# RE-SOCIALISATION OF OFFENDERS IN THE EU: ENHANCING THE ROLE OF THE CIVIL SOCIETY (RE-SOC)

Workstream 1: Imprisonment in Europe

## GERMANY – COUNTRY REPORT

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## 1. Introduction: Basic information on imprisonment in the country

To understand the German situation on imprisonment one always has to bear in mind the federal composition of Germany. There are 16 states ("Länder") who have their own administration for the prison system, in addition the court system and the offices of public prosecutors are further subdivided.

16 states with 16 Ministries of Justice are responsible for about 65,000 to 80,000 prisoners and 16 Ministries of Public Health are supervising institutions for about 10,000 prisoners (formally: patients) in forensic institutions (psychiatric clinics for offenders and clinics for compulsory drug/ alcohol treatment). 142 District Courts have to decide about prisoner's complaints and probation. These are organized within a structure of 23 higher district courts. The Prosecution Services are organized likewise: 142 Prosecution Services are headed by 23 General Prosecution Services. There is no federal entity above those state institutions. The Federal Ministry of Justice has no supervising power. Within the court system many important decisions are drawn by the Federal Constitutional Court (FCC). However, the FCC deals only with breaches of the German Basic Law (constitution), and is not part of the ordinary court system and not a general appeal chamber.

The legal framework is partly made by the parliaments of the Länder as well as the federal parliament with participation of the house of the Länder.

In addition to the regional division of responsibility another important aspect for understanding the German system of criminal law is the so-called "twin-track-system" of sanctions. While imprisonment is perceived as punishment (first track) within the German system there are also special intramural "measures of betterment and security" which also mean a deprivation of liberty: a) treatment in a psychiatric institution, b) drug/ alcohol treatment and c) preventive detention (Sicherungsverwahrung). Looking at a first glance, one would assume the difference between the two tracks is due to the state of mind ascribed to the offender by the court. In fact the measures of betterment and security conducted in a psychiatric institution are regularly connected to a lack or at least

diminishment of responsibility in the offender. But matters are more complicated when looking closer, especially at the recent developments in connection with preventive detention. Preventive detention is a highly controversial measure of German criminal law, allowing continuing incarceration of an offender after the end of the prison term if, inter alia, the offender is still expected to commit serious crimes in case of release. The measure of preventive detention has challenged the "twin-track-system" of sanction during the last years. Especially, after the European Court of Human Rights in 2009 for the first time judged preventive detention to be a punishment in fact and thus questioned the traditional "twin-track-system" of sanctions in Germany (*M. v. Germany*, no. 19359/04, 17 December 2009). This will be explained in more detail below.

While prisons in Germany fall within the scope of the ministries of justice (of the Länder) psychiatric or withdrawal clinics are supervised by the Ministries of health of each of the states, and each state has its own law concerning the way the measures are dealt with in practice. Even though preventive detention is said by law to be a measure of betterment and security its execution falls under the supervision of the prison authorities. This and other reasons led to judgements of the ECtHR (*M. v. Germany*, no. 19359/04, 17 December 2009) stating that the distinction under German law between penalties and measures of betterment and security in the case of preventive detention is not convincing, and preventive detention is to be seen as a penalty.

One should note that committal to a psychiatric hospital and to preventive detention have no time limits, and the duration merely depends on a prognosis of dangerousness.

In addition to these general points, one might acknowledge different major developments concerning imprisonment in the last four decades.

In the 1970ies a federal law (Federal Prison Act, FPA) was implemented to regulate the way prison sentences are dealt with. The aim of imprisonment was said to be resocialisation/ rehabilitation. The prisoner was seen as bearer of constitutional rights like any other citizen. Before prisoners were perceived to be in a kind of particular closeness to the state, called "special relationship of subordination", not as holders of rights against the state.

The FPA stated that the open prison regime has to be the rule, not the exception and prisoners were supposed to be given the opportunity to systematically test progress by relaxations, e.g. via home leave for a day or for weekend or by working outside the prison and coming back for night times only. Additionally, the FPA included the obligation to adapt living conditions inside prison to life outside as far as possible, and to counteract against negative impact of imprisonment (this means to acknowledge that such impacts exist). In the long run prisoners should have been included into the general pension scheme, the health insurance system and being paid standard wages of the outside world. Unfortunately, these and further progressive regulations never entered into force, not even those which were supposed to be realised immediately, like the provision of the open regime as a rule.

Another important point is the change of the prison population. Since the 1970ies the number of prisoners with problematic drug use has risen. It is now estimated that 25% to 50% of the prison population consist of problematic drug users.

