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# Judicial Law-Making in the Criminal Decisions of the Polish Supreme Court and the German Federal Court of Justice: A Comparative View

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**Abstract**
This paper investigates the phenomenon of judicial law-making in the practice of the highest courts dealing with criminal matters in Germany and Poland on the basis of 200 of their decisions. While German jurisprudence principally acknowledges the right of the judiciary to create new law, the Polish legal theory generally rejects this notion. Still, research indicates that, in practice, the differences in the frequency and intensity with which these courts pass creative rulings are not as substantial as the discrepancy in the theoretical stance would suggest. Owing to circumstances, both the German Federal Court of Justice and the Polish Supreme Court are willing to create new legal norms, but the dimensions of judicial law-making presented by these bodies deviate from each other. In the research sample, the German Federal Court of Justice was more inclined to introduce legal institutions that were foreign to the statutes and rule against the will of the lawmaker explicitly stated in the preparatory works. On the other hand, the Polish Supreme Court used logical conclusions more often, but did not also refrain from passing rulings against the clear wording of the statutory law, and was just as willing to go beyond the wording of the law as was the German Federal Court of Justice. Notably, only the German apex court is willing to openly admit that it creates new legal norms, whereas the Polish Supreme Court does not concede in the reasons that its decisions are of a law-making nature, especially when it applies so-called "interpretation in the wider sense"—which is, in essence, a "concealed" way of creating new legal norms.

**Keywords** Judicial law-making · Comparative law · Legal interpretation · Polish criminal law · German criminal law · Judicature

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## 1 Introduction

The role of judicial law-making is one of the focal points of every legal culture. The main demarcation line between the systems rooted in the common law and civil law traditions is the prominence of the judge-made law as compared to the legal norms codified in the statutes. And even among the latter group, namely the national legal orders founded on the continental heritage, one may find great discrepancies in the prevailing attitudes towards judicial law-making. In general, it is possible to distinguish between more formalistic and more substantive (value-oriented) legal cultures. One of the fundamental differences between these two poles concerns the position of the judiciary. Broadly speaking, in the formalistic cultures, the role of a judge is ideally limited to an unbiased application of unequivocal rules. The creation of new norms lies solely in the hands of the legislative branch. Contrary to that view, in the value-oriented cultures, judicial activism is accepted, and case law is acknowledged as a legitimate source of law [35, pp. 223–224].

At the first glance, a fundamental difference in the acceptance of judicial activism can be observed in the Polish and German legal orders. Both these cultures are characterised by opposing theoretical premises regarding the permissibility of judicial law-making—while German jurisprudence acknowledges the right of the judiciary to create new law under certain circumstances, the Polish legal theory principally rejects this notion.

The difference in the theoretical stance begs the question of whether, and if so, of the extent to which this disparity is reflected in the judicial practice of both countries' courts. An interesting example can be derived from the practice of the highest courts dealing with criminal matters in Germany and Poland, namely the Federal Court of Justice (*Bundesgerichtshof*) and the Supreme Court (*Sąd Najwyższy*), respectively. Our previous research indicates that neither of these legal cultures is purely formalistic or strictly value-oriented. However, a comprehensive comparison of the argumentative patterns and interpretation methods applied by these two courts revealed that the argumentation of the Polish apex criminal court consistently leaned on the more formalistic side than the statements of reasons of its German counterpart [49, pp. 443–448; 50, pp. 1812–1813].

The following comparative paper investigates the phenomenon of judicial law-making in the practice of the German Federal Court of Justice and the Polish Supreme Court in criminal matters.[1] It aims to establish the extent of judicial activism in the judgments of these courts as well as the quantitative and qualitative differences between their practices. A special emphasis was put on the question of whether the differences in the theoretical stance on the judge-made law translate to correspondingly large discrepancies in the judicial practice of these courts.

A comparison of the decisions of the highest courts, as opposed to the decisions of the lower courts is particularly informative. The apex courts regularly deal with

[1] The creative judgments under analysis were identified within an earlier research project with a much broader scope. This paper significantly expands and revises the research on judicial law-making conducted earlier by the co-author Maciej Małolepszy and published in German [49, pp. 123–128, 408–442].

hard cases raising intricate legal questions, so these matters will naturally give more room to consider creative solutions. In contrast, the vast mass of cases dealt with by the lower courts pose no major interpretation problems or, alternatively, the solutions to these problems have already been settled in the older judgments.

The tasks assigned to the apex courts in each respective legal culture[2] reflect why they might be more prone to judicial activism than the lower courts. The principal objective [7, p. 25] of the Polish Supreme Court is the assertion of legality and uniformity of judicates passed by the ordinary and military courts, as provided for by Art. 1 (1) (a) of the Supreme Court Act33, pp. 35–45]. Similarly, the German Federal Court of Justice primarily deals with the control of the correct application of the law by the ordinary courts. In criminal matters, this competence is provided for by Art. 135 (1) of the Judicial Systems Act (GVG),2, pp. 263–274]. Furthermore, it is acknowledged in the German literature that the task of the Federal Court of Justice lies in the assertion of the uniform application of the law by the German courts and in the further development of the law [5, p. 2815; 23, p. 366]. This mandate is partially reflected in Art. 132 (4) GVG.24[3] [for details, see [4] in connection with sect. 337 of the Code of Criminal Procedure (StPO)[5] [for details, see [6] It is worth highlighting that in contrast to the Polish law, the German statute explicitly foresees the competence of the apex court to further develop the law.

The system in which the apex court reviews the legality of decisions of the lower courts creates an environment in which, even when faced with a hard case, the judges of the lower courts might be less inclined to seek creative solutions than the judges of the apex court. The rulings of the lower courts can be challenged on the grounds of law. If a lower court passes a decision which goes beyond mere application of existing law and is not backed by the case law of the higher courts, it runs the risk of having its ruling subsequently quashed. The judges of the apex courts have no such concern.

Finally, the Polish law provides for two procedures that enable other subjects to submit legal questions to the Supreme Court, which by nature pertain to difficult problems. (The German criminal procedure does not foresee a comparable mechanism.) Firstly, the Polish law enables a lower court to seek the assistance of the Supreme Court in dealing with a hard case, namely the institution of a "concrete legal question" (*konkretne pytanie prawne*), in criminal matters provided for by Art. 441 (1) of the Code of Criminal Procedure (k.p.k.).[7] A court examining an appeal measure might submit a legal question to the Supreme Court if, in the pertinent case, the submitting court faces a legal issue requiring a „substantial interpretation

[2] A concise presentation and comparison of tasks assigned to the German Federal Court of Justice and the Polish Supreme Court in criminal matters can be found in [49, p. 452–459].

[3] *Ustawa o Sądzie Najwyższym.*

[4] *Gerichtsverfassungsgesetz*, officially abbreviated as "GVG".

[5] *Strafprozessordnung*, officially abbreviated as "StPO".

[6] According to this stipulation, the adjudicating panel of the Federal Court of Justice may submit an issue of fundamental importance to the pertinent Grand Senate of the Federal Court of Justice if the submitting panel deems this necessary for the further development of the law or in order to ensure uniform application of the law by the courts.

[7] *Kodeks postępowania karnego*.

of a statute"[8] [for details, see ]. Secondly, the Supreme Court not only hears legal questions arising in a specific judicial case, but also has the competence to hear an "abstract legal question" (*abstrakcyjne pytanie prawne*) with a view to resolving discrepancies in the judicial practice (Art. 83 of the Supreme Court Act) [for details, see 14].

All these considerations lead to the conclusion that the most informative research material for the judicial activism are the rulings of the apex courts. And among these decisions, it is helpful to limit the research corpus to cases which were deemed important enough to be published in the most prominent law report of the respective country.

## 2 Research Corpus

The research corpus encompasses 200 rulings in criminal matters—100 of them authored by the German Federal Court of Justice, and an equal number drafted up by the Polish Supreme Court. The corpus was taken from the most important law reports with the criminal rulings of the given courts.

Germany does not publish official law reports in the strict sense of the word, but the reports unanimously considered to be the most prominent are published by the Carl Heymanns publishing house. Provided the judges of the Federal Court of Justice themselves decide whether their decision is intended for publication in these volumes, their nature is close to being official. The criminal decisions of the Federal Court of Justice are published in the *Entscheidungen des Bundesgerichtshofes in Strafsachen* ("Decisions of the Federal Court of Justice in Criminal Matters", commonly abbreviated as "BGHSt"). The German corpus covers all the decisions published in the 49th and 50th volumes of the BGHSt and the first 21 decisions from the 51st volume thereof. This includes decisions from the beginning of 2004 up until the beginning of 2007.

Conversely, the most important decisions of the Polish Supreme Court are published in official reports, as provided for by Art. 9 of the Supreme Court Act. The criminal decisions of the Supreme Court are published in the *Orzecznictwo Sądu Najwyższego. Izba Karna i Izba Wojskowa* ("Decisions of the Supreme Court. Criminal and Military Chamber", commonly abbreviated as "OSNKW"). The research corpus encompasses all 12 issues from the year 2007 and 6 decisions taken from the first issue published in 2008.

[8] A "substantial interpretation of a statute" (*zasadnicza wykładnia ustawy*) is required when the issue is strictly legal in nature and concerns an important problem of interpretation, that is, a provision or provisions that are divergently interpreted in judicial practice or that are faultily or unclearly formulated and, moreover, the issue concerns important issues of fundamental significance for the correct understanding and application of the law [decision of the Supreme Court of 25.2.2016, I KZP 19/15, OSNKW 2016, iss. 5, item 30].

## 3 Theoretical Background

### 3.1 Conceptual Framework

Before going into more detail, it is worth presenting a short conceptual for legal interpretation and judicial law-making. This is rendered more important, but also more difficult, by the differences in methodology and terminology applied by the German and Polish legal theories. And even within one legal culture, the substance of some terms is highly debatable. Certain simplifications in relation to the complex national legal discourses are therefore inevitable.

The starting point is the traditional view prevalent in the legal theories of both countries, one that differentiates between "interpretation" (revealing existing legal norms) and "law-making"[9] [15, p. 366; 20, pp. 23, 25; 22, § 8 recital 5; 25, recital 553]. "Law-making" is a phenomenon venturing beyond interpretation in this strict sense. This principal differentiation ought to be highlighted, because it is not shared in all legal cultures—for instance, the French legal tradition and the Court of Justice of the European Union apply the term *interprétation* to both these phenomena indiscriminately [17, § 4 recital 37, § 6 recital 149; 37, § 15 recital 5].

