder by the private accessory prosecutor.
- (2) The private accessory prosecutor shall have the right to lodge an immediate complaint against the order refusing to open the main proceedings or terminating the proceedings pursuant to Sections 206a and 206b, insofar as the order concerns the offence on the basis of which the private accessory prosecutor is entitled to joinder. In other respects the decision by which the proceedings are terminated cannot be contested by the private accessory prosecutor.

Section 401

[Appellate Remedy for Private Accessory Prosecutor]

- (1) The private accessory prosecutor may avail himself of an appellate remedy independently of the public prosecution office. If joinder for the purpose of appellate remedy occurs after judgment, the contested judgment shall immediately be served upon the private accessory prosecutor. The time limit for stating the grounds for an appellate remedy shall begin to run on expiry of the time limit to be observed by the public prosecution office for filing an appellate remedy or, if the judgment has not yet been served upon the private accessory prosecutor, on service of the judgment upon him even if a decision has not yet been given on the private accessory prosecutor's entitlement to joinder.
- (2) If the private accessory prosecutor was present at the main hearing or was represented by an attorney, the time limit for filing an appellate remedy shall begin to run for him on pronouncement of judgment even if he was no longer present or represented when judgment was pronounced; he may not claim restoration of the *status quo ante* in respect of non-observance of the time limit on the ground that he was not instructed on his right to appellate remedy. If the private accessory prosecutor was not present or represented at all at the main hearing the time limit shall begin to run when the operative provisions of the judgment are served on him.
- (3) Where only the private accessory prosecutor has filed an appeal on fact and law, such appeal shall immediately be dismissed, notwithstanding the provision in Section 301, if at the beginning of a main hearing neither the private accessory prosecutor nor an attorney representing him appeared. The private accessory prosecutor may, within one week after non-appearance, demand restoration of the *status quo ante* under the conditions of Sections 44 and 45.
- (4) Further action in the case shall be incumbent on the public prosecution office if the contested decision is quashed by virtue of an appellate remedy filed by the private accessory prosecutor alone.

Section 402

[Revocation; Death of Private Accessory Prosecutor]

A declaration of joinder shall become ineffective through revocation and upon the death of the private accessory prosecutor.

CHAPTER III COMPENSATION FOR THE AGGRIEVED PERSON

Section 403 [Conditions]

The aggrieved person or his heir may, in criminal proceedings, bring a property claim against the accused arising out of the criminal offence if the claim falls under the jurisdiction of the ordinary courts and is not yet pending before another court, in proceedings before the Local Court irrespective of the value of the matter in dispute.

Section 404 [Application by the Aggrieved Person]

- (1) The application asserting the claim may be made in writing or orally to be recorded by the registry clerk, or also orally at the main hearing before the closing speeches begin. The application must specify the subject of, and the grounds for, the claim and should set forth the evidence. If the application is not made at the main hearing, it shall be served on the accused.
- (2) Making an application shall have the same effect as bringing an action in civil litigation. They come into effect upon receipt of the application by the court.
- (3) The applicant shall be notified of the place and time of the main hearing if the application is made before the main hearing begins. The applicant, his statutory representative, and the spouse or civil partner of the person entitled to make the application may participate in the main hearing.
- (4) The application may be withdrawn at any time prior to pronouncement of the judgment.
- (5) The applicant and the indicted accused shall, upon application, be granted legal aid under the same provisions as in civil litigation as soon as public charges have been preferred. Section 121 subsection (2) of the Code of Civil Procedure shall be applicable with the proviso that, if the indicted accused has defence counsel, the latter shall be assigned to him; if the applicant avails himself of the assistance of an attorney in the main proceedings, the latter shall be assigned to him. The court seized of the case shall be competent to decide; the decision shall not be contestable.

Section 405 [Dispensing with a Decision]

- (1) Upon application by the aggrieved person or his heir, and of the accused, the court shall include, in the court record, a settlement in respect of the claims arising out of the criminal offence. Upon unanimous application by the persons named in the first sentence, the court shall make a proposal for a settlement.
- (2) The court of civil jurisdiction in whose district the criminal court of first instance is located shall have jurisdiction to decide upon objections to the legal effect of the settlement.

Section 406 [Decision]

- (1) The court shall grant the application in the judgment in which the accused is pronounced guilty of a criminal offence or in which a measure of reform and prevention is ordered in respect of such criminal offence, so far as the application is based on such criminal offence. The decision may be limited to the ground for, and part of, the asserted claim; section 318 of the Code of Civil Procedure shall apply *mutatis mutandis*. The court shall dispense with a decision if the application is

inadmissible or insofar as it appears unfounded. In all other cases the court may dispense with a decision only if the application is not suitable to being dealt with in criminal proceedings even after taking into account the legitimate interests of the applicant. An application will be unsuited to being dealt with in criminal proceedings particularly where its further examination, even where a decision is only conceivable on the ground for, or a part of, the asserted claim, would considerably protract the proceedings. Where the applicant has asserted a claim in respect of damages for pain and suffering (section 253 subsection (2) of the Civil Code) a decision may only be dispensed with in accordance with the third sentence.

(2) If the accused wholly or partly acknowledges the claim asserted against him he shall be sentenced in pursuance of the acknowledgment.

(3) The decision on the application shall be equivalent to a judgment in civil litigation. The court shall declare the decision to be provisionally enforceable; sections 708 to 712, as well as sections 714 to 716 of the Code of Civil Procedure shall apply *mutatis mutandis*. Insofar as the claim has not been awarded, it may be asserted elsewhere. If a final judgment has been given on the ground for the claim, the hearing concerning the amount shall take place before the competent civil court pursuant to section 304 subsection (2) of the Code of Civil Procedure.

(4) The applicant shall be provided with a copy of the judgment with reasons, or with an excerpt thereof.

(5) If the court is considering dispensing with a decision on the application, it shall inform the participants to the proceedings thereof as soon as possible. As soon as the court considers, after hearing the applicant, that the requirements for a decision on the application are not fulfilled, it shall issue an order dispensing with a decision on the claim.

Section 406a **[Appellate Remedy]**

(1) An immediate complaint against the order dispensing with a decision on the application pursuant to Section 406 subsection (5), second sentence, shall be admissible if the application was made prior to commencement of the main hearing and as long as proceedings have not been concluded by a final decision at that instance. In all other cases, the applicant shall not be entitled to an appellate remedy.

(2) If the court grants the application, the defendant may contest the decision by an appellate remedy which would otherwise be admissible, even without contesting that part of the judgment which concerns the criminal offence. In this case the decision on the appellate remedy may be given in an order at a sitting held *in camera*. If the admissible appellate remedy is the appeal on fact and law, then upon an application by the defendant or the applicant an oral hearing of the participants shall be held.

(3) If the conviction is quashed and the defendant is found not guilty of a criminal offence and no measure of reform and prevention is ordered against him in respect of the decision on which the application was founded, the decision granting the application shall be quashed. This shall apply even if the judgment has not been contested in this respect.

Section 406b **[Execution]**

Execution shall be governed by the provisions which apply to the execution of judgments and settlements in civil litigation. The court of civil jurisdiction in whose

district the criminal court of first instance is located shall have jurisdiction over proceedings pursuant to sections 323, 731, 767, 768, and 887 to 890 of the Code of Civil Procedure. Objections which concern the claim declared in the judgment itself shall only be admissible to the extent that the reasons on which they are based arose after conclusion of the main hearing at first instance and, if the court hearing the appeal on fact and law has given its decision, after conclusion of the main hearing in the appeal on fact and law.

Section 406c

[Reopening]

(1) The application to reopen the proceedings may be limited by the defendant for the purpose of obtaining an essentially different decision on the claim. The court shall then decide in an order without a new main hearing.

(2) Section 406a subsection (3) shall apply *mutatis mutandis* if the application to reopen the proceedings is directed only against that part of the judgment which concerns the criminal offence.

CHAPTER IV

OTHER RIGHTS OF THE AGGRIEVED PERSON

Section 406d

[Notification of the Aggrieved Person]

(1) The aggrieved person shall, upon application, be notified of the termination of the proceedings and of the outcome of the court proceedings to the extent that they relate to him.

(2) Upon application, the aggrieved person shall be notified as to whether

1. the convicted person has been ordered to refrain from contacting or consorting with the aggrieved person;
2. custodial measures have been ordered or terminated in respect of the accused or the convicted person, or whether for the first time a relaxation of the conditions of detention or leave has been granted, if he can show a legitimate interest and if there is no overriding interest meriting protection of the person concerned in excluding the notification; in the cases referred to in Section 395 subsection (1), numbers 1 to 5, as well as in the cases referred to in Section 395 subsection (3), in which the aggrieved person was admitted as private accessory prosecutor, there shall be no requirement to show a legitimate interest;
3. the convicted person is again granted a relaxation of the conditions of detention or leave if a legitimate interest can be shown or is evident and if there is no overriding interest meriting protection of the convicted person in excluding the notification.

(3) Notification need not be furnished if delivery is not possible at the address which the aggrieved person indicated. If the aggrieved person has selected an attorney as counsel, if counsel has been assigned to him or if he is legally represented by such counsel, Section 145a shall apply *mutatis mutandis*.

Section 406e

[Inspection of Files]

- (1) An attorney may inspect, for the aggrieved person, the files that are available to the court or the files that would be required to be submitted to it if public charges were preferred, and may inspect officially impounded pieces of evidence, if he can show a legitimate interest in this regard. In the cases referred to in Section 395, there shall be no requirement to show a legitimate interest.
- (2) Inspection of the files shall be refused if overriding interests worthy of protection, either of the accused or of other persons, constitute an obstacle thereto. It may be refused if the purpose of the investigation, also in another criminal proceeding, appears to be jeopardized. It may also be refused if the proceedings could be considerably delayed thereby, unless, in the cases designated in Section 395, the public prosecution office has noted the conclusion of the investigations in the files.
- (3) Upon application and unless important reasons constitute an obstacle, the attorney may be handed the files, but not the pieces of evidence, to take to his office or private premises. The decision shall not be contestable.
- (4) The public prosecution office shall decide whether to grant inspection of the files in preparatory proceedings and after final conclusion of the proceedings; in other cases the presiding judge of the court seized of the case shall give this decision. An application may be made for a decision by the court competent pursuant to Section 162, appealing against the decision made by the public prosecution office pursuant to the first sentence. Sections 297 to 300, 302, 306 to 309, 311a and 473a shall apply *mutatis mutandis*. The court's decision shall be incontestable as long as the investigations have not yet been concluded. These decisions shall not be given with reasons if their disclosure might endanger the purpose of the investigation.
- (5) Under the conditions in subsection (1) the aggrieved person may be given information and copies from the files; subsections (2) and (4) and Section 478 subsection (1), third and fourth sentences, shall apply *mutatis mutandis*.
- (6) Section 477 subsection (5) shall apply *mutatis mutandis*.

Section 406f

[Assistance and Representation of the Aggrieved Person]

- (1) Aggrieved persons may avail themselves of the assistance of an attorney or be represented by such attorney. Legal counsel appearing at the aggrieved person's examination shall be permitted to be present.
- (2) At the examination of aggrieved persons, a person whom they trust who has appeared at the examination shall, at their request, be permitted to be present, except where this could endanger the purpose of the investigation. The person conducting the examination shall decide; the decision shall not be contestable. The reasons for denying the request shall be documented on the files.

Section 406g

[Assistance for an Aggrieved Person Entitled to Private Accessory Prosecution]

- (1) Persons who are entitled to join the proceedings as a private accessory prosecutor pursuant to Section 395 may also avail themselves of the assistance of an attorney or be represented by such attorney, prior to preferment of public charges and without declaration of joinder. They shall be entitled to be present at the main hearing, even if they are to be examined as witnesses. If it is in doubt whether a person is entitled to private accessory prosecution, the court shall decide upon hearing the person and the public prosecution office whether the person is entitled to be present; the decision shall be incontestable. Persons entitled to private

accessory prosecution shall be notified of the date set down for the main hearing if they have so requested.

(2) The attorney of the person entitled to private accessory prosecution shall be entitled to be present at the main hearing; subsection (1), third sentence, shall apply *mutatis mutandis*. He shall be notified of the date set down for the main hearing if his selection has been notified to the court or if he has been appointed as counsel. The first and second sentences shall apply *mutatis mutandis* at judicial examinations and judicial inspections, unless the presence or notification of the attorney would jeopardize the purpose of the investigation.

(3) Section 397a shall apply *mutatis mutandis* to

1. the appointment of an attorney and
2. the granting of legal aid for calling in an attorney.

In preparatory proceedings the court which would be competent pursuant to Section 162 shall decide.

(4) Upon application by the person entitled to join the proceedings as a private accessory prosecutor an attorney may, in the cases referred to in Section 397a subsection (2), be appointed as counsel provisionally if

1. this is imperative for special reasons,
2. the assistance of counsel is urgently required and
3. the granting of legal aid appears to be possible, but a decision cannot be expected on it in time.

Section 142 subsection (1) and Section 162 shall apply *mutatis mutandis* to the appointment. The appointment shall end unless an application for granting legal aid is filed within a time limit to be set by the judge, or if the granting of legal aid is refused.

Section 406h **[Information as to Rights]**

(1) Aggrieved persons shall be informed as early as possible, as a rule in writing, and as far as possible in a language they understand, of their rights following from Sections 406d to 406g and, in particular, shall also be informed of the fact that they may,

1. under the prerequisites of Sections 395 and 396 of this statute or section 80 subsection (3) of the Youth Courts Act, join the public prosecution as private accessory prosecutors and thereby apply, pursuant to Section 397a, to have legal counsel appointed for them or to have legal aid granted for calling in such counsel;
2. in accordance with Sections 403 to 406c of this statute and section 81 of the Youth Courts Act, assert a property claim arising out of the criminal offence in criminal proceedings;
3. in accordance with the Crime Victims Compensation Act, assert a claim for benefits;
4. in accordance with the Act on Civil Law Protection against Violent Acts and Stalking, apply for the issue of orders against the accused; and

5. obtain support and assistance through victim support institutions, e.g. in the form of counselling or psychosocial support during the proceedings.