The end of the 1990ies saw new discussions on the question how to deal with sexual offenders. Especially cases of sexual abuse of children which resulted in the death of the victim (even though not growing in numbers) led to more and longer sentences, and an increase in committals to psychiatric institutions and preventive detention for all kinds of sexual offences, not only the most severe ones.

At the moment the closure of prisons starts to be discussed, because of lower numbers of prisoners

## 2. Domestic legislation on imprisonment

The German penitentiary system has various legal sources. Beside the main substantive regulations, encompassed by the German Prison Act as well as respective state laws, and the German Basic Law (Grundgesetz), law enforcement authorities and responsible courts are additionally bound by diverse international and European conventions which – among other things – contain prisoners' rights. Furthermore, the UN have issued several rules

and guidelines with a focus on prisoners' rights which are relevant in German prison law as well.

### 2.1. International and EU documents

#### *a) Ratification of UN documents*

As it comes to legal documents passed by bodies of the United Nations, Germany is legally bound by diverse agreements. One of those is the International Covenant on Civil and Political Rights which has been ratified by Germany in December 1973[1]. In the same month, the Federal Republic of Germany also ratified the International Covenant on Economic, Social and Cultural Rights (Federal Law Gazette 1973 II, p. 1569).

Furthermore, prisoners enjoy the fundamental rights provided by the Convention of the Elimination of all Forms of Discrimination against Women (Federal Law Gazette 1985 II, p. 1234), the Convention of Elimination of all Forms of Racial Discrimination (Federal Law Gazette 1969 II, p. 961) and the Convention on the Rights of the Child (CRC) which Germany ratified in March 1992. With reference to the CRC, a German reservation in view of the convention's applicability to foreign minors was withdrawn in 2010 (Löhr 2010). Moreover, prisoners may also assert rights from the Convention on the Rights of Persons with Disabilities (CRPD) which Germany ratified in 2008 (Federal Law Gazette 2008 II, p. 1419).

Last but not least, Germany signed and ratified both the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Federal Law Gazette 1990 II, p. 246) and the Optional Protocol to the afore-mentioned Convention (Federal Law Gazette 2008 II, p. 854).

[1] According to Art. 59 para. 2 Basic Law and on the conditions stated in Art. 1 Act on the International Covenant of 19 December 1966 on Civil and Political Rights (Federal Law Gazette 1973 II, p. 1533), the ICCPR represents directly applicable law in Germany and functions as an ordinary non-constitutional federal law.

***b) Non-binding UN rules and guidelines***

There are a few further international legal documents which directly address prisoners' rights but lack the status of legally binding conventions and covenants.

One of these instruments comprises the Basic Principles for the Treatment of Prisoners. These principles were released in the form of a General Assembly Resolution in 1990. Although non-binding, the Basic Principles are considered as a criterion for the lawfulness of prison conditions by the German legal literature (see e.g. Feest/Lesting 2012, Vor § 1 StVollzG, marg. no. 9). In a case concerning the extradition of a Bosnian national to Peru, the Higher Regional Court of Stuttgart also ascribed significance to the Basic Principles and regarded Peru's fulfilment of them as a precondition for an expulsion.[2]

Another set of guidelines – which are non-binding but nonetheless not irrelevant – are the Standard Minimum Rules for The Treatment of Prisoners (1955). Even though not legally binding, the so-called "Minima" have been considered as morally mandatory in German legal literature (Böhm 2003, marg. no. 11) and received attention in German case-law as well. The Federal Constitutional Court (FCC) confirmed that the Minimum Rules bore an indicative significance with reference to the legal examination of prison conditions (Federal Constitutional Court, decision of 13 November 2007, 2 BvR 939/07).[3]

Moreover, the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991) were taken into account by the Federal Constitutional Court in a case of coercive treatment in the context of a forensic psychiatric hospital.[4]

The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), however, are only referred to in the literature (see e.g. Kaiser & Schöch 2002, § 3 fn. 75).

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[2] Higher Regional Court of Stuttgart, decision of 07 April 2006, file ref. 3 Ausl. 23/04, published in Die Justiz 2006, pp. 308 et seqq.
[3] Published in: EuGRZ 2008, pp. 83 et seqq.
[4] Federal Constitutional Court, non-acceptance order of 23/03/2011, 2 BvR 882/09, published in: NJW 2011, pp.2113 et seqq.

The UN Bangkok rules for the treatment of Women Prisoners and Non-custodial Measures for Women Offenders (UN GA Res. 2010/16) were not taken into account in German court judgements so far. The Brandenburg Prison Act took the Bangkok rules into consideration (without special reference) in the establishment procedure of this act (Brandenburg LT-Drs. 5/6437, p. 5). Even in the scientific discussion the Bangkok Rules are missing so far, and only one NGO referred to them in public, to point out that the actual health situation of imprisoned women was below the standards described especially in rules 10, 29, 33 (Deutscher Caritas Verband 2013, p. 2).