Both the German and Polish legal theories make a distinction between a "legal text" (subdivided into legal provisions[10]) and a "legal norm" (*Rechtsnorm*, *norma prawna*) [1, p. 618; 25, recital 24; 46, p. 63]. Legal norms are expressed by the lawmaker with the help of legal provisions [46, p. 63]. Legal norm is an order, prohibition or (arguably) a permission [26, p. 237; 46, p. 63] of conduct for the given addressee in a given situation [1, p. 618; 28, recital 120; 47, pp. 23–24]. Legal interpretation is an activity aiming to establish the correct meaning of legal norms contained in legal provisions[11] [40, p. 76; 41, p. 843; 43, p. 223] or, speaking more broadly, in legal texts [36, p. 28; 47, p. 35]. The underlying premise is that interpretation should only reveal the meaning of legal norms already contained in the legal texts without creating new legal norms [9, p. 216; 16, p. 69]. In contrast,

[9] The terminological distinction between "interpretation" and "law-making" is stricter in the German literature—"law-making" (*Rechtsfortbildung*, literally "further development of the law") begins where interpretation (*Auslegung*) ends [13, pp. 389; 47, p. 39], and "further development of the law" is not treated as an activity belonging to "interpretation". In the Polish context, scholars assert that the aim of interpretation is to reveal existing legal norms and not create new legal norms [9, p. 216; 16, p. 69], but use terms like "law-making interpretation" (*wykładnia prawotwórcza*) [12, p. 5; 20, p. 21] or "interpretation *contra legem*" (*wykładnia contra legem*) [16, p. 73] to describe the activity going beyond the disclosure of norms encoded in legal texts.

[10] Legal provisions are utterances in the form of sentences and constitute basic units of legal texts (e.g., statutes) [1, p. 618; 42, p. 165; 46, p. 63]. In Polish methodology, a strict distinction between legal provisions and legal norms is emphasised in the derivational theory of legal interpretation [1, p. 618], one of the two major Polish theories of legal interpretation, the second one being the clarificative theory [see e.g. 6; 49, pp. 108–117; 44].

[11] In Polish legal theory, this notion of interpretation is the foundation of the derivational theory of legal interpretation [1, p. 618].39, pp. 2408–2409].28, recital 797, 814]. This issue is related to one of the major debates in legal theory, namely whether the aim of the interpretation is the discovery of the actual will of the historical lawmaker at the time of passing the statute (subjective interpretation) or rather the so-called "will of the law" itself (objective interpretation) [for details, see e.g. 17, § 6 recital 60–80b].3, pp. 361–362; 8, pp. 356–357].

law-making leads to the creation of legal norms that were not contained in legal provisions. Herein lies the demarcation line between legal interpretation and law-making. Therefore, "judicial law-making" can be defined as all the activities of a judge passing a decision which go beyond revelation of legal norms already encoded in legal texts and, at the same time, which create legal norms.

In theory, this distinction between "interpretation" (revealing existing legal norms) and "law-making" might seem fairly straightforward, but in practice, a clear differentiation poses significant difficulties when dealing with particular cases [45, pp. 49–50]. Some authors even argue that any attempt to establish a clear-cut demarcation line is doomed to failure [13, p. 435; 17, § 4 recital 37]. The distinction is muddied by the fact that the reconstruction of existing legal norms might also require creativity on the part of the subject applying the law [12, p. 5; 15, p. 367; 18, pp. 6–7], so the difference between interpretation in this strict sense and law-making lies not so much in the existence of creative features, but rather in the extent of this creativity [10, p. 2275; 15, p. 366]. The fluid boundaries between the application of existing law by means of interpretation on the one hand, and judicial law-making on the other hand, are not as highly problematic for legal cultures which acknowledge the permissibility of judicial law-making. They pose, however, a significant challenge for legal orders which generally reject its permissibility.

### 3.2 Judicial Law-Making in Polish Legal Theory

In principle, Polish jurisprudence denies the judiciary the right to create legal norms (*zakaz działalności prawotwórczej*) [12, p. 5; 16, p. 69; 20, p. 21]. The term "law-making ruling " also has a negative connotation in the Polish legal culture [32, p. 62; 48, p. 72]. The power to create the law is reserved to the legislative branch, whereas the role of the judicature is limited to the mere application of the law. The Criminal Chamber of the Supreme Court sitting as a full bench declared in the decision of 11.1.1999[12] [p. 3]:

> No court, including the Supreme Court, may intrude on the competences of the legislative power and—under the guise of interpreting a certain legal provision, or interpreting an interrelation between legal provisions—create, in essence, a completely new substance of the analysed provisions, or deny an interrelation between these provisions, although such an interrelation clearly follows from the wording of the statute.[13]

The Constitutional Tribunal has also explicitly rejected the idea of judicial law-making. According to this body, interpretation of law conducted by judges cannot lead to the creation of new legal norms, but it only reveals the correct meaning already embodied in the statutory provisions.[14] Furthermore, legal interpretation shall not add or omit any substance from a provision.[15] Scholars have nevertheless

[12] I KZP 15/98, OSNKW 1999, iss. 1–2, item 1.
[13] All translations are our own.
[14] Decision of 7.3.1995, W 9/94, OTK 1995, iss. 1, item 20.
[15] Decision of 26.3.1996, W 12/95, OTK 1996, iss. 2, item 16.

pointed out that quite a few rulings of the Constitutional Tribunal do indeed have a law-making character [19, p. 96; 30, p. 55]. Academics have also made similar assertions regarding the law-making tendencies of the Supreme Court, be it of its Criminal Chamber [16, p. 69] or the Civil Chamber [31, p. 623]. It must be noted that academics do not universally condemn the creative activities of the judiciary—legal scholars have highlighted that the judiciary, especially the apex courts, are under certain conditions *obliged* to further develop the law, whether they like it or not [18, p. 94; 19, pp. 9–10].

The general interdiction of judicial law-making is limited by the recognized topos of deviation from the result of literal interpretation. According to the dominant legal theory in Poland and the Supreme Court itself, the interpretation process follows a step-by-step formula. The interpretation in the strict sense of the word consists of three stages. The first stage is the literal interpretation.[16] The systematic interpretation[17] and the purposive interpretation[18] serve a supplementary role, in which they either "confirm" or "correct" the previous interim result [20, pp. 74–76, 81–82]. The "correction" of the result against unequivocal wording can be considered to be of a creative nature. Nevertheless, even though this activity goes beyond the scope of the wording, Polish methodology classifies this step as a mere interpretation of the law.

A further easing of the general prohibition of judicial law-making can be seen in the differentiation between the "interpretation in the strict sense" and the "interpretation in the wider sense" (*wykładnia sensu stricto* and *wykładnia sensu largo*) [20, p. 26; 43, recital 69]. The "interpretation in the strict sense" consists mainly of the classical interpretation methods mentioned above (the literal, systematic and purposive approach). The "interpretation in the wider sense" encompasses primarily rules on the collision of norms[19] and. logical arguments[20]

### 3.3 Judicial Law-Making in German Legal Theory

The German legal culture, on the other hand, begins with a completely different premise. The institution of judicial "law-making" or, closer to the literal German terminology, "further development of the law", is acknowledged in the German legal methodology [15, p. 366 ff.; 25, recital 549 ff.; 28, recital 822 ff.; 36, p. 81 ff.; 47, pp. 63–64] and it is uncontested that, as a principle, this tool can be applied in case of a legislative gap [26, p. 635; 28, recital 878]. These gaps are divided firstly

[16] Literal interpretation addresses the meaning of words used in legal provisions.

[17] Systematic interpretation addresses the position of a legal provision within the context of legal texts (e.g., by drawing conclusions from the allocation of a provision in a certain division of a particular statute).

[18] Purposive interpretation addresses the aim pursued by a certain legal provision.

[19] *Lex superior derogat legi inferiori*, *lex posterior derogat legi priori*, *lex specialis derogat legi generali*.

[20] Analogy, *argumentum e contrario*, *argumentum a fortiori*.

into "unconsciously" and "consciously" created gaps, and secondly into "visible" and "covert" gaps. This legislative vacuum is filled by means of analogy, through logical arguments (e.g., *a fortiori* and *argumentum e contrario*), by invoking legal principles, and finally by so-called "purposive reduction" (*teleologische Reduktion*). Academics are divided on what exact phenomena the latter term shall incorporate. The advocates of a narrower definition assign the term "purposive reduction" only to the restriction of the scope of the norm in relation to the purpose of the said norm in question [28, recital 903–903a]. On the other hand, Karl Larenz, who coined the term *teleologische Reduktion*, uses a wider definition, and includes not only the restriction due to the purpose of the restricted norm itself, but also due to the purpose of other norms, due to the very nature of the matter at hand, and due to overriding legal principles [15, p. 392].

The judicial power to further develop the law is also accepted in the judicature of the Federal Constitutional Court. In the leading case concerning judicial law-making, the Soraya-decision of 14.2.1973,[21] the Court highlights that pursuant to Art. 20 (3) of the Basic Law (GG),[22] the judiciary is bound by the "statutes and law". According to the Court, this distinction implies that the law is not merely a sum of all written provisions. The strict application of only positive laws would assume that they are gapless, which is unachievable in practice. Some legal rules stemming from the constitutional normative order were not at all or only insufficiently laid down by the lawmaker in the written rules, and the judges are obliged to find and apply these unwritten norms in an unbiased manner [pp. 286–287]. The Federal Constitutional Court underlines that at least since the adoption of the Basic Law (in 1949), this judicial power to "creative finding" of legal norms has never been contested, and the federal apex courts have been using this competence from the very beginning. The Court also remarks that the federal lawmaker has explicitly assigned the Grand Senates of the apex courts the task to further develop the law [pp. 287–288].

In its newer judicates, the Federal Constitutional Court shows slightly more restraint regarding its acceptance of judicial law-making. For example, in the decision of 25.1.2011,[23] the Court submits that the separation of powers, laid down in Art. 20 (2) GG, prohibits judges from claiming the powers reserved by the constitution to the lawmaker and from stepping out of the role of subjects applying the law into the role of norm-setters, putting their own ideas of justice above the ones of the legislator [p. 210]. Nevertheless, the Court notes in the further part of the justification that constitutional principles do not prohibit judges from further developing the law. The constantly accelerating societal changes combined with the limited reaction capacity of the legislator and the open wording of many legal provisions all lead to the fact that the judiciary is entrusted with the task of adjusting the current law to the changed conditions. Still, this power to further develop the law has its limits. The judges shall not stray away from the purpose of the law as intended by the lawmaker. When faced with the changed circumstances, they must respect the

[21] 1 BvR 112/65, BVerfGE 34, 269.

[22] *Grundgesetz*—German federal constitution.

[23] 1 BvR 918/10, BVerfGE 128, 193.

fundamental decision of the legislature and implement its will to the extent possible. In such situations, the judges are expected to use accepted interpretation methods. Therefore, a law-making effort which disregards the clear wording of the provisions, finds no support in the law, and is not covered by the intention of the lawmaker. As such, it is an unlawful infringement of the competences reserved to the legislative branch [p. 210].

### 3.4 Different Scope of Judicial Law-Making

When comparing the Polish and the German methodologies, numerous differences can be noticed already at first glance. The seemingly radical disparity—a general prohibition of judicial law-making in Poland as opposed to the acceptance of this legal institution in Germany—is much softened by the fact that many tools considered to be law-making in Germany are classified as (permissible) interpretation tools in Poland. To provide just one example, the analogy and the arguments *a fortiori* or *e contrario* are assigned to the category of "interpretation in the wider sense".