Where the prerequisites for a certain right have obviously not been fulfilled in a particular case, the information concerned may be dispensed with. There shall be no duty to inform aggrieved persons who have not specified any address at which documents can be served. The first and third sentences shall also apply to relatives and heirs of aggrieved persons, insofar as they are entitled to the corresponding rights.

PART SIX SPECIAL TYPES OF PROCEDURE

CHAPTER I PROCEDURE FOR PENAL ORDERS

Section 407 [Admissibility]

(1) In proceedings before the criminal court judge and in proceedings within the jurisdiction of a court with lay judges, the legal consequences of the offence may, in the case of misdemeanours, be imposed, upon written application by the public prosecution office, in a written penal order without a main hearing. The public prosecution office shall file such application if it does not consider a main hearing to be necessary given the outcome of the investigations. The application shall refer to specific legal consequences. The application shall constitute preferment of the public charges.

(2) A penal order may impose only the following legal consequences of the offence, either on their own or in combination:

1. fine, warning with sentence reserved, driving ban, forfeiture, confiscation, destruction, making something unusable, announcement of the decision, and imposition of a regulatory fine against a legal person or an association,
2. withdrawal of permission to drive, where the bar does not exceed two years,
- 2a. prohibition of the keeping or care of, trade in or other professional contact with animals of any kind or of a certain kind for the duration of one to three years, as well as
3. dispensing with punishment.

Where the indicted accused has defence counsel, imprisonment not exceeding one year may also be imposed, provided its execution is suspended on probation.

(3) The court shall not be required to give the indicted accused a prior hearing (Section 33 subsection (3)).

Section 408 [Judicial Decisions]

(1) If the presiding judge of the court with lay judges considers the criminal court judge to have jurisdiction, he shall, through the public prosecution office, refer the case to the latter; the ruling shall be binding on the criminal court judge, and the public prosecution office shall be entitled to lodge an immediate complaint. If the criminal court judge considers the court with lay judges to have jurisdiction, he shall, through the public prosecution office, submit the files to the presiding judge for a decision.

(2) If the judge does not consider that there are sufficient grounds for suspecting the indicted accused, he shall refuse to issue a penal order. The decision shall be equivalent to a ruling declining to open the main proceedings (Section 204, Section 210 subsection (2), Section 211).

(3) The judge shall comply with the application of the public prosecution office if he has no reservations about issuing the penal order. He shall set down a date for the main hearing if he has reservations about deciding the case without a main hearing, if he wishes to deviate from the legal assessment in the application to issue the penal order, or if he wishes to impose a legal consequence other than those applied for and the public prosecution office insists on its application. In addition to the summons, the defendant shall be provided with a copy of the application to issue a penal order, not including the legal consequence applied for.

Section 408a

[Application for Penal Order After Opening of the Main Proceedings]

(1) In proceedings before the criminal court judge and before the court with lay judges, where the main proceedings have already been opened, the public prosecution office may apply for issuance of a penal order if the conditions in Section 407 subsection (1), first and second sentences, obtain, and if the defendant's failure to appear or his absence or another important reason constitutes an obstacle to the main hearing being conducted. The public prosecutor may make the application orally at the main hearing; the essential content of the application for issuance of a penal order shall be included in the record made at the sitting. Section 407 subsection (1), fourth sentence, and Section 408 shall not apply.

(2) The judge shall grant the application if the conditions in Section 408 subsection (3), first sentence, obtain. In other cases he shall refuse the application in an incontestable ruling and continue the main proceedings.

Section 408b

[Appointment of Defence Counsel]

Where the judge is considering granting the public prosecution office's application to issue a penal order with the legal consequence set out in Section 407 subsection (2), second sentence, he shall appoint defence counsel for the indicted accused if he does not yet have defence counsel. Section 141 subsection (3), shall apply *mutatis mutandis*.

Section 409

[Content of the Penal Order]

(1) The penal order shall contain

1. the personal identification data of the defendant and of any other persons involved;
2. the name of the defence counsel;
3. the designation of the offence the defendant is charged with, time and place of commission and designation of the statutory elements of the criminal offence;
4. the applicable provisions by section, subsection, number, letter and designation of the statute;
5. the evidence;

6. the legal consequences imposed;
7. information on the possibility of filing an objection and the relevant time limit and form of objection, as well as an indication that the penal order shall become effective and executable unless an objection is lodged against it pursuant to Section 410.

If a sentence of imprisonment is imposed on the defendant, or if he is given a warning with sentence reserved, or if a driving ban is imposed on him, he shall be instructed in accordance with Section 268a subsection (3), or Section 268c, first sentence. Section 111i subsection (2), as well as Section 267 subsection (6), second sentence, shall apply *mutatis mutandis*.

(2) The penal order shall also be communicated to the defendant's statutory representative.

Section 410

[Time Limit for Lodging Objections; Entry into Force]

- (1) Within two weeks following service of the penal order the defendant may lodge an objection against the penal order at the court which issued it, either in writing or orally to be recorded by the registry. Sections 297 to 300 and Section 302 subsection (1), first sentence, and subsection (2) shall apply *mutatis mutandis*.
- (2) The objection may be limited to certain points of complaint.
- (3) Where objections to the penal order are not lodged in time the order shall be equivalent to a judgment that has entered into force.

Section 411

[Dismissal for Inadmissibility; Date of Main Hearing]

- (1) Where the objection is lodged late or is otherwise inadmissible it shall be dismissed in an order without a main hearing; an immediate complaint shall be admissible against the order. In all other cases a date shall be set down for the main hearing. Where the defendant has limited his complaint to the level of daily units in respect of a fine imposed, the court may, with the consent of the accused, the defence counsel and the public prosecution office, decide in an order without a main hearing; no deviation from the sentence imposed in the penal order shall be permissible to the detriment of the defendant; an immediate complaint shall be admissible in respect of the order.
- (2) The defendant may be represented at the main hearing by defence counsel provided with a written power of attorney. Section 420 shall apply.
- (3) The complaint and the objection may be withdrawn at any time prior to pronouncement of the judgment by the court of first instance. Section 303 shall apply *mutatis mutandis*. Where the penal order was issued in proceedings pursuant to Section 408a, the complaint cannot be withdrawn.
- (4) Where an objection has been lodged, the court when giving judgment shall not be bound by the decision contained in the penal order.

Section 412

[Non-Appearence of the Defendant]

If at the beginning of the main hearing the defendant has not appeared and is not represented by defence counsel and no sufficient excuse has been given for the non-appearance, Section 329 subsections (1), (3) and (4) shall apply *mutatis mutandis*. If the statutory representative has lodged an objection, Section 330 shall also apply *mutatis mutandis*.

CHAPTER II PROCEDURE FOR PREVENTIVE DETENTION

Section 413 [Conditions]

If the public prosecution office does not conduct criminal proceedings because of the perpetrator's lack of criminal responsibility or his unfitness to stand trial, it may file an application for an order imposing measures of reform and prevention on their own, if this is admissible by virtue of a statute and the order is to be anticipated in the light of the outcome of the investigations (procedure for preventive detention).

Section 414 [Proceedings]

- (1) The provisions governing criminal proceedings shall apply to preventive detention proceedings *mutatis mutandis* unless otherwise provided.
- (2) The application shall be equivalent to public charges. Instead of an indictment a written application shall be submitted complying with the requirements for an indictment. The application shall indicate the measure of reform and prevention applied for by the public prosecution office. If the judgment does not impose a measure of reform and prevention the application shall be refused.
- (3) An expert shall be given the opportunity in the preliminary proceedings to prepare the opinion to be rendered at the main hearing.

Section 415 [Main Hearing Without the Accused]

- (1) If in the preventive detention proceedings the appearance of the accused in court is impossible due to his condition or is inappropriate for reasons of public order or security, the court may conduct the main hearing without the accused being present.
- (2) In this case the accused shall be examined prior to the main hearing by a commissioned judge with the assistance of an expert. The public prosecution office, the accused, defence counsel and the statutory representative shall be informed of the date set for the examination. It shall not be necessary for the public prosecutor, defence counsel and the statutory representative to be present.
- (3) If the condition of the accused so requires, or if the proper conduct of the main hearing is otherwise not possible, then in preventive detention proceedings after examination of the accused on the charges, the court may conduct the main hearing even if the accused is not, or is only temporarily, present.
- (4) If a main hearing takes place without the accused, his previous statements contained in a judicial record may be read out. The record of his prior examination pursuant to subsection (2), first sentence, shall be read out.
- (5) An expert shall be examined at the main hearing concerning the accused's condition. If the expert has not previously examined the accused he shall be given the opportunity for an examination prior to the main hearing.

Section 416 [Transition to Criminal Proceedings]

- (1) If, in the preventive detention proceedings, the accused's criminal responsibility becomes apparent after the main proceedings were opened and if the court has no jurisdiction over the criminal proceedings, it shall declare, in an order, that it lacks jurisdiction and shall refer the matter to the competent court. Section 270 subsections (2) and (3) shall apply *mutatis mutandis*.

(2) If, in the preventive detention proceedings the accused's criminal responsibility becomes apparent after the main proceedings were opened and if the court also has jurisdiction over the criminal proceedings, the accused shall be informed of the new legal situation and shall be given the opportunity to defend himself. If he states that he has not sufficiently prepared his defence, the main hearing shall be suspended upon his application. If pursuant to Section 415 the main hearing has been held in the accused's absence, those parts of the main hearing shall be repeated during which the accused was not present.

(3) Subsections (1) and (2) shall apply *mutatis mutandis* if, in the preventive detention proceedings, it becomes apparent after the main proceedings were opened that the accused is fit to stand trial and that the preventive detention proceedings are being conducted because of his unfitness to stand trial.

CHAPTER IIa ACCELERATED PROCEDURE

Section 417

[Application by the Public Prosecution Office]

In proceedings before the criminal court judge and the court with lay judges the public prosecution office shall file an application, in writing or orally, for a decision to be taken in an accelerated procedure if, given the simple factual situation or the clarity of the evidence, the case is suited to an immediate hearing.

Section 418

[Main Hearing]

(1) Where the public prosecution office files the application, the main hearing shall be held immediately or at short notice, without a decision to open main proceedings being required. No more than six weeks should lie between receipt of the application by the court and commencement of the main hearing.

(2) The accused shall be summoned only if he does not appear at the main hearing of his own volition or is not brought before the court. He shall be informed in the summons of the charges against him. The time limit set in the summons shall be twenty-four hours.

(3) It shall not be necessary to file a bill of indictment. Where such bill is not filed, the charges shall be preferred orally at the beginning of the main hearing and their essential content shall be included in the record made at the sitting. Section 408a shall apply *mutatis mutandis*.

(4) Where imprisonment of at least six months is to be anticipated, defence counsel shall be appointed for an accused who does not yet have defence counsel for the accelerated proceedings before the Local Court.

Section 419

[Maximum Sentence; Decision]

(1) The criminal court judge or the court with lay judges shall grant the application if the case is suitable to heard using this procedure. A prison sentence exceeding one year or a measure of reform and prevention shall not be imposed in such proceedings. Withdrawal of permission to drive shall be admissible.

(2) Adjudication using the accelerated procedure may be refused in the main hearing until such time as judgment is pronounced. The ruling shall not be contestable.

(3) Where adjudication using the accelerated procedure is refused, the court shall decide to open main proceedings if there are sufficient grounds for suspecting the indicted accused of having committed a criminal offence (Section 203); where main proceedings are not opened and adjudication using the accelerated procedure is refused, submission of a new bill of indictment may be dispensed with.

Section 420
[Taking of Evidence]

- (1) Examination of a witness, expert or co-accused may be replaced by reading out records of an earlier examination as well as of documents containing written statements originating from them.
- (2) Statements from public authorities and other agencies about their own observations, investigations and findings made in an official context and about those made by their staff may be read out, also in cases where the conditions of Section 256 are not fulfilled.
- (3) The procedure pursuant to subsections (1) and (2) shall require the consent of the defendant, his defence counsel and the public prosecution office if they are present at the main hearing.
- (4) In proceedings before the criminal court judge, the latter shall, notwithstanding Section 244 subsection (2), determine the extent to which evidence shall be taken.

Sections 421 to 429
(Deleted)

CHAPTER III
PROCEDURE CONCERNING CONFISCATION AND SEIZURE OF PROPERTY

Section 430
[Waiver of Confiscation]

- (1) If confiscation is deemed insignificant in addition to the anticipated penalty or measure of reform and prevention, and if the proceedings so far as they relate to confiscation are considered to be disproportionate or to make a decision on the other legal consequences of the offence unreasonably difficult, the court may, with the public prosecution office's consent, limit prosecution of the offence to the other legal consequences at any stage of the proceedings.
- (2) The public prosecution office may make such limitation in the preparatory proceedings. The limitation shall be recorded in the files.
- (3) The court may revoke the limitation at any stage of the proceedings. An application to this effect by the public prosecution office shall be granted. If the limitation is revoked again, Section 265 shall apply *mutatis mutandis*.