***c) EU legislation***

On the level of the European Union, there are a few legal instruments that may play a certain role for individuals under imprisonment in Germany. One of them is the Charter of Fundamental Rights of the European Union (2000) that does not only bind the organs of the EU but also the Member States when transposing or implementing legislative acts of the European Union. As primary EU law, the CFREU has direct effect in Germany and is a regular point of reference for German courts handling cases relating to the implementation of EU secondary and tertiary law (e.g. asylum and expulsion cases). In spite of the clear European context, German legal literature even acknowledges a spill-over effect of the CFREU into jurisdictional issues with a solely national frame of reference (Streinz & Ohler & Hermann 2010, 124).

A further EU document that bears significance to questions concerning the German penitentiary system is the Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA), which was released by the Council of the European Union on 13 June 2002. Germany ratified this Framework Decision in 2004 (Federal Law Gazette I 2004, p. 1748), but the Implementing Act was declared null and void by the Federal Constitutional Court one year later (Federal Constitutional Court, decision of 18 July 2005, 2 BvR 2236/04). As a consequence, the legislator had to deal with the matter once again and finally passed an Act of Assent (Federal Law Gazette I 2006, p. 1721) that incorporates the FCC's demands by nearly copying them (Böhm 2006, p. 2593).

The Framework Decision on the Application on the Principle of Mutual Recognition to Judgements in Criminal Matters imposing Custodial Sentences of Measures Involving Deprivation of Liberty for the Purpose of their Enforcement in the European Union (2008/909/JHA), which was amended by Framework Decision 2009/299/JHA into its final version, has not been formally implemented into German law so far (Report from the Commission to the European Parliament and the Council, 5 Feb. 2014, COM(2014) 57 final). However, it was said that Framework Decisions are taken into account while interpreting the applicable national law, even if they are not implemented (Higher Court of Oldenburg, 3 Sept 2013, 1 Ausl 132/12).

***e) European Prison Rules***

Last but not least, the European Prison Rules (EPR), initially passed by the Committee of Ministers in 1973 and renewed in 2006, play a significant role in German prison law, being regarded as an expression of an increased awareness of human rights in the penitentiary system (Dünkel 2010, p. 202). Similar to other international rules and guidelines, the FCC attributes an indicative effect to the European Prison Rules as well (Federal Constitutional Court, decisions of 31 May 2006, - 2 BvR 1673/04 and 2 BvR 2402/04 and of 17 October 2012, 2 BvR 736/11). Due to the court's decision from 2006, the regional parliaments took the EPR into account while designing their different State Prison Acts (Feest/Lesting 2012, Vor § 1, marg. no. 10). However, they did so in referring to them rather in general, without special influence of the EPR to be recognizable (Nestler 2012).

***f) Monitoring mechanism – the National Agency for the Prevention of Torture***

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted by the UN General Assembly in 2002 and ratified by Germany in 2008 (see above), provides for two controlling mechanisms that are meant to ensure that the Convention's signing states meet their commitments: on the one hand, it paved the way for the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 2, 5 to 16 of the Protocol), and on the other hand, it foresees the set-up of mechanisms for the prevention of torture at the domestic level (Art. 3, 17 to 23 of the Protocol).

After passing a Ratification Act that came into force in January 2009, Germany created two bodies for the prevention of torture – the Federal Agency for the Prevention of Torture and the Joint Commission of the States (Flügge 2012, pp. 151 et seq.). According to the agency, the two institutions have to observe 13,000 detention places in total (National Agency for the Prevention of Torture 2013a). As the Federal Agency is composed of one honorary member, three research assistants and one office worker, and the Joint Commission employs four volunteers (Geiger & Schöner 2012, p. 137), the personnel resources and the funding have been widely criticised (National Agency for the Prevention of Torture 2013b). The two institutions publish common annual reports (http://www.nationale-stelle.de).

***g) ECtHR case-law on German prison conditions***

With reference to the conditions in German correctional facilities, there is only one decision of the European Court of Human Rights. In this judgement (*Hellig v. Germany*, no. 20999/05, 7 July 2011), the ECtHR established that Germany acted in violation of Art. 3 ECHR in a case, in which a prisoner had been held naked in a security cell for seven days. The convict had refused to be transferred from a single to a multi-occupancy cell with no separate toilet, basing his objection on existing case law and applying for a court ruling from the responsible Penal Execution Chamber. Ignoring the protest, prison officers escorted the appellant to the cell which he refused to enter. After a scuffle, the officers brought him – under the use of direct coercion – to a scarcely-equipped security cell and removed all his clothing . After seven days, the prisoner was released from the security cell and placed in the prison hospital. Subsequently, he asked the Regional Court of Gießen to establish the unlawfulness of his transfer to the security cell and the officers' use of force. After three and a half years, the regional court admitted that his placement in the multi-occupancy cell would have been illicit but regarded his transfer to the security cell as appropriate. After an unsuccessful appeal and a non-acceptance order – devoid of any reasons – by the FCC, the appellant lodged a complaint with the ECtHR (Pohlreich 2011, pp. 1058 et seq.).