### 3.5 Applied Definition of Law-Making

The different scope of the very term "law-making" in Poland and Germany poses a problem for a comparative analysis, namely: which definition of the term should be applied as a basis for identifying law-making decisions in both countries. Two main possible approaches are reliance on the respective national perspectives or, alternatively, defining "law-making" at the meta-level. The first alternative suffers from the shortcoming of comparing two in essence different objects which share only a partial overlap in their scope. Therefore, the second approach was chosen. The definition of "law-making" was crafted in the following manner. Based on the discussion in the German and the Polish legal literature, the categories of activities that were classified in the discussion as having law-making nature were identified. To achieve the most informative results and not omit any creative rulings, a broad approach was chosen. Our definition included categories of action which are subject to debate in legal literature whether they have a law-making character. This concerns two situations—firstly, if one legal culture classifies this action as "law-making", but the other legal culture sees is only as a mere interpretation (in the wider sense) [see below for Variant 3]; and secondly, when it is debatable within the discussion in one national legal culture whether a certain action belonged to the category of "law-making" decisions [see below for Variants 3 and 4]. In sum, four categories of such "law-making" decisions were identified, which will be presented below.

This working meta-definition was the starting point for empirical research. However, the definition was not set in stone before starting the analysis of the research corpus—under the premise typical of qualitative research methods, if over the course of an analysis a certain passage in the reasoning of the court was identified as creative, but would not fit well in one of the provisional subcategories of "law-making", then the definition would have been revised. Nevertheless, all identified creative passages could be satisfactorily assigned to one of the pre-defined categories.

On the basis of the academic discussion in both countries and 200 decisions from the corpus, the following four variants were identified as belonging to the law-making category:

(1) In the first variant, a court creates a new legal norm which does not have an explicit counterpart in a statute, for example by inventing a completely new legal institution or by adding new elements to an institution already established in the written law. This argumentative tool is allocated in Germany to the term "further development of the law" [22, § 6 recital 5] and in Poland to the term "law-making interpretation" [20, p. 21].
(2) In the second variant, the court either interprets a certain provision in a way that is not compatible with its clear wording,[24] or the court ignores the provision altogether. The former alternative can pose difficulties in practical application, as it refers to the controversial criterion of "clarity" or "unequivocality". Furthermore, the determination whether a certain provision is obviously non-ambiguous can be troublesome and prone to the interpreter's subjective perception. German legal methodology classifies such topoi, inter alia, as "judicial deviations from a statute" that can potentially be permissible [28, recital 936–939]. The Polish academia describes them as "deviations from the literal sense of the provision" [20, p. 83].
(3) The third group of argumentation strategies include logical conclusions (e.g., *a fortiori*, *argumentum e contrario*) and other methods of legal reasoning, especially the analogy. These arguments are assigned to the "further development of the law" in Germany[25] [17, § 6 recital 81–148; 28, recital 878–905] and to the "interpretation in the wider sense" in Poland [20, p. 23].
(4) In the fourth and final variant, the court applies a certain provision or legal term in a way that is contrary to the explicitly stated will of the lawmaker. The rulings from the research corpus were assigned to this category if the court referred to the preparatory works in which the lawmaker had stated its intention and the court strayed away from this intent. According to the German terminology, the court conducts an "objective interpretation"[26] [47, p. 17]. From the Polish perspective, this strategy can be seen as a the "deviation from the result of subjective interpretation" [20, p. 163].

[24] This includes cases in which the wording allows for more than one outcome (and therefore is not clear in the strict sense of the word), but the court chooses yet another, third outcome, which is clearly incompatible with the wording of the provision.

[25] With the caveat that there is a disagreement in the German legal literature whether logical conclusions or even the analogy have a law-making quality [see e.g.

[26] It is controversial whether an outcome contrary to the law-maker's intention transcends the border between interpretation and law-making [affirmatively

The meta-definition of "law-making" was sculptured with the specific purpose in mind of conducting comparative empirical research of the German and Polish judicial decisions. This has several implications. Firstly, it is not an exhaustive meta-definition that can be applied to all legal cultures. Secondly, our definition is purposefully broad and includes several argumentative methods whose law-making nature is debatable in national discourses. It should not be inferred that with their inclusion we take a stand on their nature within the national legal methodology. Thirdly, this research aims to analyse not only the quantitative, but also the qualitative differences between the creative decisions. This was facilitated by the division of the notion of "law-making" into several variants. Therefore, our definition differs from some more concise concepts presented in the literature on national legal methodology, but it does not aim to challenge or replace them within the context of the national discourse. For example, according to the dominant view in German legal methodology, interpretation ends and judicial law-making begins when the outcome is incompatible with any possible meaning of the existing wording of legal provisions [11, p. 343; 47, p. 39; 37, § 15 recital 12]. All of the three first variants in our meta-definition of "law-making" could have been collectively bundled in one broad category of "going beyond the wording of the existing written law". Nevertheless, our meta-definition aims to reflect the qualitative differences that emerge, for instance between cases in which the court creates a new legal institution without any statutory basis (e.g., German Case 1—BGHSt 50, 40) and when it only applies the *a fortiori* reasoning to an existing legal provision (e.g., Polish Case 6—III KK 83/06).

## 4 Distribution of Creative Decisions

Before discussing individual decisions from the research corpus that fit the definition of "judicial law-making", a short quantitative summary of the results of the empirical research should be presented. In certain cases, a categorical demarcation between an interpretation revealing the existing norms and the creation of new norms might pose difficulties and be subject to debate. Therefore, only the decisions whose creative character was indisputable were chosen.

Out of 100 rulings from each apex court, 9 German decisions and 8 Polish decisions were identified as having a law-making nature. Their distribution significantly differs across the variants, as shown in Tables 1 and 2.

## 5 Decisions of the German Federal Court of Justice

### 5.1 Case 1—BGHSt 50, 40

The analysis should start with the decision of the Grand Senate for Criminal Matters of the Federal Court of Justice of 3.3.2005.[27] The depth and the intensity with which

[27] GSSt 1/04, BGHSt 50, 40.

the Grand Senate created new law is unparalleled across the entire research corpus. Even a search across the entire acquis of the Criminal Chamber of the Supreme Court showed that the Polish court has never assumed the competence to create law to such a large extent. Furthermore, the Grand Senate provides in-depth and instructive deliberations on the permissibility of judicial law-making. This decision therefore serves as a benchmark for all the other rulings in this paper. Finally, the decision was not passed by one of the Criminal Senates (regular adjudicating bodies of the Federal Court of Justice), but by the Grand Senate for Criminal Matters—a body which, among its other competences provided for in sect. 132 of the Judicial Systems Act, may be called by a Criminal Senate for a decision if it considers the submission essential for the development of the law, or for ensuring the uniform application of the law. The former prerequisite shows that under given circumstances, the lawmaker explicitly authorizes the Grand Senate to create new legal norms. All these facts justify a significantly more thorough presentation of this decision in this paper as compared to the other rulings from the research corpus.

The decision of the Grand Senate must be seen as another milestone in the development of the legal institution of confession agreements by the judiciary. At the time of passing this decision, confession agreements were not regulated in the statutes. The previous activity of the Federal Court of Justice in this field, especially the landmark decision of 28.8.1997,[28] was already heavily criticised in the legal literature. Scholars argued that by introducing an institutionalised agreement procedure, the apex court overstepped the boundaries of permissible judicial law-making [27, § 17 recital 7; 38, p. 58]. Given the power of the courts to regulate confession agreements was a highly problematic matter, it does not come as a surprise that the Grand Senate presented an extensive justification for assuming this right [pp. 53–54]:

> The rule of law, the obligation of the state to protect the security of its citizens and their trust put into the proper functioning of state institutions, and not least the requirement of equal treatment of all the accused persons in the criminal proceedings, command all competent public authorities, especially the ones dealing with administration of criminal justice, to ensure that the state's right to inflict punishment will overall—with a view to all initiated proceedings—be executed to the extent possible. The execution of this right cannot be waived at will or due to non-compelling grounds, regardless of whether it would be waved entirely, partially, or only in a particular case. The rule of law can be realized only if it is ensured that the perpetrators will be prosecuted, sentenced, and penalized within the framework of the valid statutory legislation (cf. BVerfG—Chamber—NJW 1987, 2662).
>
> Under current legal and factual circumstances regarding the criminal justice system, these requirements cannot be met by the organs administering criminal justice if the confession agreements will not be accepted as permissible. Especially with a view to scarce resources of the administration of justice (cf. on that the report of the conference of the ministers of justice held on 17th

[28] 4 StR 240/97, BGHSt 43, 195.

**Table 2** Decisions belonging to each variant of law-making

| Variant of law-making | German decisions | Polish decisions |
|---|---|---|
| Variant 1<br>(new legal institution or new elements of existing legal institution) | Case 1—BGHSt 50, 40<br>Case 2—BGHSt 49, 84<br>Case 3—BGHSt 50, 284<br>Case 4—BGHSt 49, 68<br>Case 5—BGHSt 49, 189<br>Case 6—BGHSt 51, 88 | Case 1—KSP 10/06 |
| Variant 2<br>(incompatibility with the clear wording of a legal provision) | Case 7—BGHSt 50, 217<br>Case 8—BGHSt 51, 180 | Case 2—II KZ 25/07<br>Case 3—I KZP 4/07<br>Case 4—I KZP 26/07 |
| Variant 3<br>(logical conclusions and other methods of legal reasoning) | – | Case 5—II KK 310/06<br>Case 6—III KK 83/06<br>Case 7—I KZP 32/06<br>Case 8—III KK 181/06 |
| Variant 4<br>(incompatibility with the explicitly stated will of the lawmaker) | Case 9—BGHSt 50, 180 | – |

> and 18th June 2004: "The ministers of justice once again point out that the administration of justice reaches the limit of its capacity."), the functionality of the criminal justice system cannot be guaranteed if the courts were generally barred from reaching agreements with the parties on the content of the future judgment. In any case, as long as the agreements meet the presented minimum standards, they enable to accommodate the sometimes opposing requirements for the proper functioning of the criminal justice administration in their entirety.

This passage from the statement of reasons shows that the crucial justification for the acceptance of confession agreements by way of judicial law-making was the scarcity of resources available to the organs of the administration of justice. The Federal Court of Justice showed that it did not consider its tasks to be limited to correcting the errors of law committed by the lower courts, interpreting statutes and harmonising them. The apex court also feels a general responsibility for guaranteeing the adequate functioning of the criminal justice system, not leaving this task solely in the hands of the lawmaker but rather taking an active stance when necessary.

The Grand Senate continues its line of thought in the adjacent excerpt [pp. 54–55]:

> This is especially the case when one takes into account the principle of prevention of excessive length of the proceedings, which is an integral part of the rule of law, and the principle of procedural economy. Both principles may determine the scope of the investigative efforts required in a particular case. The weight of the criminal matter, the significance and the evidential value of further pieces of evidence need to be balanced against the delays of the proceedings (BGH NJW 2001, 695). The consideration of procedural economy when

> the threat of delay of the proceedings arises is not foreign to the criminal procedure—just like it is the case in every other procedure (…). Furthermore, the delays of proceedings, even if they stem from a court overload, not seldomly lead to the necessity of lowering a guilt-appropriate sentence (…).