Section 431
[Participation of Third Persons in Proceedings]

- (1) If in the criminal proceedings a decision has to be made concerning confiscation of an object and it appears to be credible that
1. a person other than the indicted accused owns, or is entitled to, the object, or
 2. another person has some other right to the object, the extinguishment of which could be ordered in the event of confiscation (Section 74e subsection (2), second and third sentences, of the Criminal Code),

the court shall order that the other person shall participate in the proceedings as far as confiscation is concerned (person with an interest in the confiscation). The court may dispense with the order if due to certain facts it may be assumed that participation is not feasible. The court may also dispense with the order if participation is required on the part of a party, association, or institution outside the territorial scope of this statute pursuing action directed against the existence or security of the Federal Republic of Germany or against any constitutional principles designated in section 92 subsection (2) of the Criminal Code, and if it is to be assumed, in the light of the circumstances, that such party, association or institution, or one of its agents, made the object available to promote such action; in this case it shall be sufficient to hear the owner of the object or the person authorized to exercise the right prior to the decision on confiscation of the object, if this is feasible. (2) The court may order that participation shall not extend to the question of the indicted accused's guilt if

1. confiscation in the case of subsection (1), number 1, is possible only on the condition that the indicted accused owns, or is entitled to, the object, or
2. the object, in the light of the circumstances that may substantiate confiscation, can be taken away permanently, without compensation, from the person with an interest in the confiscation also by virtue of legal provisions outside the criminal law.

(3) If a decision has to be given against a legal person or an association (section 75, in conjunction with section 74c, of the Criminal Code) on confiscation of an equivalent sum of money, the court shall order their participation.

(4) Participation in the proceedings may be ordered at any time prior to pronouncement of confiscation and, if an admissible appeal on fact and law has been filed, at any time prior to completion of the closing speeches in appellate proceedings on fact and law.

(5) The decision ordering participation in the proceedings cannot be contested. If participation in the proceedings is refused or an order is made pursuant to subsection (2), an immediate complaint shall be admissible.

(6) If a person states before the court or the public prosecution office, either in writing or orally for the record, or before any other authority in writing that he does not want to object to the confiscation of the object, his participation in the proceedings shall not be ordered or the order shall be revoked.

(7) The course of the proceedings shall not be delayed by participation in the proceedings.

Section 432

[Hearing a Person with an Interest in Confiscation]

(1) If during the preparatory proceedings indications arise that a person might have an interest in the confiscation, he shall be heard if this appears feasible. Section 431 subsection (1), third sentence, shall apply *mutatis mutandis*.

(2) If a person who might have an interest in the confiscation states that he wants to object to the confiscation and if it appears credible that he has a right to the object, the provisions concerning the examination of the accused shall, in the event of his examination, apply *mutatis mutandis* if it is conceivable that he might become a participant in the proceedings.

Section 433

[Rights and Duties of a Person with an Interest in Confiscation]

- (1) With the opening of the main proceedings, a person with an interest in the confiscation shall have the rights which a defendant enjoys unless otherwise provided by this statute. In accelerated proceedings this shall apply from the beginning of the main hearing, and in proceedings for a penal order, from the issuance of the penal order.
- (2) The court may order the personal appearance of a person with an interest in the confiscation for the purpose of clarifying the facts. If such person's personal appearance has been ordered and he fails to appear without sufficient excuse, the court may order that he be brought before it if a summons has been served upon him also drawing his attention to this possibility.

Section 434

[Representation by Defence Counsel]

- (1) A person with an interest in the confiscation may at any stage of the proceedings be represented, on the basis of a written power of attorney, by an attorney or any other person who may be chosen as defence counsel. The provisions in Sections 137 to 139, 145a to 149, and 218 applying to the defence shall apply *mutatis mutandis*.
- (2) The court may assign to a person with an interest in the confiscation an attorney or another person who may be appointed as defence counsel, if the factual or legal situation is complex or if he cannot exercise his rights himself.

Section 435

[Summons to the Main Hearing]

- (1) Notification of the date set down for the main hearing shall be served on the person with an interest in the confiscation; Section 40 shall apply *mutatis mutandis*.
- (2) On notification of the date of the hearing, if he is a participant in the proceedings, he shall be furnished with the bill of indictment and, in the cases referred to in Section 207 subsection (2), with the order opening proceedings.
- (3) At the same time, the person with an interest in the confiscation shall be advised of the fact that

1. the hearing may be conducted in his absence and
2. the decision given on the confiscation shall apply to him as well.

Section 436

[Non-Appearence at the Main Hearing]

- (1) If a person with an interest in the confiscation fails to appear at the main hearing despite being properly informed of the date of the hearing, the hearing may be conducted in his absence; Section 235 shall not be applicable.
- (2) Section 244 subsection (3), second sentence, and subsections (4) to (6) shall not apply to applications made by the person with an interest in the confiscation for evidence to be taken regarding the question of the defendant's guilt.
- (3) If the court orders confiscation on the basis of circumstances constituting an obstacle to compensation of the person with an interest in the confiscation, it shall also declare that such person shall not be entitled to compensation. This shall not apply if the court considers compensation of such person to be necessary because it would constitute undue hardship to refuse such compensation; in this case the court shall also determine the amount of compensation (section 74f subsection (3))

of the Criminal Code). The court shall, in advance, advise persons with an interest in the confiscation of the possibility of such a decision and shall give them the opportunity to make submissions.

(4) If a person with an interest in the confiscation was neither present nor represented when the judgment was pronounced, the judgment shall be served on him. The court may order parts of the judgment not concerning the confiscation to be struck out.

Section 437

[Appellate Proceedings]

(1) In appellate proceedings the examination as to whether confiscation is justified with respect to a person with an interest in the confiscation shall extend to the verdict of guilt in the contested judgment only if such person makes objections in this respect and, through no fault of his own, was not heard concerning the question of guilt earlier in the proceedings. If the examination also extends to the question of guilt, the court shall refer to the findings of guilt unless such person's submissions require renewed examination.

(2) Subsection (1) shall not apply to appellate proceedings on fact and law if at the same time a decision has to be given with respect to the verdict of guilt upon an appellate remedy filed by another participant.

(3) In appellate proceedings on law, objections to the verdict of guilt shall be made within the time limit set for the submission of grounds of appeal.

(4) Where it is only the decision on the amount of compensation that is contested, a decision can be given on the appellate remedy in a ruling unless the participants object. The court shall, in advance, advise them of the possibility of such procedure and of making an objection, and shall give them the opportunity to make submissions.

Section 438

[Confiscation by Penal Order]

(1) If confiscation is ordered by penal order, the penal order shall also be served upon persons with an interest in the confiscation; Section 435 subsection (3), number 2, shall apply *mutatis mutandis*.

(2) If a decision is required only on the objection made by a person with an interest in the confiscation, Section 439 subsection (3), first sentence, and Section 441 subsections (2) and (3) shall apply *mutatis mutandis*.

Section 439

[Subsequent Proceedings]

(1) If confiscation of an object has been ordered with binding effect and if someone substantiates

1. that at the time when the decision entered into force he had a right to the object, which right is negatively affected by the decision or no longer exists; and
2. that he could not exercise the rights of a person with an interest in the confiscation through no fault of his own, either in the proceedings at first instance or in the appellate proceedings on fact and law,

he may claim in subsequent proceedings that the confiscation, insofar as it relates to him, was not justified; Section 360 shall apply *mutatis mutandis*.

- (2) The application for subsequent proceedings shall be made within a month after the day on which the applicant acquired knowledge of the final decision. The application shall be inadmissible if two years have elapsed since the decision entered into force and its execution has been effected.
- (3) The court shall not examine the verdict of guilt if, in the light of the circumstances that substantiated the confiscation, an order pursuant to Section 431 subsection (2) would have been admissible in criminal proceedings. In all other cases Section 437 subsection (1) shall apply *mutatis mutandis*.
- (4) If the right claimed by the applicant is not proved, the application shall be unfounded.
- (5) Prior to the decision, the court may revoke the confiscation order with the public prosecution office's consent, if the subsequent proceedings are considered disproportionate.
- (6) Reopening of the proceedings pursuant to Section 359, number 5, for the purpose of making objections pursuant to subsection (1) shall be precluded.

Section 440

[Independent Confiscation Proceedings]

- (1) The public prosecution office and the private prosecutor may file the application to order confiscation independently if this is admissible by virtue of a statute and the order is to be anticipated in view of the outcome of the investigations.
- (2) The object must be designated in the application. The facts substantiating the admissibility of the independent confiscation shall also be stated. Otherwise Section 200 shall apply *mutatis mutandis*.
- (3) Sections 431 to 436 and 439 shall apply *mutatis mutandis*.

Section 441

[Jurisdiction in Subsequent and in Independent Confiscation Proceedings]

- (1) The decision on confiscation in subsequent proceedings (Section 439) shall be given by the court of first instance; the decision on independent confiscation (Section 440) shall be given by the court which would be competent in the case of criminal prosecution of a particular person. For the decision on independent confiscation, the court in whose district the object has been secured shall also have local jurisdiction.
- (2) The court shall give its decision in a ruling, against which an immediate complaint shall be admissible.
- (3) A decision on an admissible application shall, however, be given in a judgment after an oral hearing if the public prosecution office or any other participant so applies, or if the court so orders; the provisions governing the main hearing shall apply *mutatis mutandis*. Whoever filed an admissible appeal on fact and law against the judgment may no longer file an appeal on law against the appellate judgment on fact and law.
- (4) If the decision has been given in a judgment, Section 437 subsection (4) shall apply *mutatis mutandis*.

Section 442

[Forfeiture; Destruction; Rendering Unusable]

- (1) Forfeiture, destruction, rendering something unusable and eliminating a situation that is illegal shall be equivalent to confiscation within the meaning of Sections 430 to 441.

(2) If forfeiture pursuant to section 73 subsection (3) or section 73a of the Criminal Code is directed against a person other than the indicted accused the court shall order that such person shall participate in the proceedings. He may state his objections to the order of forfeiture in subsequent proceedings, if through no fault of his own he was not in a position, either in proceedings at first instance or in appellate proceedings on fact and law, to exercise the rights of a participant in the proceedings. If under these conditions subsequent proceedings are applied for, execution measures shall not be taken against the applicant prior to the conclusion of such proceedings.

Section 443 **[Seizure of Property]**

(1) Property or individual items of property may be seized, if located within the territorial scope of this statute and if they belong to an accused against whom public charges were preferred or a warrant of arrest was issued for a criminal offence pursuant to

1. sections 81 to 83 subsection (1), section 89a, sections 94 or 96 subsection (1), sections 97a or 100, sections 129 or 129a, also in conjunction with section 129b subsection (1), of the Criminal Code;
2. one of the provisions referred to in section 330 subsection (1), first sentence, of the Criminal Code, provided that the accused is suspected of intentionally endangering life or limb of another or another person's property of considerable value, or under the conditions in section 330 subsection (1), second sentence, numbers 1 to 3, of the Criminal Code, or pursuant to section 330 subsection (2) or section 330a subsections (1) and (2) of the Criminal Code;
3. sections 51, 52 subsection (1), numbers 1 and 2, letters c and d, or subsections (5) and (6) of the Weapons Act, sections 17 and 18 of the Foreign Trade and Payments Act, if the offence was committed wilfully, or pursuant to section 19 subsections (1) to (3), section 20 subsections (1) or (2), each also in conjunction with section 21 or section 22a subsections (1) to (3) of the War Weapons Control Act; or
4. a provision referred to in section 29 subsection (3), second sentence, number 1, of the Narcotics Act under the conditions set out therein or a criminal offence pursuant to sections 29a, section 30 subsection (1), numbers 1, 2 and 4, section 30a or section 30b of the Narcotics Act.

The seizure shall also include any property subsequently acquired by the accused. The seizure shall be revoked before conclusion of the main hearing at first instance.

(2) Seizure shall be ordered by the judge. In exigent circumstances, the public prosecution office can make a provisional order for seizure; the provisional order shall become ineffective if it is not confirmed by the judge within three working days.

(3) The provisions in Sections 291 to 293 shall apply *mutatis mutandis*.

CHAPTER IV **PROCEDURE FOR IMPOSING A REGULATORY FINE AGAINST LEGAL PERSONS** **AND AGAINST ASSOCIATIONS**

Section 444

(1) If in criminal proceedings a decision has to be given on imposition of a regulatory fine against a legal person or an association (section 30 of the Regulatory Offences Act), the court shall order their participation in the proceedings in respect of the offence; Section 431 subsections (4) and (5) shall apply *mutatis mutandis*.

(2) The legal person or the association shall be summoned to the main hearing; if their representative fails to appear with no sufficient excuse, the hearing may be conducted in their absence. Sections 432 to 434, Section 435 subsections (2) and (3), number 1, Section 436 subsections (2) and (4), Section 437 subsections (1) to (3), Section 438 subsection (1) shall apply to their participation in the proceedings and, insofar as a decision has to be given only on their objection, Section 441 subsections (2) and (3), shall apply *mutatis mutandis*.

(3) Sections 440 and 441 subsections (1) to (3) shall apply to the independent proceedings *mutatis mutandis*. The court in whose district the legal person or the association has its seat or a branch office shall also have local jurisdiction.

**Sections 445 to 448
(Deleted)**

**PART SEVEN
EXECUTION OF SENTENCE AND COSTS OF PROCEEDINGS**

**CHAPTER I
EXECUTION OF SENTENCE**

**Section 449
[Execution]**

Criminal judgments shall not be enforceable before they have entered into force.

**Section 450
[Crediting Remand Detention and Withdrawal of Driver's Licence]**

(1) Where a defendant has undergone remand detention after he waived the right to seek an appellate remedy or after he has withdrawn an appellate remedy, or after the time limit for seeking an appellate remedy has expired without the defendant having made a statement, the period of such detention shall be credited in full against an enforceable prison sentence.

(2) If, pursuant to the judgment, the impounding, securing, or seizure of the driver's licence pursuant to Section 111a subsection (5), second sentence, has continued, such period shall be credited in full from the duration of the driving ban (section 44 of the Criminal Code).

**Section 450a
[Crediting Detention Pending Extradition]**

(1) The deprivation of liberty undergone by the convicted person abroad in extradition proceedings for the purpose of execution of sentence shall also be credited against the enforceable prison sentence. This shall also apply if the convicted person has been extradited for the purpose of criminal prosecution.