Eleven years after the first complaint, the European Court of Human Rights decided on 7 July 2011 that the Federal Republic of Germany had violated Art. 3 ECHR in this case.

Nonetheless, it considered the institutional staff's behaviour as lawful, stating that the use of force in public custody was allowed if it is indispensable and non-excessive (ECtHR, *Hellig v. Germany*, no. 20999/05, para. 33, 7 July 2011). Ascribing responsibility for the violent encounter between the prison staff and the appellant to the latter, the Court also found his transfer to the security cell admissible (ibid., para. 57). However, the ECtHR deemed the constant removal of the inmate's clothes to be inhuman and degrading treatment in the meaning of Art. 3 ECHR, allowing for the fact that such treatment "is capable of arousing feelings of fear, anguish and inferiority" (ibid., para. 56). Moreover, the Court awarded non-pecuniary damages of 10,000 € (ibid., para. 65).

As much as the ECtHR's ruling is to be welcomed, it disregarded several important facts of the case: At first, the Strasbourg judges simply dismissed the applicant's complaint in view of a violation of Art. 13 ECHR (Right to an effective remedy) without giving any reasons. Thereby, they ignored the fact that it took the Regional Court of Gießen almost four years to decide on the applicant's complaint. As *Feest* rightly demands, cases like the present one would, however, require a judicial accessibility within hours – rather than months or years – in order to guarantee an effective legal remedy (Feest 2011). Moreover, the ECtHR concludes in respect of the applicant's conduct that he "could have been reasonably expected to pursue his legal complaint against his transfer, and eventually to claim damages for any inappropriate accommodation occurring in the meantime, instead of physically resisting his transfer." (ECtHR, *Hellig v. Germany*, no. 20999/05, § 36, 7 July 2011). Starting from this premise, the Court justifies both the prison officers' use of direct coercion and the applicant's placement in a security cell. Allowing for the fact that the appellant was resisting the transfer to an unsuitable joint accommodation, which would have constituted a violation of Art. 3 ECHR in itself (see Meyer-Ladewig 2011, Art. 3 ECHR, marg. no. 35), it appears incomprehensible to ascribe the cause for the scuffle to the applicant and to point to the duty to wait for legal compensation (Bachmann & Goeck 2012, pp. 410 et seqq.; Pohlreich 2011, pp. 1059 et seqq.).

Unfortunately, the ECtHR has not taken the fact into consideration that even in a situation with the law being on the side of the prisoner from the beginning there was no effective remedy for the prisoner to be taken to gain justice. This case could have been an ideal

example pointing to the general weakness of the prisoner's status when his or her rights are violated by the prison administration.

### 2.2. Constitutional law and the Federal Constitutional Court on imprisonment

Alongside international and European norms, the constitutional principles depict a significant legal source for the German prison law and regime.

In a ground-breaking decision, the FCC ruled in 1972 that fundamental rights of prisoners – as in the case of any citizen – may only be restricted by or pursuant to a law (Federal Constitutional Court, decision of 14 March 1972, 2 BvR 41/71)[5]. In the given case, a prisoner had gone to court in order to complain against the stopping of a letter he had written, containing critical statements on the prison staff and – especially – the prison director (Beaucamp 2003, 937). His complaint was rejected by the Higher Regional Court of Celle, establishing that fundamental rights of prisoners may be restricted – or even completely suspended – as far as it is required by the circumstances of the correctional institution in order to fulfil the purpose of punishment (ibid., pp. 937 et seq.). This point of view corresponded to the theretofore predominant doctrine of the 'special relationship of subordination' (Besonderes Gewaltverhältnis) which prisoners were allegedly exposed to (Kaiser & Schöch 2002, para. 5, marg. no. 43). This theory started from the premise that prisoners were closely linked to the state, finding themselves in a relationship based on compulsory subordination (Günther 2000, pp. 299 et seq.). In this situation, neither basic rights nor a requirement of the specific enactment of a statute (Gesetzesvorbehalt) were provided for (ibid., p. 300). The FCC, however, abandoned this doctrine as it facilitated the relativisation of basic rights in an unbearably indefinite manner. Therefore, the Constitutional Judges enjoined the German legislator to pass a Federal Prison Act that specifically regulates the interference in fundamental rights of prisoners and set a deadline for its enactment (Laubenthal 2011, p. 69).