In this passage, the Grand Senate explicitly refers to the principle of prevention of excessive length of the proceedings, a topos which came in 10 out of the corpus of the 100 analysed rulings of the Federal Court of Justice. Still, the significance of this principle is most visible in this decision. Combined with the principle of procedural economy, the principle of prevention of excessive length of the proceedings serves the apex court as a foundation for establishing a legal institution. The Grand Senate then derives concrete norms from this principle.

Another argument for the permissibility of confession agreements are the legitimate interests of the victims [p. 55]:

> Finally, further development of the law connected with the judicial acceptance of confession agreements is also justifiable from the constitutional perspective, with a view that the right to fair trial also protects the witness, namely the witness being the victim of the crime, from being treated as a mere object of the proceedings governed by the rule of law (BVerfGE 38, 105, 114 f.). According to the view of the lawmaker, the task of the social constitutional state is not limited to ensuring that the crime will be investigated and the guilt or innocence of the accused determined in the proceedings under the rule of law, but it shall also protect the interests of the victim (see the explanatory remarks of the Federal Government to the draft of the Act Reforming the Protection of Victims' Rights of 24th June 2004, BGBl I 1354, BT-Drucks. 15/2536). The protection of witnesses and victims may therefore be an inducement to refrain from further investigation—which would possibly increase the scope of culpability—namely, under the application of sect. 154, 154a StPO.

This extensive argumentation is brought to a point in the following words which corroborate that the apex court felt forced to further develop the law in this particular case due to the lawmaker's failure to act [p. 55]:

> Despite its necessity to ensure proper functioning of the criminal justice system arising from a change of circumstances, the Grand Senate for Criminal Matters would consider itself prevented from further developing the law by accepting the confession agreements (within the presented narrow boundaries), if only a pertinent regulation by the lawmaker was to be expected (cf. BVerfGE 34, 269, 291). Despite a pressing necessity for regulation, it is not tangibly foreseeable that the lawmaker will take action.

Finally, the Grand Senate directly turns to the lawmaker with an appeal which reads as an allegation for the inactivity—the apex court highlights that the lawmaker is the primary subject responsible for regulating confession agreements and the forced regulation of this matter by the judiciary is only an interim solution [p. 64]:

> The Grand Senate for Criminal Matters appeals to the lawmaker to statutorily regulate the admissibility and, in case of affirmation, the essential legal

**Table 1** Number of decisions belonging to each variant of law-making

| Variant of law-making | German decisions | Polish decisions |
|---|---|---|
| Variant 1<br>(new legal institution or new elements of existing legal institution) | 6 | 1 |
| Variant 2<br>(incompatibility with the clear wording of a legal provision) | 2 | 3 |
| Variant 3<br>(logical conclusions and other methods of legal reasoning) | 0 | 4 |
| Variant 4<br>(incompatibility with the explicitly stated will of the lawmaker) | 1 | 0 |
| All variants in total | 9 | 8 |

conditions and limitations of confession agreements. Establishing fundamental matters of the design of the criminal procedure, including legal rules on confession agreements, is primarily the task of the lawmaker.

The wide-ranging, multidimensional argumentation based on differing topoi shows that, in the view of the Grand Senate, the permissibility of judicial law-making in this case was far from obvious. The Grand Senate acknowledges the arising problem that by taking matters in its own hands, it may introduce a regulation which shall be reserved for the lawmaker to be dealt with, but nevertheless, the apex court decided to further develop the law anyway.

Before the Grand Senate gave the responses to the particular questions submitted by the Third Criminal Senate, it turned its attention to the general rules on admissibility and limitations regarding confession agreements. After a depiction of the judicial acquis in this matter, the Grand Senate provided a roundup and clarification of the existing boundaries. In their justification, references to the constitutional principles play a major role. The Grand Senate submitted that the constitutional limitations of the confession agreements arise mainly from the principle of fair trial—derived from Art. 2 (1) in connection with Art. 20 (3) GG—and the principle of guilt. The latter principle is also derived from the Basic Law by the Grand Senate, namely from Art. 1 (1) and Art. 2 (1) GG as well as from the rule of law, but it is worth noting that neither of these principles is explicitly codified in the Basic Law. Based on these constitutional standards and their concrete implementation in the provisions of the Code of Criminal Procedure, the Grand Senate presented the following minimum standards for permissible confession agreements [pp. 49–50]:

(a) The court is not allowed to prematurely follow the confession agreement route without due examination of the indictment by analysing the factual circumstances on the basis of the file, as well as conducting a legal assessment of the case.

(b) If a confession is obtained, which is usually the case when reaching confession agreements, its reliability must be examined.
(c) The discrepancy between the sanction arranged in the confession agreement and the expected sanction at the end of traditional proceedings cannot be so substantial that it becomes unacceptable in the view of sanctioning principles and cannot be justified as a reasonable mitigation due to a confession.
(d) The court may withdraw its approval of the confession agreement not only due to new facts coming to light, but also—after informing the parties about such possibility—if certain factual or legal circumstances existing during the creation of the agreement were overlooked.

With the exception of the second requirement, the minimum standards have a prohibitive character. As they are not mere recommendations and have an imperative nature, they evoke a quasi-statutory impression.

After these introductory remarks, the Grand Senate provided substantiated answers to the actual three questions submitted by the Third Criminal Senate. The body inquired as follows [p. 45]:

1. Is it permissible to submit a waiver to file an appeal as part of the confession agreement?
2. Is it permissible that, during the negotiations of the confession agreement, the court works towards a waiver to file an appeal by directly raising this topic or by giving a favourable opinion on the waiver?
3. Is the declaration of the accused waiving the right to file an appeal effective if it was preceded by a confession agreement, in which a waiver was unlawfully pledged or in which the court, without letting the accused pledge the waiver in an unlawful way, merely worked towards a waiver?

Regarding the first two questions, The Grand Senate answered that the court is not permitted to participate in a discussion on a waiver to file an appeal during the negotiations of the confession agreement, and the court is also not allowed to work towards such a waiver.

The Grand Senate substantiated this prohibition mostly quoting arguments of constitutional and pragmatic nature. It submitted that making the severity of the penalty dependent on the waiver is not permissible and used rather harsh words to reject this idea, claiming that this "extreme case" is "out of the question", because such action would profoundly infringe the principle of punishment being proportionate to fault. Then, the Grand Senate highlighted that a confession agreement cannot be reached in an autonomous, informal procedure, separate from the actual main proceedings. Apparently, the key argument against the participation of the court was the assertion that there are no legitimate interests in allowing the parties to arrange for a waiver within the framework of a confession agreement. Furthermore, such practice would harbour enduring dangers not only for the legal culture, but also for the indispensable values of a criminal procedure governed by the rule of law.

In a later part of the reasons, the Grand Senate stressed that even in cases where a confession agreement was reached, an effective appeal procedure must be maintained. If the court participates in an agreement on a waiver or even urges the accused to declare the waiver, it creates an impression that the court wants to avoid the possibility of having its ruling controlled by a higher instance. This appearance would in turn be incompatible with the dignity of the court and harm its authority. Therefore, the court must refrain from collaborating in reaching a confession agreement so long as the agreement shall encompass a waiver.

In regard to the third question, the Grand Senate confirmed that the waiver to file an appeal after a confession agreement is not binding if the court was unlawfully involved in the negotiations of the waiver. The Grand Senate reminded that the confession agreement and the waiver pertain to different stages of the proceedings: the confession agreement and the pronouncement of the sentence take place at the first stage, whereas the decision of the accused regarding the waiver is declared at the subsequent stage. At the latter stage, the statute provides for correctives protecting the person entitled to lodge an appeal from hasty decisions—this person shall be instructed about the right to file a remedy (sect. 35a of the Code of Criminal Procedure—StPO) and the declaration of waiver shall be minuted—sect. 273 (3) sentence 3 StPO. The Grand Senate believed that these protective measures alone are nevertheless insufficient to guarantee that the entitled person will be aware that he[29] still has the right to lodge an appeal, even though the court participated in the earlier confession agreement, which had (unlawfully) contained a waiver to file an appeal [pp. 59–60]:

> The Grand Senate for Criminal Matters also acknowledges that the person eligible to file a remedy—namely the accused—may find it difficult to move away from the declaration not to lodge a legal remedy after a certain outcome of the judgment. The accused is also caught between a rock and a hard place in cases in which he had approved such an agreement following the recommendation of his defence counsel and made a confession under this (albeit legally not binding) condition—he has therefore made a significant commitment in advance.

All these arguments led the Grand Senate to the conclusion that a waiver declared after an unlawful participation of the court in the agreement is invalid. Yet, in consideration of legal certainty, the Grand Senate introduced a caveat: the waiver to file an appeal remains valid if the person entitled to lodge a remedy was specifically instructed that his right to file an appeal remains unaffected despite an earlier confession agreement. Such an extensive instruction goes beyond the general information

[29] The German criminal statutes and the Federal Court of Justice generally use generic masculine nouns. They should be understood as encompassing all genders.

on the right to file an appeal and shall always be given if a confession agreement was reached, even if the agreement did not encompass a waiver to file an appeal.

In sum, the Grand Senate took the role of the lawmaker in this decision and also openly admitted it. In the eyes of the apex court, the legislative power does not lie solely in the hands of the lawmaker—under certain conditions, the courts are allowed, or even obliged, to take part in the law-making process. However, this submission raises the problem of the demarcation line between the legislature and the judiciary. The Grand Senate moved the boundary even further in favour of the judges and provoked the question of the role of the lawmaker, given the judiciary may step in its shoes in cases of perceived inaction. The decision in question did not mere concern the details of the procedure—in fact, it significantly reshaped the criminal proceedings in the German legal system. After the publication of this decision, the lawmaker had no choice but to pass a statutory regulation,[30] which entered into force on 4.8.2009.

In accordance with the meta-criteria explained in an earlier part of this paper, the decision of the Grand Senate constitutes the first variant of judicial law-making, as it legitimises and refines a legal institution that was not provided for by the statutes.

### 5.2 Case 2—BGHSt 49, 84

Confession agreements were also the topic of a slightly earlier[31] decision of the Federal Court of Justice of 19.2.2004.[32] The apex court submitted that an agreement is not permissible if it encompasses an obligation of the accused that is manifestly disconnected from the offence and the present proceedings. In this case, the court of first instance made the agreement dependent on paying a tax liability by the accused. The liability stemmed from an earlier offence which was not the object of the proceedings in question. The Federal Court of Justice therefore asserted that the obligation served a purely extraneous purpose, namely the enforcement of an extrinsic debt. Such a condition within an agreement violates the principle of fair trial:

> If any socially laudable behaviour of the accused, which might be taken into account as a mitigating circumstance during the consideration according to sect. 46 (2) StGB,[33] for example a generous donation for a victim protection organisation, could be subject to an agreement on sentencing, then this would lead to a "sale of justice", which is incompatible with the principle of fair trial (cf. BVerfG NJW 1987, 2663).