(2) In the case of extradition for the purpose of execution of more than one sentence, the deprivation of liberty undergone abroad shall be credited against the highest sentence, in the case of sentences of equal severity against the sentence which, after the convicted person's placement, was executed first.

(3) The court may, upon application by the public prosecution office, order that no, or only partial, credit shall be given, where such credit is not justified in view of the

convicted person's conduct after pronouncement of the judgment in which the underlying findings of fact were last examined. If the court gives such an order, credit shall not be given in any other proceedings, for deprivation of liberty undergone abroad, so far as its duration does not exceed the sentence.

Section 451

[Executing Authorities]

- (1) The sentence shall be executed by the public prosecution office as the executing authority on the basis of a certified copy of the operative provisions of the judgment containing an endorsement of enforceability, to be issued by the registry clerk.
- (2) The prosecutors at the Local Courts shall be authorized to execute the sentence only insofar as such authority has been conferred on them by the *Land* department of justice.
- (3) The public prosecution office which is the executing authority shall exercise the duties incumbent on the public prosecution office also vis-à-vis the criminal chamber responsible for execution of sentences at another Regional Court. It may assign its duties to the public prosecution office competent at that court if this appears to be imperative in the interest of the convicted person and if that public prosecution office gives its consent.

Section 452

[Pardoning Power]

The power of pardoning shall be vested in the Federation in cases decided at first instance in the exercise of jurisdiction by the Federation; in all other cases it shall be vested in the *Länder*.

Section 453

[Subsequent Decision on Probationary Suspension of Sentence or Warning with Sentence Reserved]

- (1) Subsequent decisions relating to suspension of a sentence on probation or a warning with sentence reserved (sections 56a to 56g, 58, 59a, 59b of the Criminal Code) shall be given by the court, with no oral hearing, in an order. The public prosecution office and the defendant shall be heard. Section 246a subsection (2) and Section 454 subsection (2), fourth sentence, shall apply *mutatis mutandis*. If the court has to decide on a revocation of suspension of sentence because of a violation of conditions or instructions, it shall give the convicted person an opportunity to be heard orally. Where a probation officer has been appointed the court shall inform him if a decision on the revocation of suspension of sentence or of remission of sentence is being considered; the court shall give him information obtained from other criminal proceedings if the objective of probationary supervision makes this seem appropriate.
- (2) A complaint shall be admissible against decisions pursuant to subsection (1). The complaint may be based only on the ground that an order made is unlawful or that the probation period has been subsequently prolonged. Revocation of suspension, remission of sentence, revocation of remission, conviction with sentence reserved and a ruling that a warning shall be sufficient (sections 56f, 56g, 59b of the Criminal Code), may be contested by immediate complaint.

Section 453a

[Instruction on Suspension of Sentence or Warning with Sentence Reserved]

- (1) If the defendant was not instructed pursuant to Section 268a subsection (3), such instruction shall be given by the court competent to give the decision pursuant

to Section 453. The presiding judge may entrust a commissioned or a requested judge with giving the instruction.

(2) The instruction shall be given orally except in cases of minor significance.

(3) The defendant shall also be instructed in respect of the subsequent decisions. Subsection (1) shall apply *mutatis mutandis*.

Section 453b

[Supervision of the Convicted Person]

(1) The court shall supervise the conduct of the convicted person during the probation period and especially compliance with conditions and instructions as well as with offers made and assurances given.

(2) Supervision shall be the responsibility of the court competent to give the decisions pursuant to Section 453.

Section 453c

[Warrant of Arrest on Revocation]

(1) If there are sufficient reasons for assuming that the suspension will be revoked, the court may, until the revocation order enters into force, take provisional measures to ensure that the convicted person will not abscond, and, if necessary, issue a warrant of arrest under the prerequisites of Section 112 subsection (2), number 1 or 2, or if certain facts substantiate the risk that the convicted person will commit offences of substantial significance.

(2) The detention served on the basis of a warrant of arrest pursuant to subsection (1) shall be credited against the sentence of imprisonment to be executed. Section 33, subsection (4), first sentence, Sections 114 to 115a, Section 119 and Section 119a shall apply *mutatis mutandis*.

Section 454

[Suspension of Remainder of Sentence]

(1) The decision whether execution of the remainder of a prison sentence is to be suspended on probation (sections 57 to 58 of the Criminal Code), as well as the decision that prior to expiry of a certain time limit an application by the convicted person to this effect shall be inadmissible, shall be given by the court without an oral hearing, in an order. The public prosecution office, the convicted person and the penal institution shall be heard. The convicted person shall be heard orally. The oral hearing of the convicted person may be dispensed with if

1. the public prosecution office and the penal institution support suspension of a determinate prison sentence and the court proposes suspension;
2. the convicted person has applied for suspension and at the time of the application has served
 - a) less than half, or less than two months, of a determinate prison sentence,
 - b) less than thirteen years of a sentence of life imprisonmentand the court refuses the application because it has been submitted prematurely; or
3. the application by the convicted person is inadmissible (section 57 subsection (7), section 57a subsection (4) of the Criminal Code).

The court shall at the same time decide whether credit pursuant to section 43 subsection (10), number 3, of the Prison Act shall be ruled out.

(2) The court shall obtain the opinion of an expert concerning the convicted person if it is considering suspending execution of the remainder of

1. a sentence of life imprisonment, or
2. a determinate prison sentence of more than two years for a criminal offence of the type referred to in section 66 subsection (3), first sentence, of the Criminal Code and it cannot be ruled out that reasons of public security might preclude the convicted person's early release.

The opinion shall, in particular, express a view as to whether a risk that the convicted person is still posing the danger apparent from his offence no longer exists. The expert shall be heard orally. The convicted person, his defence counsel, the public prosecution office and the penal institution shall be given the opportunity to participate in the hearing. The court may dispense with the oral hearing of the expert if the convicted person, his defence counsel and the public prosecution office waive such hearing.

(3) An immediate complaint shall be admissible against the decisions pursuant to subsection (1). A complaint lodged by the public prosecution office against the decision ordering suspension of the remainder of sentence shall have suspensive effect.

(4) In all other cases, Section 246a subsection (2), Section 268a subsection (3), Section 268d, Section 453 and Section 453a subsections (1) and (3) as well as Sections 453b and 453c shall apply *mutatis mutandis*. Instruction on suspension of remainder of sentence shall be given orally; the duty to give such instruction may also be assigned to the penal institution. The instruction shall be given immediately prior to release.

Section 454a

[Extension of Probation Period; Revocation of Suspension of Remainder of Sentence]

(1) If the court orders suspension of execution of the remainder of a prison sentence at least three months before the date of release, the probation period shall be extended by the period lasting from entry into force of the decision on suspension until release.

(2) The court may revoke suspension of execution of the remainder of a prison sentence up until the convicted person's release if, by virtue of new facts or facts that have subsequently come to light, responsibility can no longer be taken for suspension, having regard to the security interests of the general public; Section 454 subsection (1), first and second sentences, and subsection (3), first sentence, shall apply *mutatis mutandis*. Section 57 subsection (5) of the Criminal Code shall remain unaffected.

Section 454b

[Execution of Prison Sentences and of Default Imprisonment]

(1) Prison sentences and default imprisonment for failure to pay a fine should be executed consecutively.

(2) Where more than one prison sentence, or a prison sentence and default imprisonment for failure to pay a fine are to be executed consecutively, the executing authority shall interrupt execution of the first prison sentence to be executed, if

1. under the conditions of section 57 subsection (2), number 1, of the Criminal Code one half, but at least six months of the sentence,
 2. in the case of a determinate prison sentence two-thirds, but at least two months of the sentence, or
 3. in the case of a sentence of life imprisonment, fifteen years of the sentence have been served. This shall not apply to a remainder of sentence executed because its suspension has been revoked. Where the conditions for interrupting the first prison sentence to be executed have already been met before the prison sentence subsequently to be executed becomes liable to execution, the interruption shall take effect retrospectively from the time the prison sentence became liable to execution.
- (3) Where the executing authority has interrupted execution pursuant to subsection (2), the court shall not give the decisions pursuant to section 57 and section 57a of the Criminal Code until a decision can be given at the same time on suspension of execution of the remainder of all sentences.

Section 455

[Postponement of Execution of a Prison Sentence]

- (1) Execution of a prison sentence shall be postponed if the convicted person becomes insane.
- (2) The same shall apply with respect to any other illness if imminent risk to the convicted person's life is to be feared in the case of execution.
- (3) Execution may also be postponed if the convicted person's physical condition is such that it would make immediate execution incompatible with the facilities of the penal institution.
- (4) The executing authority may interrupt execution of a prison sentence if
 1. the convicted person becomes insane,
 2. due to an illness an imminent risk to the convicted person's life is to be feared in the case of execution, or
 3. the convicted person falls seriously ill and the illness cannot be diagnosed or treated in a penal institution or in the hospital of such institution,and if it is to be expected that the illness will presumably continue to exist for a considerable time. Execution shall not be interrupted if overriding reasons, especially reasons of public security, so dictate.

Section 455a

[Postponement or Interruption on Grounds of Institutional Organization]

- (1) The executing authority may postpone execution of a prison sentence or a custodial measure of reform and prevention or interrupt it without the prisoner's agreement if this is necessary on grounds of institutional organization and if overriding reasons of public security do not run present an obstacle thereto.
- (2) If the decision of the executing authority cannot be obtained in time, the director of the institution may provisionally interrupt execution under the conditions referred to in subsection (1) without the prisoner's agreement.

Section 456

[Temporary Postponement]

- (1) Execution may, upon application by the convicted person, be postponed if immediate execution causes substantial detriment, unintended by the penalty, to the convicted person or his family.
- (2) Postponement of sentence shall not exceed a period of four months.
- (3) Approval may be made contingent on the furnishing of security or on other conditions.

Section 456a

[Dispensing With Execution in the Case of Extradition or Expulsion]

- (1) The executing authority may dispense with execution of a prison sentence, default imprisonment or a measure of reform and prevention if the convicted person is to be extradited to a foreign government for another offence, or transferred to an international criminal court of justice, or if he is expelled from the territorial scope of this Federal statute.
- (2) Execution may take place subsequently if the extradited or expelled person returns. Section 67c subsection (2) of the Criminal Code shall apply *mutatis mutandis* to subsequent execution of a measure of reform and prevention. On dispensing with execution the executing authority may, at the same time, order subsequent execution in the event of the extradited or expelled person's return, and to this end it may issue a warrant of arrest or a placement order as well as order the necessary search measures, in particular issuance of an arrest notice; Section 131 subsection (4) as well as Section 131a subsection (3) shall apply *mutatis mutandis*. The convicted person shall be so informed.

Section 456b (Deleted)

Section 456c

[Postponement and Suspension of Prohibition of Pursuit of an Occupation]

- (1) When giving judgment, the court may, upon the convicted person's application or with his agreement, postpone, in an order, entry into force of the prohibition of pursuit of an occupation if immediate entry into force means a considerable hardship to the convicted person or his relatives, unintended by the prohibition and avoidable by postponed entry into force. If the convicted person has a statutory representative, the latter's consent shall be required. Section 462 subsection (3) shall apply *mutatis mutandis*.
- (2) The executing authority may suspend the prohibition of pursuit of an occupation under the same conditions.
- (3) Postponement and suspension may be made contingent on the furnishing of security or on other conditions. Postponement and suspension shall not exceed a period of six months.
- (4) The period of postponement and of suspension shall not be deducted from the period specified for the prohibition of pursuit of an occupation.

Section 457

[Arrest Warrant]

- (1) Section 161 shall apply *mutatis mutandis* for the purposes of this Chapter.
- (2) The executing authority shall be authorized to issue an order for the convicted person to be brought before it or a warrant of arrest for execution of a prison sentence if the convicted person, after being summoned to commence his sentence, has not appeared or is suspected of having absconded. It may also issue an order

that the convicted person be brought before it or issue a warrant of arrest if a prisoner escapes or otherwise evades serving the sentence.

(3) In the cases referred to in subsection (2) the executing authority shall have the same powers as the criminal prosecuting authority insofar as the measures are intended and appropriate for the purpose of arresting the convicted person. In assessing the proportionality of measures, special consideration shall be given to the length of the prison sentence still to be served. Court decisions that may become necessary shall be given by the court of first instance.

Section 458

[Court Decisions on Execution of Sentence]

(1) A court decision shall be obtained if doubts arise concerning the interpretation of a criminal judgment or the calculation of the sentence imposed, or if objections are raised against the admissibility of executing the sentence.

(2) The court shall also decide, in the cases referred to in Section 454b subsections (1) and (2) and under Sections 455, 456 and 456c subsection (2), on objections raised against the executing authority's decision or on objections raised against the executing authority's order that a sentence or a measure of reform and prevention shall subsequently be executed against an extradited or expelled person.

(3) The course of execution shall not be hindered as a result of this; the court may, however, order postponement or suspension of execution. In the cases referred to in Section 456c subsection (2), the court may make a provisional order.

Section 459

[Execution of Fine]

The provisions of the Ordinance on Recovery of Claims of the Judicial Authorities shall apply to the execution of a fine unless otherwise provided under this statute.

Section 459a

[Facilitating Payment]

(1) After the judgment has entered into force the executing authority shall decide whether to grant relaxation of conditions of payment of a fine (section 42 of the Criminal Code).

(2) The executing authority may subsequently amend or revoke a decision concerning relaxation of payment conditions pursuant to subsection (1) or section 42 of the Criminal Code. Here it may deviate from a preceding decision to the convicted person's detriment only on the basis of new facts or evidence.

(3) Where relaxation in the form of payment in specified instalments is revoked pursuant to section 42, second sentence, of the Criminal Code, this shall be noted in the files. The executing authority may grant relaxation of conditions of payment again.

(4) A decision concerning relaxation of conditions of payment shall also extend to the costs of the proceedings. It may also be given with regard to costs alone.