As a result of the FCC's watershed decision, prisoners enjoy – like any other (German) citizen –those fundamental rights enshrined in Art. 1 to 19 of the German Basic Law

[5] Published in BVerfGE 33, 1-18.

(Grundgesetz), though the exercise of these liberties and rights are heavily restricted by the penitentiary law. Additionally, prison conditions and the treatment of convicts have to correspond to the principles of the democratic and social constitutional state (Laubenthal 2011, p. 18).

In view of the objectives of the German penitentiary system, the main aim – that is to say, the prisoner's rehabilitation, which is meant to enable the prisoner to lead a life in social responsibility without committing criminal offences – enjoys constitutional status. As established by the FCC in its 'Lebach decision', rehabilitation is a constitutional right derived from Art. 2 para. 1 in connection with Art. 1 Basic Law and the Social State Principle enshrined in Art. 20 and 28 Basic Law (Federal Constitutional Court, decision 5 June 1973, 1 BvR 536/72)[6]. In order to facilitate the prisoner's re-socialisation, the state and – especially – society have to play their part in helping him or her to reintegrate, as it were contempt and rejection which often caused the reintegration to fail (Landau 2011, p. 133). In this connection, the FCC also insisted on the media discharging their responsibility and thereby restricted the freedom of press – in the favour of prisoners in preparation for release – to a considerable extent.

Strengthening its emphasis on rehabilitation, the FCC dedicated itself to the constitutionality of the regulation of life imprisonment in a further decision in 1977 (Federal Constitutional Court, judgement of 21 June 1977, 1 BvL 14/76). After an order for reference by the Regional Court of Verden, the Federal Constitutional Court had to examine whether a life sentence for murder was irreconcilable with the German Basic Law and – in particular – with the inviolable (guarantee of) human dignity.

In its decision, the FCC acknowledged that life imprisonment portrays an extraordinarily severe interference in the fundamental rights of the person concerned as it entails a constant deprivation of his or her personal liberty (Art. 2 para. 2, sentence 2 Basic Law[7]) and finally excludes the convict from society, thereby restricting a number of constitutionally guaranteed fundamental rights (Walther 1996, p. 758). In view of the

[6] Published in BVerfGE 35, 202-245.
[7] Wording of Art. 2 para. 2, sentence 2 Basic Law: "Freedom of the person shall be inviolable".

inviolability of human dignity according to Art. 1 para. 1 Basic Law[8], the FCC also investigated possible severe distortions of the prisoner's personality but refused to declare a violation of Art. 1 with reference to the absence of unequivocal scientific proof of such a damaging effect (Köhne 2003, p. 6). As the protection of human dignity belongs to the constitutive principles of the Basic Law and represents the highest duty of the state, cruel, inhumane and degrading forms of punishment were prohibited, and the state was obliged to guarantee every individual a minimum subsistence level which facilitated a decent existence in the first place (Walther 1996, pp. 758 et seq.). Therefore, the FCC considered a lifelong deprivation of liberty without any chance to regain the latter to be irreconcilable with Art. 1 para. 1 Basic Law (Landau 2011, p. 134). Remarkably, the Constitutional Judges explicitly stressed that, contrary to human dignity itself, the requirements for its safeguarding is subject to gradual changes, pointing out that – throughout the history of criminal justice – severe punishments had always been replaced by less restrictive ones (Walther 1996, 759). What is more, the FCC concluded that the mandatory chance to regain liberty at some point also called forth the individual (lifelong) prisoner's claim to rehabilitation (ibid.). This means that one has to bear in mind that human dignity postulates at least the chance to regain freedom again one day in future.

The German legislator reacted to the FCC decision from 1977 by introducing Section 57a Criminal Code. According to that regulation, the court is supposed to grant conditional release with parole in case of imprisonment for life if a) fifteen years of the sentence have been served, b) the particular seriousness of the prisoner's guilt does not require the continued imprisonment, c) the release is reconcilable with public security interests and d) if the convicted person consents to it.

With respect to the deprivation of liberty in general, Art. 104 Basic Law stipulates that the "[l]iberty of the person may be restricted only pursuant to a formal law" (translation:

[8] Art. 1 para. 1 Basic Law: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." Quotations from the German Basic Law are gathered from the official translation, published by the Public Relations Section of the Bundestag (see References). Official German wording: "Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt."