In its reasons, the apex court draws mainly upon the general principles of the law—which is hardly surprising because confession agreements were not codified in

[30] In the explanatory notes to the draft of the Act Regulating Confession Agreements in the Criminal Proceedings, BT-Drucks. 16/4197, p. 1, the lawmaker directly invoked the decision of the Grand Senate, claiming the necessity to regulate this matter by the legislative branch.

[31] Owing to its far greater significance, the later decision of the Grand Senate for Criminal Matters was presented in this paper as the first ruling from the selection.

[32] 4 StR 371/03, BGHSt 49, 84.

[33] Criminal Code (*Strafgesetzbuch*).

a statute at the time of the proceedings. The Federal Court of Justice created a legal norm without a statutory counterpart. Therefore, according to the meta-criteria, this decision represents the first variant of judicial law-making.

### 5.3 Case 3—BGHSt 50, 284

Another ruling that is representative of the first variant of law-making is the decision of 25.11.2005.[34] The case concerned an order of preventive detention imposed after the end of stay in a psychiatric facility. The question arose of whether a motion of the prosecution to impose subsequent preventive detention must contain reasons. The apex court opened its line of argumentation with the assertion that the pertinent regulations in sect. 66b of the Criminal Code (StGB) and sect. 275a StPO do not contain any minimal requirements concerning the substance of a motion. Also the preparatory works did not touch upon this matter. Still, the Federal Court of Justice concluded that the prosecution had been obliged to provide reasons in the motion. This inference was supported by balancing multiple constitutional values:

> aa) In sect. 275a StPO, an endeavour to take account of the constitutionally protected legitimate expectations (Art. 2 (2) GG in connection with Art. 20 (3) GG) of the accused is clearly visible (cf. decision of the Senate of 1st July 2005—2 StR 9/05—NJW 2005, 3078, to be published in BGHSt). The rule of law and the human rights limit the authority of the lawmaker to change laws which refer to past situations. The reliability of the legal system is a fundamental condition of liberal constitutions. As a principle, the citizen must be able to foresee possible state interferences and arrange his actions accordingly (cf. BVerfGE 109, 133, 180). An order of subsequent preventive detention refers to a past offence which has already been punished and by that, the general principle of the protection of legitimate expectations gives way to the prevailing interest of the general public. The expectation of the affected person to regain freedom at a predetermined time after serving the imposed penalty is set aside in favour of protecting the human rights of the potential victims from the harm done by potential perpetrators. Nevertheless, the affected person's right to freedom, which has a high constitutional rank, has to be sufficiently enforced through procedural guarantees.

The fact that the Federal Court of Justice created a new legal norm is highlighted by a later excerpt, in which the apex court submitted that the particular motion of the prosecution in the case at hand was, by way of exception, admissible despite the lack of reasons. The highest court noted that the prosecution was unable to foresee that the judiciary will demand a statement of reasons:

> At the time of filing the motion, the prosecution did not know that the case law of the highest court will develop in the direction requiring reasons in the motion. Up until this moment, no relevant rulings were passed. A statutory

[34] 2 StR 272/05, BGHSt 50, 284.

regulation does not exist, and the preparatory works contain no indications for a requirement of providing reasons, so for a short transition period (up until the publication of this ruling), a motion not containing detailed grounds must suffice.

### 5.4 Case 4—BGHSt 49, 68

A law-making character may also be attributed to the decision of 12.2.2004,[35] in which the Federal Court of Justice faced the following problem. The court of first instance questioned the victims on the first day of the trial, and on the second day, the court played the audio and visual recordings of their earlier interrogation conducted by an examining magistrate. The Federal Court of Justice ruled that this method of introducing evidence was admissible, even though the court did not name a statutory basis for this approach (which was only natural, as such a written provision did not exist). Instead, the argumentation is centred around references to the previous rulings of the Federal Court of Justice and legal literature. The crucial part of the argumentation consists of a lengthy verbatim quote from a past decision of the Federal Court of Justice[36]:

> Section 250 StPO only forbids substituting a witness testimony with the use of a reporting document created for evidence reasons, regardless of whether this document is a transcript or a written statement of the witness. The provision does not forbid that *in addition* to the interrogation of a certain person as a witness, a statement included in an earlier testimony, recorded in a transcript or given by the witness in writing, will be used. (…) The law foresees in sect. 253 StPO only a special provision on the usage of minutes which only then allows for reading them out for the purpose of documentary evidence (as a last resort), as long as confronting the witness with the excerpts of the minutes neither leads to congruency between the current testimony and the content of the minutes, nor does the witness declare that contrary to his recent testimony, the statements in the minutes are correct. Therefore, it can neither be concluded that the law forbids the usage of written statements in addition to a witness testimony, …, nor may a conclusion be drawn that sect. 253 StPO shall apply mutatis mutandis to the written statements which can be read out only after an unsuccessful confrontation of the witness with their content. Instead, it should be assumed that the systematic interpretation of the law leads to a general principle, according to which the law permits the use of documentary evidence in every instance in which it is not explicitly banned.

According to the Federal Court of Justice, the general principle presented above is also applicable to audio and video recordings of a witness interrogation carried out by an examining magistrate. The multimedia recordings are therefore treated

[35] 1 StR 566/03, BGHSt 49, 68.

[36] BGHSt 49, 68, p. 70 quoting the decision of 16.2.1965, 1 StR 4/65, BGHSt 20, 160, pp. 161–162.

similarly to the written transcript of the interrogation and act as a "video minutes". The purpose of playing the recordings is the assessment of whether the testimony is consistent across multiple interrogations.

The ruling belongs to the first variant of judicial law-making.

### 5.5 Case 5—BGHSt 49, 189

The decision of 17.7.2004[37] concerned the criminal liability of a former *Schutzstaffel*-officer for a mass shooting of Italian prisoners of war as a retaliatory measure in 1944. The court of first instance found the accused guilty of cruel murder in 59 cases and sentenced him to seven years' imprisonment. The Federal Court of Justice set aside this judgment. It acknowledged that the findings of the court of first instance confirm that the accused was guilty of homicide (a less severe crime than murder). Still, the Federal Court of Justice did not refer the case back to the court of first instance and instead, terminated the proceedings due to an advanced age of the accused (95 years). The Code of Criminal Procedure does not provide for a proceedings impediment due to the age of the accused. In the crucial passage, the apex court used a value-oriented argumentation and weighted all interests against each other [p. 200]:

> b) After consideration of all factual and legal circumstances, especially in respect of the now limited possibilities of further streamlining and accelerating the proceedings, which stems solely from the high age of the accused, the Senate holds it impossible to ascertain that in these proceedings, the perpetration of murder by the accused can be determined and it can be ensured that the crime did not become status-barred.
> The balancing of conflicting interests which both are anchored in the rule of law—finding the truth on the one hand and avoiding the danger of degrading the accused to a mere object of the proceedings on the other hand—commands, under given circumstances, to refrain from ordering the continuation of the proceedings. This is reinforced by the fact that any realistic effort to prosecute the accused started inconceivably late, in 1995, and is reinforced by the fact that the outcome of the proceedings is in every respect unclear.

By creating a legal norm without a counterpart in a statute, the Federal Court of Justice provided an example of the first variant of judicial law-making.

### 5.6 Case 6—BGHSt 51, 88

In the decision of 11.8.2006,[38] the Federal Court of Justice faced the following problem. Pursuant to sect. 274 StPO, compliance or non-compliance with the essential formalities can only be proven by the minutes of the main trial. According to the second sentence of this provision, against the probative value of the minutes regarding these formalities,

[37] 5 StR 115/03, BGHSt 49, 189.
[38] 3 StR 284/05, BGHSt 51, 88.

the only admissible objection is that of forgery. In the case at hand, the accused was defended simultaneously by two defence counsels. At the trial day in question, only the first defence counsel accompanied the accused in the court. The text of the minutes of the trial at the court suggested a procedural breach, namely that a defence counsel was not continuously present at the trial. Overwhelming evidence (e.g., hand notes of other parties) pointed to the contrary, namely that the defence counsel was questioning a witness at the time of her alleged absence. Nevertheless, the second defence counsel contented a procedural breach due to the absence of the defence, even though she must have realized that her colleague was present at all times. The Federal Court of Justice believed that the second defence lawyer, being in full knowledge of the facts, wanted to deliberately exploit the mistake in the minutes and the fact that the probative value of the minutes could not be undermined by contrary evidence.

The Federal Court of Justice ruled that the complaint was inadmissible on the grounds of the general prohibition of abusive practices. This ban had no explicit statutory basis, but the Federal Court of Justice provided the following argumentation to substantiate this idea [pp. 92–93]:

> 3. The general prohibition of abusive practices is applicable—just like in the other procedures—also to the criminal proceedings. Even though the Code of Criminal Procedure does not contain a general provision banning abusive practices, it regulates its particular subsets, like the abuse of the right to ask questions in sect. 241 (1) in connection with sect. 239 (1) StPO and the abuse of the defence counsel's rights in sect. 138 a (1) (2) StPO. The idea of preventing the abuse of one's rights also underlies the provisions of sect. 26a (1) (3), sect. 29 (2), sect. 137 (1) sentence 2, sect. 244 (3) sentence 2 (››dilatory tactics‹‹), sect. 245 (2) sentence 3 and sect. 266 (3) sentence 1 StPO (cf. Meyer JR 1980, 219 f.). In other cases of abuse of procedural rights in the criminal proceedings, where the lawmaker did not explicitly regulate this matter, the general prohibition of abusive practices applies—just as is the case in all proceedings (…). Some voices oppose this view, showing concern that the courts themselves may abuse the general prohibition of abusive practices (Rieß in Löwe/Rosenberg, StPO 25th ed. Einl. J. recital 36; Kühne, Strafprozessrecht 6th ed. recital 293; Fezer in FS für Ulrich Weber p. 475 ff.). To this dogmatically not weighty argument can be responded that almost 45 years have passed since the general acknowledgement of the prohibition of abusive practices in the jurisprudence of the Federal Court of Justice in BGHSt 38, 111 and this concern has not been confirmed. The very rare decisions in which this principle was deployed show great restraint in its practical application.

This type of argumentation is an example of the first variant of judicial law-making according to the meta-criteria presented in this paper.

### 5.7 Case 7—BGHSt 50, 217

In the decision of 10.8.2005,[39] the Federal Court of Justice tackled the interpretation of sect. 26a (1) (2) alternative 1 StPO. This stipulation reads: "*The court shall*

[39] 5 StR 180/05, BGHSt 50, 217.

*reject the challenge of a judge as inadmissible if: 1. the grounds for a challenge or the means of substantiating a challenge are not disclosed* (…)". The wording clearly shows that this norm refers to the situation in which the grounds or the means have not been provided at all. Yet, the Federal Court of Justice expanded the scope of this norm [p. 220]:

> In principle, equating a motion for challenge containing grounds which, due to imperative legal reasons, are completely unsuitable to justify the motion for challenge, with a motion for challenge not providing grounds, does not raise any objections, also from the constitutional perspective (BVerfG loc. cit.; BGH NStZ 1999, 311).