Section 459b

[Setting Off Instalments]

Instalments shall be first set off against the fine, then against possible incidental consequences requiring payment of money and finally against the costs of the proceedings, unless the convicted person makes other dispositions regarding payment.

Section 459c
[Recovery of Fine]

- (1) The fine or part thereof shall be recovered within two weeks after the amount became due only if, on the basis of certain facts, it is apparent that the convicted person wishes to evade payment.
- (2) Execution may be dispensed with if it is to be expected that it will not lead to any success in the foreseeable future.
- (3) The fine may not be executed in respect of the convicted person's estate.

Section 459d
[No Execution]

- (1) The court may order that there shall be no execution of the full fine or of part thereof, if
 1. in the same proceedings a prison sentence has been executed or suspended on probation, or
 2. a prison sentence has been imposed in other proceedings and the conditions in section 55 of the Criminal Code have not been fulfilledand execution of the fine may make the convicted person's reintegration more difficult.
- (2) The court may decide pursuant to subsection (1) also with regard to the costs of the proceedings.

Section 459e
[Execution of Default Imprisonment]

- (1) Default imprisonment shall be executed on the basis of an order made by the executing authority.
- (2) The execution order shall be contingent on the fine not being recoverable or on execution being dispensed with pursuant to Section 459c subsection (2).
- (3) Execution of default imprisonment may not be ordered for part of a fine not corresponding to a full day of imprisonment.
- (4) Default imprisonment shall not be executed to the extent that the fine is paid or recovered or execution is dispensed with pursuant to Section 459d. Subsection (3) shall apply *mutatis mutandis*.

Section 459f
[Dispensing with Execution of Default Imprisonment]

The court shall make an order to the effect that there shall be no execution of default imprisonment, if execution would constitute an undue hardship for the convicted person.

Section 459g
[Execution of Incidental Consequences]

- (1) If there is an order for forfeiture, confiscation or the rendering unusable of an object, it shall be executed by taking the object away from the convicted person or from a person with an interest in the forfeiture or confiscation. The provisions of the Ordinance on Recovery of Claims of the Judicial Authorities shall apply to execution.
- (2) Sections 459, 459a, 459c subsections (1) and (2) and Section 459d shall apply *mutatis mutandis* to execution of incidental consequences requiring payment of money.

Section 459h
[Legal Remedy]

The court shall decide on objections against the decisions of the executing authority pursuant to Sections 459a, 459c, 459e and 459g.

Section 459i
[Execution of Property Fine]

- (1) Sections 459, 459a, 459b, 459c, 459e, 459f and 459h shall apply *mutatis mutandis* to execution of a property fine (section 43a of the Criminal Code).
(2) In the cases under Sections 111o and 111p the measure shall only be revoked after conclusion of execution.

Section 460
[Subsequent Aggregate Penalty]

Where a person has been sentenced in different final judgments and the provisions concerning an aggregate sentence (section 55 of the Criminal Code) were not taken into account, the sentences imposed shall be combined into an aggregate sentence in a subsequent court decision. Where several property fines are combined into an aggregate property fine, the latter shall not be lower than the amount of the highest single fine imposed even if that amount exceeds the value of the convicted person's property at the time of the subsequent court decision.

Section 461
[Credit for Confinement in Hospital]

- (1) If, after beginning to serve his sentence, the convicted person was brought to a hospital outside the penal institution on account of illness, the duration of his stay in such hospital shall be included in the time served, unless the convicted person caused the illness with the intention of interrupting execution of sentence.
(2) The public prosecution office shall obtain a decision from the court in the latter case.

Section 462
[Procedure in the Case of Court Decision]

- (1) The decisions required pursuant to Section 450a subsection (3), first sentence, and Sections 458 to 461 shall be given in a court order without an oral hearing. This shall also apply to the restoration of eligibility and rights previously enjoyed (section 45b of the Criminal Code), to revocation of the reservation of confiscation and to the subsequent order of confiscation of an object (section 74b subsection (2), third sentence, of the Criminal Code), to the subsequent order of forfeiture or confiscation of the equivalent sum of money (section 76 of the Criminal Code) as well as to the extension of the limitation period (section 79b of the Criminal Code).
(2) Prior to the decision, the public prosecution office and the convicted person shall be heard. If the court orders an oral hearing, it may specify that the convicted person be located in another place than the court and that the hearing be simultaneously transmitted audio-visually to the place where the convicted person is located and to the courtroom. The court may dispense with hearing the convicted person in the case of a decision pursuant to section 79b of the Criminal Code, if due to certain facts it is to be assumed that the hearing will not be feasible.
(3) The court order shall be contestable by immediate complaint. An immediate complaint lodged by the public prosecution office against the order imposing interruption of execution shall have suspensive effect.

Section 462a
[Jurisdiction]

(1) Where a prison sentence is executed in respect of a convicted person, the criminal chamber responsible for execution of sentences, in whose district the penal institution is located where the convicted person is being held at the time the court is seized of the case, shall be competent to give the decisions pursuant to Sections 453, 454, 454a, and 462. Such criminal chamber shall also remain competent for decisions which have to be given after execution of a prison sentence has been interrupted or execution of the remainder of a prison sentence has been suspended on probation. The criminal chamber may refer individual decisions pursuant to Section 462 in conjunction with Section 458 subsection (1) to the court of first instance; referral shall be binding.

(2) In cases other than those designated in subsection (1), the court of first instance shall be competent. The court may entirely or partially refer the decisions to be given pursuant to Section 453 to the Local Court in whose district the convicted person has his domicile or, if he has no domicile, his ordinary place of residence; referral shall be binding. In derogation from subsection (1), the court of first instance shall be competent in the cases referred to therein if it has reserved the order of preventive detention and a decision thereon pursuant to section 66a subsection (3), first sentence, of the Criminal Code is still possible.

(3) In the cases under Section 460 the court of first instance shall decide. If judgments were pronounced by different courts, the decision shall be given by the court which imposed the severest type of penalty or in the case of penalties of the same type, the highest sentence, and if more than one court were then competent, the decision shall be given by the last court to pronounce judgment. If the relevant judgment was pronounced by a court of higher instance, the court of first instance shall determine the aggregate sentence; if one of the judgments was pronounced by a Higher Regional Court at first instance, the Higher Regional Court shall assess the aggregate penalty. If a Local Court would have been competent to determine the aggregate sentence and if its sentencing power was not sufficient, the criminal division of its superior Regional Court shall decide.

(4) If different courts have imposed a final sentence on the convicted person in cases other than those designated in Section 460 or if they have given him a warning with sentence reserved, only one such court shall be competent for the decisions to be given pursuant to Sections 453, 454, 454a and 462. Subsection (3), second and third sentences, shall apply *mutatis mutandis*. In cases under subsection (1) the criminal chamber responsible for execution of sentences shall decide; subsection (1), third sentence, shall remain unaffected.

(5) In lieu of the criminal chamber responsible for execution of sentences, the court of first instance shall decide if the judgment was pronounced by a Higher Regional Court at first instance. The Higher Regional Court may entirely or partially refer the decision to be given pursuant to subsections (1) and (3) to the criminal chamber responsible for execution of sentences. Referral shall be binding; it may, however, be revoked by the Higher Regional Court.

(6) The court of first instance in the cases under Section 354 subsection (2) and Section 355 shall be the court to which the case has been referred back, and in the cases in which a decision was given in reopened proceedings pursuant to Section 373, the court which gave that decision.

Section 463

[Execution of Measures of Reform and Prevention]

- (1) The provisions on execution of sentence shall apply *mutatis mutandis* to the execution of measures of reform and prevention unless otherwise provided.
- (2) Section 453 shall also apply to decisions to be given pursuant to section 68a to 68d of the Criminal Code.
- (3) Section 454 subsections (1), (3) and (4) shall also be applicable to decisions to be given pursuant to section 67c subsection (1), section 67d subsections (2) and (3), section 67e subsection (3), section 68e, section 68f subsection (2) and section 72 subsection (3) of the Criminal Code. In the cases referred to under section 68e of the Criminal Code there shall be no need for an oral hearing of the convicted person. Insofar as the court is called upon to decide upon execution of preventive detention, Section 454 subsection (2) shall be applicable *mutatis mutandis* in the cases referred to in section 67d subsections (2) and (3) and section 72 subsection (3) of the Criminal Code, irrespective of the criminal offences designated therein, and in the case of review of the conditions set out in section 67c subsection (1), first sentence, number 1, of the Criminal Code, also irrespective of whether the court is considering a suspension. In all other cases Section 454 subsection 2 shall apply to the offences mentioned therein. In preparing the decision pursuant to section 67d subsection (3) of the Criminal Code and the subsequent decisions pursuant to section 67d subsection (2) of the Criminal Code the court shall obtain an opinion from an expert focussing in particular on the question of whether it is to be expected that the convicted person will continue, given his inclinations, to commit substantial unlawful acts. If placement in preventive detention has been ordered and the convicted person has no defence counsel, the court shall appoint such counsel in good time prior to a decision pursuant to section 67c subsection (1) of the Criminal Code.
- (4) As part of its examinations pursuant to section 67e of the Criminal Code the court shall obtain the opinion of an expert after every five year period of placement in a psychiatric hospital (section 63). The expert shall not, within the framework of such placement, have been concerned with the treatment of the person committed, nor shall he be working in the psychiatric hospital in which the person committed is located. The expert is to be allowed access to the patient data kept by the hospital on the person committed. Section 454 subsection (2) shall apply *mutatis mutandis*. If the person committed has no defence counsel, the court shall appoint such counsel for the proceedings pursuant to the first sentence.
- (5) Section 455 subsection (1) shall not be applicable if placement in a psychiatric hospital has been ordered. If placement in an institution for withdrawal treatment or preventive detention has been ordered and if the convicted person becomes insane, execution of the measure may be postponed. Section 456 shall not be applicable if an order has been made committing the convicted person to preventive detention.
- (6) Section 462 shall also be applicable to decisions to be given pursuant to section 67 subsection (3) and subsection (5), second sentence, sections 67a and 67c subsection (2), section 67d subsections (5) and (6), sections 67g, 67h and 69a subsection (7), as well as sections 70a and 70b of the Criminal Code. The court shall declare the immediate enforceability of the order of measures pursuant to section 67h, subsection (1), first and second sentences, of the Criminal Code where there is a danger that the convicted person will commit substantial unlawful acts.

(7) Supervision of conduct in the cases referred to under section 67c subsection (1), section 67d subsections (2) to (6), and section 68f of the Criminal Code shall be equivalent to the suspension of the remainder of a sentence for the purposes of the application of Section 462a subsection (1).

(8) If placement in preventive detention is executed and the convicted person has no defence counsel, the court shall appoint such counsel for the proceedings concerning the court decisions to be given in the area of execution. Such appointment shall be made in good time prior to the first court decision and shall apply to every further proceeding as long as the appointment is not revoked.

Section 463a

[Powers and Jurisdiction of the Supervisory Agencies]

(1) The supervisory agencies (section 68a of the Criminal Code) may request information from all public authorities for supervision of the convicted person's conduct and of his compliance with instructions and may carry out investigations of any kind, excluding examinations under oath, or have them carried out by other agencies within the framework of their competence. If the whereabouts of the convicted person are not known, the head of the supervisory agency may issue a notice requiring determination of his whereabouts (Section 131a subsection (1)).

(2) The supervisory agency may order, for the duration of supervision or for a shorter period, that the convicted person be identified for the purpose of observation during police checks where personal identification data may be verified.

Section 163e subsection (2) shall apply *mutatis mutandis*. The order shall be made by the head of the supervisory agency. The need to continue the measure shall be reviewed at least once a year.

(3) On application by the supervisory agency the court may issue an order to appear in court if the convicted person has failed without sufficient excuse to comply with an instruction pursuant to section 68b subsection (1), first sentence, numbers 7 or 11, of the Criminal Code, and he has been informed in the summons that in such a case it would be admissible to have him brought before the court. Where the court at first instance has jurisdiction, the presiding judge shall decide.

(4) In the case of an instruction pursuant to section 68b subsection (1), first sentence, number 12, of the Criminal Code, the supervisory agency shall, with the aid of the technical devices carried by the convicted person on him, collect and store through automation data concerning his whereabouts and concerning any interference with data collection; insofar as technically possible, it shall be ensured that within the private premises of the convicted person no data concerning his whereabouts extending beyond the fact of his presence is collected. The data may only be used without the consent of the person concerned insofar as this is necessary for the following purposes:

1. to establish a violation of an instruction pursuant to section 68b subsection (1), first sentence, numbers 1, 2 or 12, of the Criminal Code;
2. to take supervisory measures that may follow from a violation of an instruction pursuant to section 68b subsection (1), first sentence, numbers 1, 2 or 12, of the Criminal Code;
3. to punish a violation of an instruction pursuant to section 68b subsection (1), first sentence, numbers 1, 2 or 12, of the Criminal Code;

4. to avert a significant present danger to the life, physical integrity, personal liberty or sexual self-determination of third parties; or
5. to prosecute a criminal offence of the kind mentioned in section 66 subsection (3), first sentence, of the Criminal Code.

To ensure adherence to the purposes pursuant to the second sentence, the processing of data for the establishment of violations pursuant to the second sentence, number 1, in conjunction with section 68b subsection (1), first sentence, numbers 1 or 2, of the Criminal Code, shall be undertaken through automation and the data shall be especially protected from unauthorized cognisance. The supervisory agency may have the data collected and processed by the authorities and officials in the police force; these shall be obliged to comply with the request of the supervisory agency. The data mentioned in the first sentence shall be deleted not later than two months after its collection, insofar as it is not used for the purposes mentioned in the second sentence. For every retrieval of data at least the time, the data retrieved and the retrieving person shall be recorded; Section 488 subsection (3), fifth sentence, shall apply *mutatis mutandis*. If within the private premises of the convicted person data concerning his whereabouts extending beyond the fact of his presence is collected, this data may not be used and shall be deleted without delay after cognisance. The fact of its cognisance and deletion shall be documented.