Deutscher Bundestag 2010, 89)[9] and that only "a judge may rule upon the permissibility or continuation of any deprivation of liberty." (ibid.) With reference to criminal cases, Art. 104 para. 3 Basic Law provides that "[a]ny person provisionally detained on suspicion of having committed a criminal offence shall be brought before a judge no later than the day following his arrest; the judge shall inform him of the reasons for the arrest, examine him, and give him an opportunity to raise objections. The judge shall, without delay, either issue a written arrest warrant setting forth the reasons therefor or order his release." (ibid., p. 90) One has to point out that the end of the next day is the absolute limit, and there is no discretion on the side of the legal institutions of using it. A court decision has to be sought as soon as possible, not only within the given time frame as was assumed by practice until clarification through another important decision of the FCC (15 May 2002, 2 BvR 2292/00). In the years following the decision of the FCC this let to the establishment of court emergency services, e.g. for out of office hours and special occasions (known demonstrations where accompanying criminal acts are expected by the authorities).

### 2.3. National regulations concerning imprisonment and other forms of deprivation of liberty

As it comes to custodial sentences, criminal sanctions and other forms of deprivation of liberty, the German legal system comprises various legal sources that need to be differentiated.

[9] Official German wording of Art. 104 Basic Law:
"(1) Die Freiheit der Person kann nur auf Grund eines förmlichen Gesetzes und nur unter Beachtung der darin vorgeschriebenen Formen beschränkt werden. Festgehaltene Personen dürfen weder seelisch noch körperlich mißhandelt werden.
(2) Über die Zulässigkeit und Fortdauer einer Freiheitsentziehung hat nur der Richter zu entscheiden. Bei jeder nicht auf richterlicher Anordnung beruhenden Freiheitsentziehung ist unverzüglich eine richterliche Entscheidung herbeizuführen. Die Polizei darf aus eigener Machtvollkommenheit niemanden länger als bis zum Ende des Tages nach dem Ergreifen in eigenem Gewahrsam halten. Das Nähere ist gesetzlich zu regeln.
(3) Jeder wegen des Verdachtes einer strafbaren Handlung vorläufig Festgenommene ist spätestens am Tage nach der Festnahme dem Richter vorzuführen, der ihm die Gründe der Festnahme mitzuteilen, ihn zu vernehmen und ihm Gelegenheit zu Einwendungen zu geben hat. Der Richter hat unverzüglich entweder einen mit Gründen versehenen schriftlichen Haftbefehl zu erlassen oder die Freilassung anzuordnen.
(4) Von jeder richterlichen Entscheidung über die Anordnung oder Fortdauer einer Freiheitsentziehung ist unverzüglich ein Angehöriger des Festgehaltenen oder eine Person seines Vertrauens zu benachrichtigen."

First of all, penal sentences and sanctions are laid down in the Criminal Code (Strafgesetzbuch)[10] for adults and in the Juvenile Courts Act (Jugendgerichtsgesetz)[11] for young offenders. As mentioned before, German criminal law distinguishes between penalties and measures of betterment and security (Maßregeln der Besserung und Sicherung). While penalties mainly encompass prison sentences and fines, the latter cover a range of sanctions. Thus, offenders may be placed in a psychiatric hospital (Section 63 Criminal Code) or ordered to receive addiction treatment in a closed rehabilitation centre (Section 64 Criminal Code). Moreover, the Criminal Code provides for detention for the purpose of incapacitation (preventive detention, Sicherungsverwahrung) in Section 66 and supervision of conduct after release (Führungsaufsicht) in Sections 68 et seqq.[12]

***a) Prison Law***

In post-war Germany, imprisonment was short of a clear legal regulation until – in a first step – a joint corrections committee agreed upon 'Service Rules on the Execution of Sentences' (Dienst- und Vollzugsordnung[13]) in 1961 – a legal instrument that did neither have a statutory character nor portray a legally binding ordinance (Laubenthal 2011, p. 68).

Basing on reform efforts in the 1960'ies and early 70'ies, and following the landmark decision of the FCC in 1972, the German legislator intensified the (priorly initiated) discussion about the enactment of a Federal Prison Act (ibid.). After the presentation of a government draft bill, controversial political debates and the submission of an alternative Draft Act, the Federal Prison Act was adopted in 1976 and came into force on 1 January 1977 (Federal Law Gazette 1976 I, p. 581).

Within the framework of a debate on a relocation of law-making competencies between federal and state legislators in the years 2003 to 2005, the 'Commission on the

[10] An English translation by Michael Bohlander (on behalf of the Federal Ministry of Justice) may be accessed on http://www.gesetze-im-internet.de/englisch_stgb/index.html (viewed 20 November 2013).
[11] An English translation can be found on http://shvv.juris.de/englisch_jgg/index.html (viewed 20 November 2013).
[12] The Criminal Code also envisages measures like a driving disqualification order (Section 69) or an order for professional disqualification (Section 70) but – as this report focusses on forms of deprivation of liberty – these norms will not find further mentioning.
[13] Bremen / Senator für Justiz und Verfassung 1961.