It follows from this passage that the entire adjudicating panel can reject the motion as inadmissible and proceed further on the basis of sect. 26a (1) (2) alternative 1 StPO when the grounds for a challenge were provided, but they are considered completely unsuitable to justify the motion. This solution does not come without problems, as it leaves room for interpretation whether particular grounds are "completely unsuitable". The court therefore faces a different task than the one originally encompassed by sect. 26a (1) (2) alternative 1 StPO—according to the wording of this provision, the court is supposed to only ascertain whether the motion for challenge included any grounds or not. This task does not pose any intellectual difficulties and leaves no room for uncertainty. Contrary to that, determining whether certain grounds are already "completely unsuitable" demands more mental effort. The Federal Court of Justice indeed noticed that the demarcation between these grounds and the grounds which are not yet completely unsuitable, but are nevertheless manifestly unfounded, may pose difficulties in a particular case. In the case of "manifestly unfounded" grounds, the motion for challenge is considered admissible, meaning and has to be dismissed on the substantial (rather than procedural) basis in accordance with sect. 27 StPO. The apex court described the key feature of the "completely unsuitable" grounds in the following manner [p. 220]:

> The deciding factor for the differentiation from »manifestly unfounded« motions for challenge which do not fall under sect. 26a (1) (2) StPO and are therefore covered by sect. 27 StPO (BGH StraFo 2004, 238; BGHR StPO sect. 26 a Unzulässigkeit 9) is the question of whether, even without closer inspection and regardless of the specific circumstances of the individual case, the motion for challenge is completely unsuitable to justify the apprehension of bias (BVerfG loc. cit.).

In this decision, the Federal Court of Justice broadened the scope of a law despite its unambiguous wording, so it provides an example of the second variant of judicial law-making.

### 5.8 Case 8—BGHSt 51, 180

The second variant of judicial law-making can also be found in the decision of 19.12.2006.[40] Section 247 StPO regulates the possibility of removal of the accused during an examination of a co-accused or a witness, as well as due to the accused's health. Regarding the situation after the accused is brought back to the courtroom, sentence 4 of this norm stipulates as follows: "*The presiding judge shall inform the accused, as soon as he is present again, of the essential content of the examination and of the remainder of the proceedings that took place during his absence*." In the case at hand, the Federal Court of Justice decided that the accused is also correctly "informed" in the sense of sect. 247 sentence 4 StPO when he may follow the video broadcast of the proceedings during his removal. This solution constitutes an alternative approach to the course of action envisioned by the lawmaker in sect. 247 sentence 4 StPO. The lawmaker has explicitly determined the person responsible for providing information (the presiding judge), and the timepoint at which information shall be provided (after the accused is brought back). The solution approved by the Federal Court of Justice modifies both these prerequisites. The information is not provided by the presiding judge, at least not directly by him (the Federal Court of Justice highlights that the presiding judge is responsible for ensuring a technically faultless broadcast). Furthermore, the information is provided to the accused not after he is brought back, but in real-time during his removal. The concept approved by the apex court is a practical solution that minimizes the interference with the accused's right to be present at the proceedings, as a video broadcast is a superior and more direct source of information than a summary provided by the presiding judge. Nevertheless, the Federal Court of Justice had to go beyond the wording of the law to validate this practice.

### 5.9 Case 9—BGHSt 50, 180

The final German ruling discussed in this paper is the decision of 1.7.2005.[41] This ruling differs from the cases mentioned above due to the fact that the Federal Court of Justice ruled against the will of the lawmaker which was explicitly expressed in the preparatory works. According to the meta-criteria, it is the only ruling in the research corpus belonging to the fourth variant of judicial law-making.

The apex court discussed whether a subsequent order of preventive detention is still possible after the prison sentence that the preventive sentence would rely on is completely executed, and the convict is already released from prison. It ruled that such an order is still permissible. The Federal Court of Justice rightly submitted that neither sect. 66b StGB, sect. 275a StPO, nor the preparatory works indicate that the convict must still be serving the prison sentence at the moment of the imposition of preventive detention by the court at the motion of the prosecution. Yet, contrary to

[40] 1 StR 268/06, BGHSt 51, 180.
[41] 2 StR 9/05, BGHSt 50, 180.

the assertion of the apex court, the preparatory works clearly oppose such an interpretation. The recommendation of the Legal Committee of the *Bundestag*[42] contains the following statement [p. 17]:

> Section 66b (1) StGB requires that ››facts come to light after the conviction … before the end of the execution of this prison sentence‹‹, to which sect. 66b (2) StGB refers. As a result, a subsequent order of preventive detention or a subsequent order of placement (sect. 275a (5) StPO) can only be considered during the time in which the prison sentence from the initial judgment is still being enforced. A subsequent imposition of preventive detention against a convict who already regained his freedom is impermissible.

The lawmaker could hardly express its will clearer than it did in this passage, explicitly stating that the completed execution of the penalty precludes the court from ordering preventive detention. In the later part of the recommendation, it was submitted as follows [p. 17]:

> Finally, an order is also possible on a case-by-case basis, when at the moment of issuing the order, or at the moment when facts come to light, the convict was serving a different prison sentence, because it would be unjust if, in otherwise constant conditions, the possibility of a subsequent imposition of preventive detention would be dependent on the accidental order of execution. Still, also in this case, an imposition is possible only as long as the prison sentence from the initial judgment has not been completely executed.

This implies that the lawmaker intended to introduce a separate, autonomous prerequisite for a subsequent order of preventive detention—the order is impermissible when the initial prison sentence is completely executed.

It is therefore worth exploring how the Federal Court of Justice concluded that the preparatory works do not speak against a subsequent order after a completed execution of a prison sentence. The apex court opened its argumentation with an assertion that the preparatory works were "in parts misleadingly phrased". The Federal Court of Justice therefore intended to undermine the unambiguity of the recommendation. The Court quoted the aforementioned crucial sentences from the preparatory works and argued that these passages do not introduce separate grounds for exclusion of a subsequent preventive detention. According to the apex court, these sentences "only clarify that facts which come to light already after the completed execution of the imposed prison sentence can no longer be taken into account".

This interpretation is not convincing, but notably, the apex court did not openly contradict the will of the lawmaker laid down in the preparatory works. The highest court created the impression that the result reached by the judges is congruent with the legislator's intent by blurring clear statements in the recommendations, stating that the recommendations are "in parts misleadingly phrased", and by applying "systematic interpretation" of the preparatory works. It is therefore visible that the

[42] BT-Drucks. 15/3346. *Bundestag* is the lower house of the German Federal Parliament.

Federal Court of Justice is not willing to (openly) hold a view which is contrary to the preparatory works.

After these deliberations, the Federal Court of Justice submitted multiple weighty arguments in favour of the preferred result. Nevertheless, this did not change the fact that the outcome was not compliant with the will of the lawmaker, as expressed in the preparatory works.

## 6 Decisions of the Polish Supreme Court

Contrary to the principal prohibition of creative rulings in the Polish legal theory, the authors were able to identify multiple examples of judge-made law in the research corpus, with the caveat that the applied meta-definition of law-making is broader than the common Polish definition.

### 6.1 Case 1—KSP 10/06

An example of the first variant of law-making can be found in the decision of 21.12.2006[43] on a complaint for delay in judicial proceedings. The Supreme Court gave concrete "hints" to the appellate court on the proper handling of the matter, even though this "advice" had no statutory basis.

The decision concerned the following problem: the accused was sentenced by the court of appeal and subsequently filed a cassation with the Supreme Court. Pursuant to Art. 525 (1) k.p.k., the cassation shall be filed through the court of appeal. In the pertinent case, the court of appeal had accepted the cassation as admissible but forwarded it to the Supreme Court two years later. The delay was caused by the fact that at first, the court of appeal had forwarded the case file (including the cassation) to the court of first instance and not to the Supreme Court. The court of first instance was supposed to re-examine the remitted case insofar as it was repealed by the court of appeal. The Code of Criminal Procedure contains no provisions on the order or manner in which the court of appeal shall forward the file if it is needed for both the cassation and the re-examination by the court of first instance. The Supreme Court nevertheless awarded compensation for the excessive duration of the proceedings and submitted that the appellate court was obliged to take every possible step to prevent the excessive duration of the cassation proceedings. Then, the Supreme Court provided several practical solutions that the appellate court ought to have had considered. Among them were sending photocopies of the file to the Supreme Court or arranging with the Supreme Court that a cassation hearing will be scheduled swiftly. All these tangible solutions have a law-making nature, as there exists a legislatory gap in this matter, yet the Supreme Court did not convey in the statement of grounds that these proposals further develop the law.

[43] KSP 10/06, OSNKW 2007, iss. 2, item 20.

### 6.2 Case 2—II KZ 25/07

An example of overstepping the boundaries of the wording of the law is provided by the decision of 30.8.2007.[44] This case concerned the admissibility of a cassation appeal to the advantage of the accused. The requirements are set forth in Art. 523 (2) k.p.k. According to this provision, a cassation appeal to the advantage of the accused is admissible only if the accused was sentenced to a penalty of imprisonment without a conditional suspension of its execution. In the case at hand, these elements were not fulfilled. The accused was not sentenced and the case was closed by imposing a protective measure in the form of a placement in a psychiatric facility pursuant to Art. 93–94 of the Criminal Code (k.k.).[45] Nevertheless, the Supreme Court rejected a restrictive interpretation[46] of the written law and recognized the appeal as admissible.

In the reasons, the Supreme Court addressed its earlier decisions where it deviated from the wording of Art. 523 (2) k.p.k., including a case where it admitted an appeal of a juvenile against a placement in a correctional facility.[47] The Supreme Court then considered the will of the lawmaker, who wanted to restrict the possibility of a cassation appeal in cases of less severe punishments, but leave this remedy available to people facing most severe penalties—a category to which placement in a correctional facility belongs [p. 53]:

> In the statements of reasons of these rulings, it was not only pointed out that the explanatory memorandum to the draft law amending the Code of Criminal Procedure expressed the intention to severely limit the possibility to file a cassation in favour of the accused only to the cases of prison sentences without parole; but above all, the essence of this limitation was highlighted—the severity of the punishment, which allows for a cassation due to a reason not defined in Art. 439 k.p.k. In the reasons of the decision III KZ 39/01 it was correctly submitted that there are no sufficient arguments for a restrictive interpretation of Art. 523 (2) k.p.k. and for an assumption that a cassation is not admissible against a correctional measure in the form of a placement in a correctional facility. After all, this measure also leads to a repressive liability for an act fulfilling the elements of a punishable offence, and the execution of this measure leads to deprivation of liberty which, in its essence, does not differ from imprisonment due to a criminal penalty (…).

Similarly to the imprisonment and the placement in a correctional facility, the placement in a psychiatric facility also leads to the most the most severe consequence for the offender, namely the deprivation of liberty (and in the case of a psychiatric facility, the offender may potentially spend the whole life there) [pp. 53–54]:

[44] II KZ 25/07, OSNKW 2007, iss. 9, item 66.

[45] *Kodeks karny*.

[46] An interpretation is restrictive when its outcome leads to a narrow scope of applicability of a legal provision, usually due to a strict adherence to its wording.