(5) The supervisory agency in whose district the convicted person has his domicile shall have local jurisdiction. If the convicted person has no domicile within the territorial scope of this statute, local jurisdiction shall lie with the supervisory agency in whose district he has his ordinary place of residence or, if this is not known, in which he had his last domicile or ordinary place of residence.

Section 463b

[Seizure of Driver's Licence]

- (1) If a driver's licence has to be officially impounded pursuant to section 44 subsection (2), second and third sentences, of the Criminal Code and if it is not voluntarily surrendered, it shall be seized.
- (2) Foreign driver's licences may be seized so that the driving ban, or the withdrawal of permission to drive and the bar, can be endorsed thereon (section 44 subsection (2), fourth sentence, section 69b subsection (2) of the Criminal Code).
- (3) Where the convicted person does not have his driver's licence with him, he shall, upon application of the executing authority, make an affirmation in lieu of an oath to the Local Court regarding its whereabouts. Section 883 subsections (2) and (3) of the Code of Civil Procedure shall apply *mutatis mutandis*.

Section 463c

[Public Announcement]

- (1) Where there is an order for public announcement of the conviction and sentence the decision shall be served on the person entitled.
- (2) The order pursuant to subsection (1) shall be executed only if the applicant or a person entitled to file an application in his place so requests within one month after service of the final decision.
- (3) If the publisher or responsible editor of a periodical publication fails to comply with his obligation to include such an announcement in his publication, the court shall, upon application by the executing authority, induce him to do so by imposing a

coercive fine not exceeding twenty-five thousand Euros or imposing coercive detention not exceeding six weeks. A coercive fine may be imposed more than once. Section 462 shall apply *mutatis mutandis*.

(4) Subsection (3) shall apply *mutatis mutandis* to an announcement by public broadcast if the person responsible for programming fails to comply with his obligation.

Section 463d

[Court Assistance Agency]

To prepare the decisions to be given pursuant to Sections 453 to 461 the court or the executing authority may avail itself of the services of the court assistance agency; this shall apply in particular before a decision is given on revocation of suspension of sentence or of suspension of the remainder of a sentence, unless a probation officer has been appointed.

CHAPTER II

COSTS OF THE PROCEEDINGS

Section 464

[Decision on Costs]

- (1) Every judgment, every penal order and every decision terminating an investigation must indicate the person who is to bear the costs of the proceedings.
- (2) The decision as to who shall bear the necessary expenses shall be made by the court in the judgment or in the order concluding the proceedings.
- (3) An immediate complaint shall be admissible against the decision regarding costs and necessary expenses; it shall not be admissible if the main decision referred to in subsection (1) cannot be contested by the complainant. The court hearing the complaint shall be bound by the findings of fact on which the decision is based. If an immediate complaint, in addition to an appeal on fact and law, or an appeal on law, is lodged against the judgment as far as it relates to the decision on costs and necessary expenses, the court hearing the appeal on law and the court hearing the appeal on facts and law shall also be competent to give the decision on the immediate complaint while considering the appeal on facts or law.

Section 464a

[Definition of Costs]

- (1) Costs of the proceedings shall include fees and Treasury expenditure. They shall also include the costs arising for the preparation of public charges as well as the costs of executing a legal consequence of the offence. The costs of an application to reopen proceedings concluded by final judgment shall also include the costs arising for the preparation of the proceedings to be reopened (Section 364a and 364b) so as far as they are caused by an application by the convicted person.
- (2) Necessary expenses of a participant shall also include

1. compensation for inevitable loss of time pursuant to the provisions applying to the compensation of witnesses, and
2. fees and expenses of an attorney so far as they are to be reimbursed pursuant to section 91 subsection (2) of the Code of Civil Procedure.

Section 464b

[Assessment of Costs]

The amount of the costs and expenses for which one participant must reimburse another participant shall, upon application by a participant, be assessed by the court of first instance. Upon application the court shall declare that interest shall be paid on the assessed costs and expenses with effect from the time of application for assessment. The provisions of the Code of Civil Procedure shall apply *mutatis mutandis* to the rate of interest, the proceedings and the execution of the decision.

Section 464c

[Costs of Interpreters]

Where an interpreter or translator has been called in for an indicted accused who does not speak German or who is hearing or speech impaired, the expenditure incurred thereby shall be charged to the indicted accused insofar as he has unnecessarily given rise to such expenditure by culpable omission or culpably in some other way; this shall be stated expressly except in the case of Section 467 subsection (2).

Section 464d

[Distribution of Expenses]

Treasury expenditure and necessary expenses of the participants may be apportioned in fractions.

Section 465

[Duty of Convicted Person to Pay Costs]

(1) The defendant shall bear the costs of the proceedings insofar as they were caused by the trial for an offence of which he has been convicted or for which a measure of reform and prevention has been ordered. A conviction for the purposes of this provision shall also be deemed to have been pronounced where the defendant has been warned with sentence reserved or where the court has dispensed with punishment.

(2) If particular expenses have been caused by investigations conducted to clear up certain incriminating or exonerating circumstances and if the outcome of such investigations was in the defendant's favour, the court shall charge the expenses in part or in full to the Treasury if it would be inequitable to charge them to the defendant. This shall apply in particular where the defendant is not convicted for individual severable parts of an offence or is not convicted of one or more of a number of violations of the law. The preceding sentences shall apply *mutatis mutandis* to the defendant's necessary expenses.

(3) If a convicted person dies before the judgment enters into force his estate shall not be liable for the costs.

Section 466

[Liability of Co-Offenders]

Co-defendants who have been sentenced or in respect of whom a measure of reform and prevention has been ordered for the same offence shall be jointly and severally liable for the expenses. This rule shall not apply to the costs caused by the services of appointed defence counsel or of an interpreter and to the costs for execution, provisional placement or remand detention as well as to expenses which were caused by investigations directed exclusively against a co-defendant.

Section 467

[Costs on Acquittal]

- (1) If the indicted accused is acquitted or if the opening of the main proceedings against him is refused or if the proceedings against him are terminated, Treasury expenditure and the indicted accused's necessary expenses shall be borne by the Treasury.
- (2) The costs of the proceedings caused by the indicted accused's culpable default shall be borne by him. To that extent, the expenses he has caused shall not be charged to the Treasury.
- (3) The indicted accused's necessary expenses shall not be charged to the Treasury if the indicted accused caused the preferring of public charges by filing a criminal information in which he pretended to have committed the offence he was charged with. The court may dispense with charging the indicted accused's necessary expenses to the Treasury if
1. he caused the preferring of public charges by falsely incriminating himself with regard to material points or in contradiction to his later statement or by concealing material exonerating circumstances despite having made a statement in response to the accusation, or
 2. he is not sentenced for a criminal offence only because there is a procedural impediment.
- (4) If the court terminates the proceedings pursuant to a provision permitting this at the court's discretion, it may dispense with charging the indicted accused's necessary expenses to the Treasury.
- (5) The indicted accused's necessary expenses shall not be charged to the Treasury if the proceedings are terminated with final effect after previous provisional termination (Section 153a).

Section 467a

[Withdrawal of Charges or Termination by the Public Prosecution Office]

- (1) If the public prosecution office withdraws the public charges and terminates the proceedings, the court where the public charges have been preferred shall charge to the Treasury the necessary expenses incurred by the indicted accused upon application by the public prosecution office or by the indicted accused. Section 467 subsections (2) to (5) shall apply *mutatis mutandis*.
- (2) In the cases under subsection (1), first sentence, the court may charge the necessary expenses incurred by a person involved (Section 431 subsection (1), first sentence, Section 442, Section 444 subsection (1), first sentence) to the Treasury or to another participant upon application by the public prosecution office or by the person involved.
- (3) The decision pursuant to subsections (1) and (2) shall be incontestable.

Section 468

[Defendants Not Liable to Punishment]

In the case of a mutual exchange of insults, charging the costs on one or both defendants shall not be precluded by one or both of them being declared not liable to punishment.

Section 469

[Costs Charged to Person Laying Criminal Information]

- (1) If proceedings, even if conducted out of court, were caused by an untrue criminal information laid intentionally or recklessly, the court shall, after hearing the person

who laid the criminal information, charge to such person the costs of the proceedings and the accused's necessary expenses. The court may charge the necessary expenses of a person involved (Section 431 subsection (1), first sentence, Section 442, Section 444 subsection (1), first sentence) to the person who laid the criminal information.

(2) If no court has yet been seized of the case, the decision shall, upon application by the public prosecution office, be given by the court which would have been competent to open the main proceedings.

(3) The decision pursuant to subsections (1) and (2) shall be incontestable.

Section 470

[Costs on Withdrawal of Application for Prosecution]

If the proceedings are terminated due to the withdrawal of the application upon which they were contingent, the applicant shall bear the costs as well as the necessary expenses of the accused and of a person involved (Section 431 subsection (1), first sentence, Section 442, Section 444 subsection (1), first sentence). They may be charged to the defendant or to a person involved as far as he declares himself willing to pay such costs, or to the Treasury if it would be inequitable to charge these costs to the participants.

Section 471

[Costs of Private Prosecution]

(1) The convicted person in proceedings conducted by private prosecution shall reimburse the private prosecutor for necessary expenses incurred.

(2) If the charges against the accused are dismissed or if the accused is acquitted or the proceedings terminated, the costs of the proceedings and the accused's necessary expenses shall be charged to the private prosecutor.

(3) The court may apportion the costs of the proceedings and the participants' necessary expenses appropriately or, in the exercise of its duty-bound discretion, charge such costs to one of the participants if

1. the court only partly granted the private prosecutor's applications;
2. it terminated the proceedings pursuant to Section 383 subsection (2) (Section 390 subsection (5)) on account of negligibility; or
3. countercharges were preferred.

(4) Several private prosecutors shall be jointly and severally liable. The same shall apply in respect of the liability of several accused for the private prosecutor's necessary expenses.

Section 472

[Costs of Private Accessory Prosecution]

(1) The private accessory prosecutor's necessary expenses shall be charged to the defendant if he is sentenced for an offence affecting the private accessory prosecutor. This may be wholly or partly dispensed with if it would be inequitable to charge these expenses to the defendant.

(2) If the court terminates the proceedings pursuant to a provision permitting this at the court's discretion, it may wholly or partly charge the necessary expenses referred to in subsection (1) to the indicted accused as far as this is equitable for special reasons. If the court finally terminates the proceedings (Section 153a) after a previous provisional termination, subsection (1) shall apply *mutatis mutandis*.

(3) Subsections (1) and (2) shall apply *mutatis mutandis* to the necessary expenses which have arisen for a person entitled to join proceedings as a private accessory prosecutor in exercising his rights pursuant to Section 406g. The same shall apply to a private prosecutor's necessary expenses if the public prosecution office has taken over prosecution pursuant to Section 377 subsection (2).

(4) Section 471 subsection (4), second sentence, shall apply *mutatis mutandis*.

Section 472a

[Aggrieved Person's Expenses]

(1) Where an application for the award of a claim arising from the criminal offence is granted, the defendant shall also bear the special costs incurred thereby and the aggrieved person's necessary expenses.

(2) Where the court dispenses with a decision on the application or where part of the aggrieved person's claim is not awarded or where the aggrieved person withdraws his application, the court shall decide, in the exercise of its duty-bound discretion, who is to bear the relevant court expenditure and the relevant necessary expenses of the participants. Court expenditure may be charged to the Treasury if it would be inequitable to charge such expenditure to the participants.

Section 472b

[Costs of Other Persons Involved]

(1) Where there is an order for forfeiture, confiscation, reservation of confiscation, destruction, rendering unusable or eliminating of a situation that is illegal, the special costs arising from involvement of another person may be charged to such person. That person's necessary expenses may, if this is equitable, be charged to the defendant, and in independent proceedings, also to another person involved.

(2) Where a regulatory fine is imposed on a legal person or an association, the latter shall bear the costs of the proceedings pursuant to Sections 465 and 466.

(3) Where an order for one of the incidental consequences pursuant to subsection (1), first sentence, or imposition of a regulatory fine on a legal person or an association is dispensed with, the necessary expenses of other persons involved may be charged to the Treasury or to another participant.

Section 473

[Costs of Unsuccessful Appellate Remedy]

(1) The costs of an appellate remedy which has been withdrawn or which proved to be unsuccessful shall be borne by the person who filed such appellate remedy. If the appellate remedy filed by the accused has proved to be unsuccessful or has been withdrawn, the necessary expenses incurred by the private accessory prosecutor or the person entitled to join the proceedings as a private accessory prosecutor in exercising his rights pursuant to Section 406g shall be charged to that person. If, in the case of the first sentence, the private accessory prosecutor has filed or pursued the appellate remedy alone, the accused's necessary expenses shall be charged to him. Section 472a subsection (2) shall apply *mutatis mutandis* to the costs of the appeal and the necessary expenses of the participants if an immediate complaint which was admissible when raised has subsequently become inadmissible.

(2) If in the case of subsection (1) the public prosecution office files the appellate remedy to the detriment of the accused or of a person involved (Section 431 subsection (1), first sentence, Section 442, Section 444 subsection (1), first sentence), his necessary expenses shall be charged to the Treasury. The same

shall apply if the appellate remedy filed by the public prosecution office for the benefit of the accused or of a person involved proves to be successful.

(3) If the accused or any other participant limited the appellate remedy to certain points of complaint and if such appellate remedy is successful, the participant's necessary expenses shall be charged to the Treasury.

(4) If the appellate remedy is partly successful, the court shall reduce the fees and charge the costs wholly or partly to the Treasury if it would be inequitable to charge such costs to the participants. This shall apply *mutatis mutandis* to the participants' necessary expenses.