Modernisation of the Order of the Federation' floated the – contested – suggestion to bestow the sole legislative authority in the field of corrections on the federal states, while the execution of prison sentences had traditionally been a matter of concurrent legislative power (Müller-Dietz 2005)[14]. In spite of broad criticism, the Federalism Reform Act provided for the proposed shift of legislative competencies (Federal Law Gazette 2006 I, pp. 2034 et seqq.) and thus, several state parliaments have passed their own State Prison Act since 2006.[15] The Federal Prison Act, however, still has legal force in those federal states which have not adopted respective state laws yet. Additionally, the existing State Prison Acts refer, at one point or another, to provisions of the federal law so that the latter will not completely lose its legal effect (Jehle 2013, Vor § 1, marg. no. 13). The regulations on legal remedies as part of the Federal Prison Act (section 109 ff. Federal Prison Act) will also remain in force for all of the Länder. Although the introduction of diverse state laws have brought along a number of changes in one way or another. Some of them may not be regarded as very prisoner-friendly and sometimes even deviate from the Federal Prison Act and related case-law in a constitutionally questionable way (Köhne 2012). Others are more prisoner friendly than the prior federal law, particularly with respect to resocialisation efforts, but still miss a real chance for legal remedy against prison decisions, especially, since the single regulations of the prison laws give a lot of discretion to the prison authorities. Thus, a court can often only rule that the decision by the prison authority was wrong, and has to say that the same prison authority has to decide again by taking the judgement into account. This means that a decision might need several years, since the prison administration can come to the same conclusion again, but with a new reasoning (Graebsch/ Burkhardt 2013).

As regards young offenders, different rules apply. Since 1953, the Juvenile Courts Act has been applicable in those cases in which an adolescent commits a punishable felony or misdemeanour. It acts as *lex specialis* to the Criminal Code and mainly deals with procedural law and the various sanctions a juvenile court judge may impose. Moreover,

[14] Concurrent legislative power describes a legislative concept according to which both the federal and the state legislators hold lawmaking powers. If the federal lawgiver makes use of his legislative authority, the states are basically not allowed to pass legal regulations in this area and existing state laws lose their validity (Gil 2013, pp. 565-577).

[15] For an overview of the existing State Prison Acts and respective links see: http://www.strafvollzugsarchiv.de/ index.php (viewed 21 November 2013).

the FCC decided in 2006 that the national legislator was obliged to pass a Juvenile Prison Act that is different from the provisions of existing law for adults (Federal Constitutional Court, decision of 31 May 2006, 2 BvR 1673/04 and 2 BvR 2402/04[16]). In the given decision, the Constitutional Judges held that youth imprisonment was due to be regulated by primary legislation and formulated a number of legal requirements which were meant to highlight the difference from adult imprisonment (Dünkel 2007). Meeting the deadline set by the FCC, all federal states passed State Juvenile Prison Acts until 2008, some of which were integrated in all-embracing laws on the execution of penal sentences.[17] Like the state laws on adult imprisonment, the adopted State Juvenile Prison Acts have been broadly criticised – mainly because they ignored, to different extents, the standards provided by the FCC (Eisenberg 2008).

***b) Measures of betterment and security***

The legal basis for rules for detention in a psychiatric hospital (sect 63 Criminal Code) or the placement in a closed rehabilitation centre for addiction (illegalized substance abuse or alcohol) treatment (Section 64 Criminal Code) is laid down in 16 different laws of the states, either incorporated into the laws governing help and security measures for persons with psychological needs or in special laws for the measures of betterment and security.

To be placed in such institution it is necessary for a criminal court to find that the unlawful commitment of a criminal offence took place, but the person acted in the state of diminished (sect. 21 Criminal Code) or lack (sect. 20 Criminal Code) of criminal responsibility and are seen to be dangerous in the future without treatment.

Time served in such an institution will be accounted for as prison time up to two thirds of a prison sentence (in cases of diminished responsibility, sect. 21 Criminal Code, in case of complete lack of criminal responsibility (sect. 20 Criminal Code), there won't be an additional prison sentence anyway, but the offender would be acquitted). In cases of "lack of criminal responsibility" there is no time limit for the placement in a psychiatric institution, when the balance of seen risks and dangers of reoffending and the time

[16] Published in NJW 2006, 2093 et. seqq.
[17] For an overview see:
http://www.strafvollzugsarchiv.de/index.php?action=archiv_beitrag&thema_id=&beitrag_id=171&gelesen=171 (viewed 24 November 2013).

already spend in such institution would generally allow provisional release. It will only end when the court is convinced that the risk of re-offending in a serious way is minimised to a degree acceptable for the public after the expertise of a forensic psychiatrist or psychologist.