[47] Decision of 12.7.2001, III KZ 39/01.

> At its core, the situation is similar in the reviewed case, in which the court discontinues the proceedings and imposes a protective measure in the form of a placement in a psychiatric facility (Art. 93 and 94 (1) k.k.). In such a ruling, the court determines that the accused (suspect—Art. 354 k.p.k.) is a perpetrator of an act which fulfils statutory elements of a prohibited act of significant adverse effects for the society—usually against life (Art. 94 (1) k.k.); and although a penalty is not imposed, because, due to an exemption from criminal responsibility at the time of committing the act, guilt cannot be attributed to him (he does not commit a crime—Art. 31 (1) k.k. and therefore a penalty cannot be imposed), he still faces legal consequences of committing this act in the form of a placement in a psychiatric facility, the essence of which is the deprivation of liberty in conditions similar to serving a prison sentence in a therapeutic system (Art. 81 (2), Art. 96 and 97 k.k.w.[48]), the duration of which can be life-long, if that is indicated by the [accused person's] health condition.

All these considerations led the Supreme Court to a deviation from the clear wording of the law (second variant of judicial law-making), although the Court did not explicitly state in the reasons that this ruling had a law-making character.

### 6.3 Case 3—I KZP 4/07

Another example of a correction of the law against its clear wording is the decision of 26.4.2007.[49] The Supreme Court tackled the question of whether a person questioned as a witness can be held criminally liable for the offence of false testimony—Art. 233 (1) k.k.—if the evidence collected until the moment of his questioning already provide sufficient grounds that he should have been interrogated in the role of a suspect. The Supreme Court assumed that the prosecution had breached their duties under Art. 313 (1) k.p.k. to bring charges against the suspect. In conclusion, the Supreme Court negated the criminal accountability of the witness due to the right of defence and the right against self-incrimination. This outcome may seem fairly straight-forward, but the lawmaker had already foreseen a mechanism protecting witnesses against forced inculpation. Under Art. 183 (1) k.p.k., a witness may decline to answer a question if such an answer might expose him (or his close relatives) to liability for a criminal or fiscal offence. A witness is therefore not bound to lie in order to avoid incrimination, but can simply refuse to answer. Still, the Supreme Court submitted that the protection offered by Art. 183 (1) k.p.k. is insufficient in the pertinent case. Therefore, the "witness" should have been treated as a suspect and instructed about his rights, especially the right to remain silent. Any different outcome would open up the possibility for the prosecution to deliberately question potential suspects as mere witnesses to gain more information.

[48] Executive Penal Code (*Kodeks karny wykonawczy*).
[49] I KZP 4/07, OSNKW 2007, iss. 6, item 45.

### 6.4 Case 4—I KZP 26/07

A similar case was dealt with in the decision of 20.9.2007.[50] The legal question also concerned the criminal liability for false testimony—Art. 233 (1) k.k.—of a person questioned in the role of a witness. Contrary to the previous case, the evidence at the moment of questioning did not provide sufficient grounds for suspecting that person. Later, it turned out that the "witness" was the actual perpetrator. Once again, the Supreme Court negated the criminal responsibility of the witness for false testimony. The court submitted that the interrogated person fulfilled the elements of this offence, but his action was justified on the basis of his right to defence, enshrined not only in Art. 6 k.p.k., but also in the Constitution and international instruments. The Supreme Court realized that this outcome may seem problematic due to the existence of Art. 183 (1) k.p.k., and even highlighted that the literal interpretation of this provision, and of Art. 233 (3) k.k., suggests that the questioned person should be held criminally liable for false testimony. Still, the Supreme Court considered this provision to be inherently faulty, as it presents the witness with an insolvable dilemma—he may either refuse to answer and by that indicate to the prosecution that he was implicated in a crime that he was previously not suspected of, or he may testify falsely and risk punishment should the truth be subsequently revealed.

It is hard to deny that in both of these decisions, the Supreme Court deviated from the clear wording of the law (the second variant of law-making) by not observing the stipulation of Art. 183 (1) k.p.k. This correction is less problematic in the former decision (Case 3—I KZP 4/07), as the prosecution breached their legal duty stemming from Art. 313 (1) k.p.k. In the latter decision (Case 4—I KZP 26/07), however, the Supreme Court grants the perpetrator who is (rightfully) interrogated as a mere witness a general impunity from testifying falsely, as long as he does so to avoid criminal liability. This privilege goes beyond the guarantee set in Art. 183 (1) k.p.k., which merely grants witness the right to refuse an answer (but not to outright lie) to avoid incrimination of himself or his close family member. The ruling of the Supreme Court provokes the question of the relevance of Art. 183 (1) k.p.k. and its scope. It seems that in light of this decision, the statutory provision may only be applicable to the cases of possible incrimination of family members. Although it also explicitly refers to self-incrimination, this part of the provision now seems to be obsolete.

From the perspective of this study, the most remarkable aspect of these two rulings is the argumentation presented in the grounds to support the result. In neither of these two decisions has the Supreme Court stated that it corrects the lawmaker or limits the scope of the offence of false testimony. Instead, the Court stated that it applied a systematic interpretation to substantiate the justification of the witnesses' act. This implies that the Supreme Court does not further develop the law, but only applies a justification already included in the legal system, even if this justification was not expressly set forth in a single written provision. Nevertheless, the Court allowed itself two remarks that case shade at the statutory regulation. The Supreme

[50] I KZP 26/07, OSNKW 2007, iss. 10, item 71.

Court quotes a monography contending that due to the aforementioned insolvable dilemma, Art. 183 (1) k.p.k.has "minimal practical significance" and "suffers from a congenital defect which no treatment may cure" [29, p. 126]. Right after that, the Supreme Court asserted that this provision had "negligible effectiveness".

### 6.5 Case 5—II KK 310/06

Another law-making ruling is the decision of 27.2.2007,[51] in which the Supreme Court set forth its right to provide a written statement of reasons for a rejection of a cassation as manifestly groundless. Pursuant to Art. 535 (3) k.p.k., rejection of a cassation as manifestly groundless does not require a written statement of reasons. In the second clause, this provision states the preconditions (which were not fulfilled here) under which the Supreme Court is obliged to provide a written statement of reasons. Using a fairly straight-forward *e contrario* reasoning, the Supreme Court noticed that the first clause simply states that the Court is not obliged to draw up a written statement of reasons, but it does not forbid the Court from providing such a statement *ex officio* [p. 55]:

> From the wording of the currently valid stipulation in Art. 535 (3) k.p.k. follows the lack of a requirement to draw up a statement of reasons for a ruling if a cassation is deemed manifestly groundless, if in the second case a party does not file a request. The absence of a requirement to draw up a statement of reasons in the currently valid Art. 535 (3) k.p.k. does not imply that drawing up a statement of reasons is forbidden—it can be drawn up if the court decides to do so, even despite determining that a cassation is manifestly groundless.

The logical conclusion applied here indicates that the ruling belongs to the third variant of judicial law-making, but it would also fit to the first variant.

### 6.6 Case 6—III KK 83/06

Finally, three decisions were identified where the Supreme Court applied the *a fortiori* reasoning. According to the meta-criteria, this logical argumentation belongs to the third variant of law-making. As Polish legal culture classifies such a reasoning as a mere interpretation in the wider sense, it is only natural that the Supreme Court does not claim in the statement of grounds that it further develops the law.

In the decision of 8.11.2006,[52] the Supreme Court tackled the question of whether a court may continue the proceedings if the accused brought to court from custody declares that he refuses to participate in the trial and intends to leave the courtroom, even though his presence is mandated by law. To solve this problem, the Supreme Court enlisted the statutory regulated cases in which the court may proceed in the absence of the accused whose participation is (otherwise) mandatory. Article 377

[51] II KK 310/06, OSNKW 2007, iss. 4, item 35.
[52] III KK 83/06, OSNKW 2007, iss. 1, item 5.

(3) k.p.k. provides for three such cases, namely: when the accused declares that he will not participate in the trial; when he makes it impossible to bring him to the trial; and finally when the accused, although personally notified of the trial, fails to appear without justification. The first and third variants were clearly not applicable in the case at hand, as they refer to the accused who was not brought to the court from custody. Therefore, the Supreme Court focused on the question of whether the behaviour of the accused fell under the term "making it impossible to bring him to the trial". The Court answered this question in the affirmative on the basis of the *a maiore ad minus* argumentation. The apex court referred to the legal literature, according to which the criterion of "making impossible to bring to the trial" is already fulfilled when the detained accused provides a written declaration that he will not participate in the upcoming proceedings. On this basis, the Supreme Court reasoned that if the criterion is already met when the detained accused declares *in advance* that he will not partake in the trial, then it must be all the more sufficient that he refuses to participate *during* the trial. This *a fortiori* argument was then strengthened by further grounds.

It is worth noting that the Supreme Court applied the *a maiore ad minus* reasoning without stating that the regulation is incomplete or that the lawmaker overlooked the situation dealt with in the ruling. The statement of grounds gives the impression that Art. 377 (3) k.p.k. already contains a solution to the legal problem.

### 6.7 Case 7—I KZP 32/06

In the decision of 20.12.2006,[53] the Supreme Court tackled, among others, the following legal problem. The defendant submitted a request to a regional court to issue a cumulative judgment encompassing three sentences passed by a district court (a lower court) and one sentence issued by the regional court (a higher court). Additionally, the court seised determined that the defendant was convicted by two further judgments of a district court. The relevant statutory provisions read as follows. Article 569 (2) k.p.k. sets forth: "*If in the first instance the rulings were issued by courts of different levels, then the cumulative judgment shall be issued by the higher court*." Article 572 k.p.k. stipulates, however: "*If there are no grounds for issuing a cumulative judgment, then the court shall issue a decision on the discontinuation of proceedings.*" In the case at hand, only the judgments of the lower court could be aggregated into a cumulative judgment, but not the judgment of the higher court (regional court). Therefore, the question arose of whether the regional court should discontinue the proceedings and refer the case back to the lower court, which would then issue a cumulative judgment. The alternative solution was for the regional court to issue a cumulative ruling encompassing only the judgments of the lower court and discontinue the proceedings only in regard to the judgment of the regional court. The Supreme Court opted for the latter solution, adducing the unequivocal wording of Art. 569 (2) k.p.k. and procedural economy.

[53] I KZP 32/06, OSNKW 2007, iss. 1, item 3.

Then, the Supreme Court explicitly invoked the *a maiore ad minus* reasoning in its deliberations concerning the discontinuation of the proceedings. The decision of the court seised consisted of two parts. In the first (positive) part, the court listed individual judgments which would be aggregated into a cumulative judgment. In the second (negative) part, the court listed judgments which would not be included in the cumulative judgment. In regard to the latter element, the Supreme Court submitted [pp. 19–20]:

> The procedural expression of this negative assessment is the decision on the discontinuation of the proceedings provided for in Art. 572 k.p.k. This provision does not only oblige the court to discontinue the proceedings "in their entirety"—when the prerequisites to render a cumulative judgment are not fulfilled in regard to any of the evaluated judgments—but also in the part in which particular sentences do not fulfil these requirements (*arg. a maiori ad minus*).