(5) An appellate remedy shall be deemed unsuccessful if an order pursuant to section 69 subsection (1) or section 69b subsection (1) of the Criminal Code is not upheld solely because its preconditions are no longer fulfilled on account of the duration of a provisional withdrawal of permission to drive (Section 111a subsection (1)) or of a measure to impound, secure, or seize the driver's licence (section 69a subsection (6) of the Criminal Code).

(6) Subsections (1) to (4) shall apply *mutatis mutandis* to the costs and necessary expenses caused by an application:

1. to reopen the proceedings concluded by final judgment, or

2. for subsequent proceedings (Section 439).

(7) The costs for restoration of the *status quo ante* shall be borne by the applicant unless they were caused by an unfounded objection by the opponent.

Section 473a

[Costs of Separate Decisions]

If, upon the application of the affected person, the court is to rule in a separate decision on the lawfulness of an investigation measure or its execution, it shall at the same time decide who is to bear the costs and the necessary expenses of the participants. These shall be borne by the Treasury insofar as the measure or its execution is held to be unlawful, in all other cases by the applicant. Section 304 subsection (3) and Section 464 subsection (3), first sentence, shall apply *mutatis mutandis*.

PART EIGHT

PROVISION OF INFORMATION AND INSPECTION OF FILES, OTHER USE OF INFORMATION FOR PURPOSES TRANSCENDING PROCEEDINGS, PROVISIONS ON DATA FILES, NATIONAL REGISTER OF PROCEEDINGS CONDUCTED BY PUBLIC PROSECUTION OFFICES

CHAPTER I

PROVISION OF INFORMATION AND INSPECTION OF FILES, OTHER USE OF INFORMATION FOR PURPOSES TRANSCENDING PROCEEDINGS

Section 474

[Provision of File Information and Other Information to Judicial Authorities and Other Public Institutions]

(1) Courts, public prosecution offices and other judicial authorities shall be able to inspect the files if this is necessary for the purposes of the administration of justice.

(2) Provision of file information to public agencies shall otherwise be admissible where

1. such information is needed for establishment or enforcement of, or opposition to, legal claims connected with the criminal offence;
2. such agencies would otherwise, pursuant to a special provision, be entitled to transmission of personal data from criminal proceedings *ex officio*, or where, following *ex officio* transmission, the transmission of further personal data is needed for the performance of duties; or
3. the information is required in order to prepare measures upon whose implementation personal data from criminal proceedings may, *ex officio*, be transmitted to such agencies pursuant to a special provision.

Provision of information to the intelligence services shall be governed by section 18 of the Federal Act on Protection of the Constitution, by section 10 of the Armed Forces Counterintelligence Service Act and by section 8 of the Federal Intelligence Service Act.

(3) Under the conditions referred to in subsection (2) inspection of the files may be granted if provision of information requires disproportionate effort or the agency requesting inspection of the files declares, indicating the reasons, that the provision of partial information would not be sufficient for the performance of its duties.

(4) Under the conditions referred to in subsection (1) or (3) officially impounded pieces of evidence may be inspected.

(5) In the cases referred to in subsections (1) and (3) files may be sent for inspection.

(6) Provisions under *Land* law granting parliamentary committees the right to inspect the files shall remain unaffected.

Section 475

[Information and File Inspection for Private Individuals and Other Institutions]

(1) For a private person and for other agencies, without prejudice to the regulation in section 406e, an attorney may obtain information from a file that is available to the court or which would have been submitted to the court if public charges had been preferred, if he sets forth a legitimate interest. Information shall be refused when an affected person has an interest meriting protection by such refusal.

(2) Under the conditions set forth in subsection (1), inspection of the files may be granted when the provision of information would require disproportionate effort or when it would be insufficient to exercise the justifiable interest according to the explanation by the one requesting inspection of the files.

(3) Under the conditions set forth in subsection (2), officially impounded pieces of evidence may be inspected. Upon application, the attorney, to the extent inspection of the files is granted and there are no significant grounds to the contrary, may be given the files, with the exception of pieces of evidence, to take to his business or private premises. The decision is not contestable.

(4) Under the conditions set forth in subsection (1), private persons and other agencies may also be given information from the files.

Section 476

[Transmission of Personal Data for Research Purposes]

(1) The transmission of personal data in files to universities, other institutions that conduct scholarly research, and public agencies shall be admissible to the extent

1. required for the performance of particular scholarly research,

2. anonymous data cannot be used for this purpose or anonymization would require disproportionate effort, and
3. the public interest in the scholarly research significantly outweighs the interests of the affected person meriting protection by exclusion of the transmission.

As part of the consideration of public interest pursuant to the first sentence, number 3, particular consideration shall be given to scholarly interest in the research project.

(2) Transmission of the data shall occur by provision of pieces of information when the purpose of the research can be achieved thereby and the provision does not require disproportionate effort. Otherwise inspection of the files may also be granted. The files may be sent for inspection.

(3) Personal data shall only be transmitted to those persons who hold public office, or who are under a special public service obligation, or who have been placed under the obligation to maintain secrecy. Section 1 subsections (2), (3), and (4), number 2, of the Obligations Act shall apply *mutatis mutandis* to placement under the obligation to maintain secrecy.

(4) Personal data shall only be used for the research for which it was transmitted. Use for other research or passing on to others shall be in accordance with subsections (1) through (3) and requires consent of the agency that had ordered transmission of the information.

(5) The data shall be protected from unauthorized disclosure to third parties. The agency conducting the scholarly research must ensure that the use of the personal data will be physically and organizationally separate from the fulfilment of those administrative activities or business purposes for which this data could also be of significance.

(6) As soon as the research purpose allows, personal data shall be anonymized. For as long as this is not possible, characteristics by which individual pieces of information regarding personal or material circumstances of certain or ascertainable persons can be established shall be stored separately. They may only be combined with individual pieces of information to the extent required for the research purpose.

(7) Where a person has obtained personal data pursuant to subsections (1) to (3) he may only publish it when it is essential for the interpretation of research results regarding contemporary historical events. Publication shall require the consent of the agency that had transmitted the information.

(8) If the recipient is not a public agency, the provisions of the Part Three of the Federal Data Protection Act shall also apply when the data is not processed into or from data files.

Section 477

[Admissibility of the Transfer of Information]

(1) Information may also be provided in the form of photocopies made from the files.

(2) Information from files and inspection of files shall be denied when the transmission is contrary to the purposes of the criminal proceedings, or could also endanger the purpose of an investigation in another criminal proceeding, or is contrary to certain federal or *Land* statutory rules of usage. If a measure pursuant to this statute is only admissible where specified criminal offences are suspected, then any personal data obtained on the basis of such a measure may only be used without the consent of the person affected by the measure for evidential purposes in other criminal offences, in respect of which the clearing up of the criminal offence

could have been ordered pursuant to this statute. Moreover, personal data which has been obtained through a measure of the type described in the second sentence may only be used without the consent of the person affected by the measure

1. to counter a significant danger to public security;
2. for those purposes for which transmission is admissible pursuant to section 18 of the Federal Act on the Protection of the Constitution; and
3. in accordance with Section 476.

Section 100d subsection (5), Section 100i subsection (2), second sentence, and Section 108 subsections (2) and (3) shall remain unaffected.

(3) In proceedings in which

1. the accused is acquitted, the opening of the main proceedings is refused, or the proceedings are terminated, or
2. the conviction will not be included in a certificate of conduct for authorities and more than two years have passed since the decision became effective,

information from files and inspection of files by non-public agencies may be granted only when a legal interest in knowledge of the information is credibly substantiated and the previously accused person has no interest worthy of protection by denial.

(4) Responsibility for the admissibility of transmission shall lie with the recipient insofar as it is a public agency or attorney. The transmitting agency in this case shall only review whether the transmission request is within the parameters of the recipient's tasks, unless there is particular cause for a more extensive examination of the admissibility of the transmission.

(5) Personal data requested in accordance with Sections 474 and 475 may only be used for the purpose for which the information or the file inspection was granted. Use for other purposes shall be admissible when information or file inspection could be granted therefor and, in the case of Section 475, the agency that granted the information or file inspection consents. If information is provided without the involvement of an attorney, the designation of a specific purpose must be indicated.

Section 478

[Competence, Requested Files, Appellate Remedies]

(1) In preparatory proceedings and after final conclusion of proceedings, the public prosecution office shall decide whether to provide information and allow inspection of the files; otherwise the presiding judge of the court seized of the matter shall decide. The public prosecution office shall be entitled, also subsequent to the preferment of public charges, to provide information. The public prosecution office may authorize agencies of the police force that lead, or have led, the investigations to provide inspection of the files and information in cases under Section 475. Their decision may be appealed to the public prosecution office. Transmission of personal data or inspection of such files amongst agencies of the police force shall be admissible without a decision pursuant to the first sentence, unless there are doubts concerning the admissibility of the transmission or of the inspection of the files.

(2) Information may only be provided from file material extraneous to the file if the applicant proves the consent of the agency responsible for such material. The same shall apply to inspection of the files.

(3) In the cases referred to in Section 475, the decision of the public prosecution office pursuant to subsection (1) may be appealed by applying for a decision by the court competent pursuant to Section 162. Sections 297 to 300, 302, 306 to 309, 311a and 473a shall apply *mutatis mutandis*. The decision of the court shall be incontestable as long as the investigations have not yet been concluded. The reasons for these decisions shall not be stated to the extent that disclosure could endanger the purpose of the investigation.

Section 479

[Transmission of Information *Ex Officio*]

(1) Personal data from criminal proceedings may be transmitted *ex officio* to criminal prosecuting authorities and criminal courts for the purpose of criminal prosecutions, as well as to the competent authorities and courts for the purpose of prosecution of regulatory offences, insofar as this information is necessary in the opinion of the transmitting agency.

(2) The transmission of personal data from criminal proceedings *proprio motu* is also admissible when knowledge of such information is necessary in the opinion of the transmitting agency for

1. the enforcement of penalties or of measures within the meaning of section 11 subsection (1) number 8 of the Criminal Code, or the execution or implementation of disciplinary measures for juvenile offenders or disciplinary measures within the meaning of the Youth Courts Act;
2. the execution of custodial measures;
3. decisions in criminal matters, particularly regarding suspension of a sentence on probation or its revocation, civil penalties, or clemency petition matters.

(3) Section 477 subsections (1), (2), and (5), as well as Section 478 subsections (1) and (2) shall apply *mutatis mutandis*. Responsibility for the admissibility of the transmission shall lie with the transmitting agency.

Section 480

[Special Statutory Provisions Excepted]

Special statutory provisions that require or allow the transmission of personal data from criminal proceedings shall remain unaffected.

Section 481

[Personal Information from Criminal Proceedings for the Police]

(1) Police authorities may use personal data from criminal proceedings in accordance with legislation on police matters. Criminal prosecuting authorities and courts may transmit personal data from criminal proceedings to police authorities or permit inspection of files for the purposes named therein. The first and second sentences do not apply in cases in which the police were exclusively active in protecting private rights.

(2) Use shall be inadmissible insofar as special federal or *Land* statutory rules of usage present an obstacle thereto.

(3) If the police authorities have doubts whether a use of personal data pursuant to this provision is admissible, Section 478 subsection (1), first and second sentences, shall apply *mutatis mutandis*.

Section 482

[Notification of Police of the Outcome of Criminal Proceedings]

- (1) The public prosecution office shall inform the police authority involved with the matter of its file reference number.
- (2) In cases under subsection (1), it shall inform the police authority of the outcome of the proceedings by notifying the operative part of the decision, the deciding agency, and the date and type of the decision. It shall be admissible to send a copy of the notification to the Federal Central Criminal Register and, upon request, a copy of the judgment or termination decision with reasons.
- (3) In proceedings against an unknown person, as well as in criminal law traffic matters, to the extent they are not encompassed by sections 142 and 315 to 315c of the Criminal Code, the outcome of the proceedings in accordance with subsection (2) shall not be notified *ex officio*.
- (4) Where there is transmission of a judgment that has been contested, there shall be indication of the person seeking an appellate remedy.

CHAPTER II PROVISIONS ON DATA FILES

Section 483

[Data Files for Criminal Proceedings]

- (1) Courts, criminal prosecuting authorities including executing authorities, probation officers, supervisory authorities of those who supervise conduct, and the court assistance agency, may store, modify and use personal data in data files to the extent necessary for the purpose of criminal proceedings.
- (2) The data may also be used in other criminal proceedings, in criminal proceedings involving international mutual legal assistance, and in clemency petition matters.
- (3) If the data is stored in a police data file together with data stored in accordance with police statutes, the law governing the storing agency shall apply to the processing and use of personal data and to the rights of the affected person.

Section 484

[Use of Data in Future Criminal Proceedings]

- (1) Criminal prosecuting authorities, for purposes of future criminal proceedings, may store, modify and use the following in data files:
 1. the accused's personal particulars and, where necessary, other distinguishing characteristics;
 2. the competent agency and the file reference number;
 3. the detailed description of the criminal offence(s), including in particular, the time(s) and place(s) of commission of the criminal offence(s) and the amount of potential damage;
 4. the charges by reference to the statutory provisions;
 5. the initiation of the proceedings as well as the outcome of the proceedings disposed of at the public prosecution office and in court, including reference to the statutory provisions.
- (2) Other personal data regarding accused persons and accomplices may only be stored, modified or used in data files to the extent necessary when, based upon the

type or execution of the criminal offence, the personality of the accused or accomplices, or other knowledge, there is reason to assume that there will be additional criminal proceedings against the accused. If the accused is finally acquitted or if the opening of the main proceedings has been refused with incontestable effect or if the proceedings have not been only provisionally terminated, storage, modification and use pursuant to the first sentence shall be inadmissible if it appears, based upon the reasons for the decision, that the affected person did not commit, or did not unlawfully commit, the offence.