### 6.8 Case 8—III KK 181/06

In the decision of 6.12.2006,[54] the Supreme Court was faced with the following legal problem concerning an investigation and subsequent trial of multiple persons. Some of the accused persons had testified during the preliminary proceedings but died before the trial commenced. The trial court was then confronted with the question of whether the testimonies of deceased accused persons were admissible in the trial, and specifically whether the minutes of the examination of these accused persons could be read out in the trial as valid evidence. The Polish law did not foresee an explicit provision regulating this matter at the time of the trial.[55]

The Supreme Court began its reasoning by referring to two fundamental principles of criminal procedure—the principle of immediacy and the principle of substantive truth. After an analysis invoking these principles and their interdependency, the Supreme Court stated that legal scholars and the judicature unanimously accept that the trial court is empowered to read out minutes of the examinations of deceased co-accused persons and accept them as admissible evidence. Nevertheless, the Supreme Court emphasised that any admission of secondary evidence is an exception from the principle of immediacy and as such cannot be based on the general procedural principles alone, but shall have a concrete statutory basis. This statement shows that the Supreme Court was keen to find a particular written provision to support this finding.

The Supreme Court commenced the search of a statutory basis with an analysis of Art. 391 (2) k.p.k., a norm that under certain circumstances provides for reading out the minutes of an examination of a witness. The apex court rejected its applicability and stated that the aforementioned provision is relevant only if the person at

[54] III KK 181/06, OSNKW 2007, iss. 2, item 16.

[55] An explicit regulation was introduced in 2015 and can currently be found in Art. 389 (3) k.p.k.: "*At the trial, reading out the explanations of a deceased co-accused is permissible.*"

hand is a "witness" in the procedural sense of the word, namely a person who was summoned for a questioning in the role of a witness. From the perspective of this paper, it is worth noting that the Supreme Court explicitly rejected the proposal of an academic Marian Cieślak [4, p. 211] to apply this norm on the basis of *a maiore ad minus* reasoning—the apex court considered such an argumentation to constitute a circumvention of the law.

Then, the Court rejected the applicability of other potential statutory bases—Art. 392 (1) and Art. 393 (1) k.p.k.—before finally coming to Art. 389 k.k. and ultimately confirming that this provision constitutes a valid legal basis for reading out the testimonies of the deceased co-accused persons. At the time of the trial, Art. 389 (1) k.k. read as follows: "*If the accused refuses to provide explanations, provides explanations differing from the earlier ones or states that he does not recall certain circumstances, it is permitted to read out, only in the adequate scope, the minutes of his explanations provided previously in the capacity as an accused in the given case or other case in the preparatory proceedings or before the court or in different proceedings provided for by law.*" The Supreme Court noted that the provision assumes that the co-accused is alive during the trial, because according to its Art. 389 (2) k.k., after reading out the minutes, the court shall call the accused to voice his opinion on the content and explain the inconsistencies. The apex court nevertheless invoked the *a minore ad maius* reasoning and argued as follows: if reading out the minutes is permissible when the accused refuses to provide explanations, then the reading out must be even more permissible if the accused is deceased. This logical conclusion takes the centre stage in the argumentation regarding Art. 389 k.p.k.

The Supreme Court nevertheless had to take a stance concerning the following problem. The Code of Criminal Procedure contains a provision widely mirroring Art. 389 (1) k.p.k., but referring to a witness instead of the accused. Article 391 (1) k.p.k. stipulates as follows: "*If a witness refuses to testify without justification, provides a testimony differing from the earlier one or states that he does not recall certain circumstances, (…), and also when the witness has died, it is permitted to read out, only in the adequate scope, the minutes of his testimony provided previously in the given case or other case in the preparatory proceedings or before the court or in different proceedings provided for by law*." Both provisions encompass all three cases from Art. 389 (1) k.p.k., but Art. 391 k.p.k. contains additional prerequisites not laid down in Art. 389 k.p.k.—including the death of the interrogated person. This might suggest that the lawmaker has consciously refrained from putting the death of the accused as one of the prerequisites for reading out the minutes. The Supreme Court was not convinced of this and submitted that the lawmaker cannot be expected to create explicit casuistic regulation for every possible occurrence. The Supreme Court stated that, in this particular case, the lawmaker must have overlooked that reading out the minutes with explanations of a deceased accused persons might be useful in cases involving multiple defendants.

## 7 Discussion

The present analysis of the research corpus rulings shows that, owing to circumstances, both the Federal Court of Justice and the Supreme Court are willing to create new legal norms. This result alone does not come as a surprise, as judicial law-making occurs in all legal orders [34, p. 32], even despite the already-mentioned reservations in Polish legal theory. Nevertheless, the dimensions of judicial law-making presented by both courts differ from each other. It should be noted, however, that the size of the research sample does not allow for definitive generalisations on the frequency of each variant in the acquis of both courts outside the research corpus.

In absolute terms, the number of creative decisions of both courts identified in the research corpus is similar: 9 German and 8 Polish decisions. While there is some overlap in the type of judicial law-making (e.g., both courts are willing to expand or restrict the scope of the pre-existing statutory institutions), there are interesting differences regarding some variants. Half of the Polish creative decisions belong to the subvariant of logical conclusions (one case of *e contrario* and three instances of *a fortiori*). In abstract terms, logical conclusions are arguably the softest and least problematic creative method of law-making—they do not assume the competence of the lawmaker to the extent that the other subvariants from our meta-definition do. In the Polish legal methodology, the courts are permitted to apply logical conclusions as means of "interpretation in the wider sense", and therefore the judges do not have a strong incentive to refrain from utilising these figures of argumentation.

While half of the Polish decisions belong to this relatively gentle form of law-making, the majority of the German rulings (6 out of 9) belong to the more controversial first variant of judicial law-making, that is, the creation or expansion of legal institutions. The German apex court was willing to pass creative rulings in the strictest sense of the word, namely by introducing legal institutions foreign to the statutes (e.g., in Case 5—BGHSt 49, 189 on the discontinuation of the proceedings due to advanced age, and most notably in Case 1—BGHSt 50, 40 on the regulation of confession agreements). It is not only the high share of these stronger forms of law-making in the German research corpus that is worth highlighting. Arguably, the greatest qualitative difference in the law-making practice of the German and Polish courts lies in the depth and extent to which the Federal Court of Justice is willing to introduce new legal norms. The regulation of confession agreements in German Case 1 goes well beyond all the creative activities of the Polish apex court in criminal matters. And while it is indeed rare even for the Federal Court of Justice to assume the competence of the lawmaker to such an extent, this decision is not the sole outlier in the acquis of the German apex court.[56] Furthermore, the Federal

[56] A particularly illustrative example is the decision of the Grand Senate for Criminal Matters of 19.5.1981, GSSt 1/81, BGHSt 30, 105. Pursuant to sect. 211 StGB, murder is punishable with imprisonment for life. It is the only penal provision in the German Criminal Code without any room for judicial discretion regarding the severity of punishment. The Federal Court of Justice nevertheless held that, under exceptional circumstances, the punishment can be mitigated [for heavy criticism, see e.g.

Court of Justice was willing to rule against the will of the lawmaker, as explicitly stated in the preparatory works (Case 9—BGHSt 50, 180).

The Polish apex court does not limit itself to the relatively soft methods of law-making mentioned above. The Supreme Court does not refrain from passing rulings even against the clear wording of the statutory law, and at least within the research corpus of 200 rulings, its willingness to go beyond the wording did by no means yield to the German activity. The extent of deviation from the meaning suggested by the wording in the decisions of the Supreme Court (e.g., in Case 4—I KZP 26/07) should not be understated. This finding is confirmed by the research of Szymon Majcher, who noted that the Criminal Chamber of the Supreme Court has repeatedly "corrected" or "improved upon" the statutory provisions [16, p. 71], and even passed blatantly *contra legem* rulings by ignoring the statutes [16, p. 73].

One major difference between the German and the Polish approach is the fact that only the Federal Court of Justice is willing to openly admit to creating new legal norms, as most clearly shown in the presented first decision on confession agreements (but on the other hand, if a relevant statutory provision does not exist, then it is virtually impossible to hide the law-making nature of a ruling). The Polish Supreme Court does not concede in the reasons that the interpretation bears a law-making character, especially when it applies so-called "interpretation in the wider sense"—which is, in essence, a "concealed" way of creating new legal norms. A similar observation regarding the entirety of the Polish legal system (not limited to criminal law) was made by Lech Morawski and Marek Zirk–Sadowski [21, p. 252]:

> Using Dworkin's terminology, we could say, that the Polish system of adjudication evolves from the doctrine of judicial restraint, where courts play an essentially passive role, which is limited to application of the law, to the doctrine of judicial activism, where courts actively participate on [*sic!*] formation of the law, although they usually hide the fact that they are doing so (…).

The authors see the reason for the convoluted way in which the Polish courts create new norms in the fact that the prevailing view in the Polish legal culture does not permit judges to create new law [21, p. 251]. As they submit:

> As a consequence, even when the courts engage in the law-making decisions they try to present them either as consequence of binding norms or as acts of interpretation of the law.

Nevertheless, the "willingness to admit" creative rulings on the German side should not be understood as a complete disclosure of every instance in which the Federal Court of Justice creates new law. The phenomenon of "concealed" law-making is also not foreign to the German apex court, but has a different nature, even if certain argumentative tools can be found in the reasoning of both the German and Polish courts. For example, both courts tend to devaluate the clear wording of the law or the preparatory works by using terms like "ostensibly" [Polish Case 8—III KK 181/06, p. 56] or by calling the phrasing "misleading" [German

Case 9—BGHSt 50, 180, p. 182]. This way, they may present their result as still being congruent with the wording of the law or the intention of the lawmaker, and therefore as reached by a simple application of standard interpretation methods.

Interestingly, even though the German apex court is more overt in its creativity, and the German jurisprudence is more accepting of judicial-law making, it would be an overstatement to claim that the judge-made law plays a significantly greater role in the German criminal judicature than it is the case in Poland. Our research indicates that, in practice, the frequency and the profoundness of creative rulings passed by the Criminal Chamber of the Supreme Court is greater than the Polish theoretical framework would suggest. This, however, is at least to some extent a testament to the reality of cases which the courts must decide on—and among them, especially the apex courts. A principled stance which completely precludes the courts from stepping outside the boundaries of written law is not feasible in reality. A gapless statutory regulation which contains convincing solutions for all cases and keeps up with societal changes is perhaps an ideal worth striving for, but this goal is ultimately unachievable. Judges might point out the shortcomings of the statutes in the statements of reasons or even call the lawmaker to action, but ultimately, they must solve a case in a satisfactory way and cannot refrain from adjudicating on the merits simply because the lawmaker did not foresee a convincing solution for a particular legal problem. One may argue whether, in a certain case, the apex court overstepped the boundaries of acceptable creativity and whether the judiciary is pushing the boundaries too much in its own favour, but as long as the statutory law will remain incomplete or faulty, judicial law-making is, to a varying extent, a necessary mechanism in every legal culture.

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