(3) The Federal Ministry of Justice and the *Land* governments shall each determine for their portfolio by statutory instrument the details regarding the type of data that may be stored for purposes of future criminal proceedings in accordance with subsection (2). This shall not apply to data in data files that is only temporarily stored and will be deleted within three months of its creation. The *Land* governments may transfer the authorization by statutory instrument to the competent *Land* ministries.

(4) The use of personal data that has been or will be stored in police data files for the purpose of future criminal proceedings shall be subject to police statutes, except for use for the purposes of criminal proceedings.

Section 485

[Administration of Proceedings]

Courts, criminal prosecuting authorities including executing authorities, probation officers, supervisory authorities of those who supervise conduct, and the court assistance agency may store, modify and use personal data in data files to the extent necessary for the purpose of the administration of proceedings. Use for the purposes set forth in Section 483 shall be admissible. Use for the purposes set forth in Section 484 shall be admissible to the extent that storage would be admissible under this provision. Section 483 subsection (3) shall apply *mutatis mutandis*.

Section 486

[Common Data Files]

(1) Personal data may be stored for the agencies named in sections 483 to 485 in common data files.

(2) In the case of supra-regional common data files, section 8 of the Federal Data Protection Act shall apply *mutatis mutandis* to compensation claims by an affected person.

Section 487

[Transmission of Stored Data]

(1) Data stored pursuant to sections 483 to 485 may be transmitted to the competent agencies to the extent necessary for the purposes referred to in these provisions, for the purposes of a clemency petition, or for international mutual legal assistance in criminal matters. Section 477 subsection (2) and Section 485, third sentence, shall apply *mutatis mutandis*.

(2) In addition, information may be provided from a data file insofar as inspection of the files or information could be granted in accordance with the provisions of this statute. The same shall apply for notifications in accordance with sections 479, 480, and 481 subsection (1), second sentence.

(3) Responsibility for the admissibility of the transmission shall lie with the transmitting agency. If transmission takes place based upon the request of the recipient, it shall bear this responsibility. In such a case, the transmitting agency

shall only examine whether the transmission request is within the parameters of the recipient's tasks, unless there is particular cause for more extensive examination of the admissibility of the transmission.

(4) Data stored pursuant to sections 483 to 485 may also be transmitted for scholarly purposes. Section 476 shall apply *mutatis mutandis*.

(5) Special statutory provisions that require or allow the transmission of data from a criminal proceeding shall remain unaffected.

(6) Data may only be used for the purpose for which it was transmitted. Use for another purpose shall be admissible insofar as the data could also have been transmitted for that purpose.

Section 488

[Automated Retrieval Procedure]

(1) The establishment of an automated retrieval procedure or an automated inquiry and disclosure procedure shall be admissible for transmissions, pursuant to Section 487 subsection (1) amongst the agencies referred to in Section 483 subsection (1), to the extent that this form of data transmission is appropriate, having regard to affected persons' interests meriting protection, in view of the large number of transmissions or of their special urgency. The agencies involved shall guarantee that measures reflecting state of the art technology at the relevant time are implemented to ensure data protection and security, which specifically guarantee the confidentiality and integrity of the data; where publicly accessible networks are used, encryption procedures reflecting state of the art technology shall be applied.

(2) Section 10 subsection (2) of the Federal Data Protection Act shall apply *mutatis mutandis* regarding the specifications for setting up the automated retrieval procedure. This requires the consent of the Federal and *Land* ministries competent for the storing agency and the retrieving agency. The storing agency shall transmit the specifications to the agency competent for controlling compliance with the provisions regarding data protection within public agencies.

(3) Responsibility for the admissibility of individual retrieval requests shall lie with the recipient. The storing agency shall examine the admissibility of the retrieval only when there is cause to do so. The storing agency shall ensure that the transmission of personal data can, at a minimum, be established and checked by appropriate sampling. For every tenth retrieval it shall record at least the time, the data retrieved, the retrieving agency's code, and the recipient's file reference. The data recorded shall only be used for controlling the admissibility of the retrieval and shall be deleted after twelve months.

Section 489

[Correction, Deletion or Blocking]

(1) Personal data in data files shall be corrected if inaccurate.

(2) It shall be deleted when storage thereof is inadmissible or when, in the course of an individual case, it becomes apparent that knowledge of the data for each of the purposes set forth in Sections 483, 484, and 485 is no longer necessary. Data stored pursuant to

1. Section 483 shall be deleted upon conclusion of the proceedings insofar as its storage is not admissible under Sections 484 and 485;

2. Section 484 shall be deleted to the extent the examination in subsection (4) shows that knowledge of the data for the purpose set forth in Section 484 is no longer necessary and its storage is not admissible under Section 485;
3. Section 485 shall be deleted as soon as its storage is no longer necessary for the administration of proceedings.

(3) Disposal by the criminal prosecution office or, in cases where public charges have been preferred, by the court, shall be deemed to be a disposal of the proceedings. If a penalty or other sanction has been ordered, completion of execution or remission shall be decisive. If the proceedings have been terminated and the termination does not prevent resumption of the prosecution, the proceedings shall be considered concluded when the limitation period has expired.

(4) The storing agency shall examine, within the established time limits, whether data stored pursuant to Section 484 shall be deleted. The time limits shall be

1. for accused persons who at the time of the offence had reached the age of eighteen, ten years;
2. for juveniles, five years;
3. in cases of final acquittal, incontestable refusal to open main proceedings, and termination of proceedings that is not merely provisional, three years;
4. in cases of persons stored pursuant to Section 484 subsection (1) who had not reached the age of criminal responsibility at the time of the offence, two years.

(5) The storing agency may set down shorter examination time limits in the order for establishment pursuant to Section 490.

(6) If data regarding a person is stored in a data file for other proceedings, deletion thereof shall not take place until the conditions for deletion have been met in respect of all entries. Subsection (2), first sentence, shall remain unaffected.

(7) Instead of deletion, blocking shall take place if

1. there are grounds to believe that detriment would be caused to an affected person's interests meriting protection;
2. the data is needed for ongoing research; or
3. in view of the particular form of storage, deletion is not possible or would be possible only with disproportionate effort.

Personal data shall also be blocked insofar as it has been stored only for purposes of securing or monitoring data protection. Blocked data may only be used for the purpose for which deletion has not occurred. It may also be used when indispensable for remedying an existing lack of evidence.

(8) If the storing agency finds that there has been transmission of personal data that is inaccurate or that should be deleted or blocked, the recipient shall be informed of the correction, deletion, or blocking if this is necessary to safeguard an affected person's interests meriting protection.

(9) Instead of deletion of the data, the data carriers shall be given to a public records office so far as specific provisions under the law governing archives make provision therefor.

Section 490
[Establishing Order]

The storing agency shall set forth in an establishing order for each automated data file, at a minimum:

1. the name of the data file;
2. the legal basis for and purpose of the data file;
3. the group of people regarding whom data in the data file will be processed;
4. the type of data to be processed;
5. the delivery or input of the data to be processed;
6. the conditions under which data processed in the data file will be transmitted to which recipient and in what proceedings;
7. examination time limits and duration of storage.

This shall not apply to data files that are only temporarily stored and will be deleted within three months of their creation.

Section 491
[Informing the Affected Person]

(1) Where this statute contains no specific provisions dealing with provision or refusal of information, the affected person shall be given information in accordance with section 19 of the Federal Data Protection Act. Information shall not be provided in respect of proceedings which have been initiated by the public prosecution office in the past six months or less. The public prosecution office may extend the time limit set in the second sentence to up to 24 months where in the particular case there is a need to maintain secrecy due to the complexity or scope of the investigations. The Public Prosecutor General shall give a decision on any further extension of the time limit, and in proceedings of the Office of the Federal Public Prosecutor General, such decision shall lie with the Federal Public Prosecutor General. Decisions pursuant to the third and fourth sentences including the reasons therefor are to be documented. The applicant is to be informed of the provisions in the second to fifth sentences, regardless of whether proceedings have been initiated against him.

(2) If the person affected with regard to a common data file is unable to ascertain the name of the storing agency, he may approach any agency involved which is entitled to store the data. The latter shall give a decision, together with the agency that entered the data, regarding the disclosure of information.

CHAPTER III
NATIONAL REGISTER OF PROCEEDINGS CONDUCTED BY PUBLIC PROSECUTION OFFICES

Section 492
[National Register of Proceedings Conducted by Public Prosecution Offices]

(1) A central register of proceedings conducted by the public prosecution offices shall be maintained at the Federal Office of Justice (Registry).

(2) The following shall be entered in the register:

1. the accused's personal particulars and, where necessary, other distinguishing characteristics;
2. the competent agency and the file reference number;
3. the detailed description of the criminal offence(s), including in particular, the time(s) and place(s) of commission of the criminal offence(s) and the amount of potential damage;
4. the charges by reference to the statutory provisions;
5. the initiation of the proceedings as well as the outcome of the proceedings disposed of at the public prosecution office and in court, including reference to the statutory provisions.

The data may be stored and modified only in respect of criminal proceedings.

(3) The public prosecution offices shall communicate the registrable data to the Registry for the purpose referred to in subsection (2), second sentence. Information from the register of proceedings shall only be given to the criminal prosecuting authorities for the purposes of criminal proceedings. Section 5 subsection (5), first sentence, number 2, of the Weapons Act and section 8a subsection (5), first sentence, number 2, of the Explosives Act shall remain unaffected; information concerning the entry shall be transmitted with the approval of the public prosecution office which transmitted the personal data to be recorded in the Registry, unless there is reason to fear that this will endanger the purpose of the investigation.

(4) Upon request, the data referred to in subsection (2), first sentence, numbers 1 and 2, may, in accordance with section 18 subsection (3) of the Federal Act on Protection of the Constitution – also in conjunction with section 10 subsection (2) of the Armed Forces Counterintelligence Service Act and section 8 subsection (3) of the Federal Intelligence Service Act – also be transmitted to the Federal and *Land* constitutional protection authorities, to the Federal Armed Forces Counterintelligence Office and the Federal Intelligence Service. Section 18 subsection (5), second sentence, of the Federal Act on Protection of the Constitution shall apply *mutatis mutandis*.

(4a) Where the Registry cannot make a clear association of a message or request to a set of data it shall transmit data files concerning persons with similar personal identification data to the agency making the request. Upon successful identification the agency making the request shall delete, without delay, all data not relating to the affected person. If identification is not possible, all transmitted data shall be deleted. In the statutory instrument pursuant to Section 494 subsection (4) the number of sets of data records which may be transmitted on the basis of one request for information shall be limited to the number necessary for making the identification.

(5) Responsibility for the admissibility of transmission shall lie with the recipient. The Registry shall examine the admissibility of transmission only if there is a special reason for doing so.

(6) Without prejudice to subsection (3), third sentence and subsection (4), the data may be used only in criminal proceedings.

Section 493

[Automated Inquiry and Disclosure Procedure]

(1) The data shall be transmitted by means of an automated retrieval procedure or an automated inquiry and disclosure procedure, in the event of a malfunction of the

tele-transmission of data or in cases of unusual urgency by telephone or telefax. The agencies involved shall guarantee that measures reflecting state of the art technology at the relevant time, and which specifically guarantee the confidentiality and integrity of the data, are implemented to ensure data protection and security; where publicly accessible networks are used, encryption procedures reflecting the state of the art technology shall be used.

(2) The specifications for setting up the automated retrieval procedure shall be determined in accordance with section 10 subsection (2) of the Federal Data Protection Act. The Registry shall transmit the specifications to the Federal Commissioner for Data Protection.

(3) Responsibility for the admissibility of each automated retrieval shall lie with the recipient. The Registry shall examine the admissibility of retrievals only where there is cause to do so. For every tenth retrieval a record shall be made of at least the time, the data retrieved, the retrieving agency's code and the recipient's file reference. The data recorded may be used only to monitor admissibility of the retrievals and is to be deleted after six months.

(4) Subsections (2) and (3) shall apply *mutatis mutandis* to the automated inquiry and disclosure procedure.

Section 494

[Correction and Deletion of the Data]

(1) If incorrect, the data shall be corrected. The competent agency shall inform the Registry without delay of any inaccuracy; it shall bear responsibility for the accuracy and currency of the data.

(2) The data shall be deleted

1. if their storage is inadmissible; or
2. as soon as it is evident from the Federal Central Criminal Register that a court decision or directive of the criminal prosecuting authority which is notifiable pursuant to section 20 of the Federal Central Criminal Register Act has been issued in the criminal proceedings from which the data were transmitted.

If the accused is finally acquitted or if the opening of main proceedings against him has been refused with incontestable effect or if the proceedings have been not only provisionally terminated, the data shall be deleted two years after the proceedings were concluded, unless notification of further registrable proceedings is given before the time limit for deletion. In this event the data shall remain stored until the requirements for deletion have been fulfilled in respect of all entries. The public prosecution office shall inform the Registry without delay of the fulfilment of the requirements for deletion or of the beginning of the time limit for deletion pursuant to the second sentence above.

(3) Section 489 subsections (7) and (8) shall apply *mutatis mutandis*.

(4) The Federal Ministry of Justice, with the approval of the Federal Council, shall specify further details in a statutory instrument, including in particular:

1. the type of data to be processed;
2. the delivery of the data to be processed;
3. the conditions under which data processed in the file may be transmitted to which recipients and in what proceedings;

4. the establishment of an automated retrieval procedure;
5. the technical and organizational measures required pursuant to section 9 of the Federal Data Protection Act.

Section 495
[Information]

Information from the register of proceedings shall be provided to the affected person in accordance with section 19 of the Federal Data Protection Act; Section 491 subsection (1), second to sixth sentences, shall apply *mutatis mutandis*. The Registry, in agreement with the public prosecution office which communicated the personal data for entry in the register, shall decide on whether information from the register of proceedings can be provided. Insofar as information from the register of proceedings has been made available to a public agency and the affected person seeks information from such agency, the agency concerned, in agreement with the public prosecution office which communicated the personal data for entry in the register, shall decide whether to disclose the information.