As opposed to placement in a forensic psychiatric hospital according to sect. 63 Criminal Code the time limit for a placement in an institution for compulsory drug or alcohol treatment is two years plus the two-third of a prison sentence which has been imposed in connection (sect. 67 d Criminal Code). In 2012 the FCC ruled that even prison sentences not as closely connected have to be considered in search of the maximum period for the time in detention when compulsory treatment and prison sentences are imposed in combination (FCC27 March 2012, 2 BvR 2258/09). In 1994 already the FCC stated that compulsory drug or alcohol treatment according to sect. 64 Criminal Code also has to be ended, if there is no realistic hope left for the success of treatment. The then valid legal regulation saying patients had to stay in treatment for at least one year even if obviously without prospect of success was regarded to be against the constitution (FCC 16 March 1994, 2 BvL 3/90).

The rules for ending the placement in such an institution are laid down in the Federal Criminal Code and the Federal Code of Criminal Procedure.

Legal complaints against actions of the institution concerning the conditions of detention are dealt with by the same courts as in prison matters.

***c) Other forms of deprivation of liberty***

Aside from prison sentences, German law provides for a number of other forms of deprivation of liberty.

To begin with, Sections 112 et. seqq. of the German Code of Criminal Procedure[18] regulate the possibility for a criminal court to order remand detention (Untersuchungshaft) against an accused. As responsibility for the execution of remand

[18] German title: Strafprozessordnung.

detention lies with the federal states, they have passed individual Remand Detention Acts over the past couple of years.[19]

Moreover, the Act on Court Procedure in Family Matters and Non-litigious Matters[20] contains provisions on other forms of deprivation of liberty, encompassing a broad field of application.[21] One of these instruments is detention pending deportation, the legal basis of which is laid down in Sections 62 and 62a Residence Act[22].

Further regulations on the deprivation of liberty in specific cases may be gathered from the Code of Civil Procedure (Zivilprozessordnung)[23], the Administrative Enforcement Act (Verwaltungsvollstreckungsgesetz)[24], the Act on Regulatory Offences (Ordnungswidrigkeitengesetz)[25], the Courts Constitution Act (Gerichtsverfassungsgesetz)[26], the Act on International Cooperation in Criminal Matters (Gesetz über die internationale Rechtshilfe in Strafsachen)[27], the Code of Criminal Procedure (Strafprozessordnung)[28] and the different state Police Acts.

***d) Preventive detention for the purpose of incapacitation (Sicherungsverwahrung)***

Having been subject to constant changes, preventive detention portrays the most challenged and controversial legal instrument in the field of criminal sanctions in Germany. Established by the National Socialists in 1933, preventive detention was introduced as a measure of incapacitation and originally aimed at so-called 'habitual offenders' (Reich Law Gazette 1933 I, p. 995). After a massive use of preventive detention during the period of the Third Reich, the incapacitative measure entered a period of consolidation in post-war Germany (Ullenbruch, Drenkhahn & Morgenstern 2012, § 66 StGB, marg. nos. 16 set seqq.).

[19] For an overview of the existing Remand Detention Acts see: Krauß 2013, § 119, marg. no. 4.
[20] German title: Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit.
[21] For a comprehensive overview of the relevant forms see: Heidebach 2011, § 415, marg. no. 10.
[22] German title: Aufenthaltsgesetz.
[23] See Sections 380, 390, 802g, 890, 918, 933.
[24] See Section 16 (substitutive coercive detention).
[25] See Sections 96 et. seqq (coercive detention).
[26] See Sections 177, 178 (coercive detention).
[27] See Sections 15et seqq. (detention pending extradition).
[28] See Sections 51, 70 (custody against witnesses in case of non-appearance at court or unlawful refusal to give evidence)

In connection with various severe sexual crimes on children in the 1990'ies – which sometimes resulted in the death of the victims, and even though their numbers were not rising – there was a clarion call for better protection of society against dangerous recidivists (Laubenthal 2011, p. 565). According to political stakeholders, such protection was to be achieved by extending the scope of preventive detention. Thus, the adopted Combating of Sexual Offences and Other Dangerous Offences Act (Federal Law Gazette 1998 I, p. 160) additionally[29] provided for a preventive detention order if the offender committed a special kind of crime (certain sexual offences, dangerous bodily harm etc.) and had been sentenced to at least three years of imprisonment due to one of these crimes before. What is more, the mentioned act lead to the (ex post facto) abolishment of preventive detention's maximum duration of ten years, now practically permitting unlimited detention (Ullenbruch, Drenkhahn & Morgenstern 2012, § 66 StGB, marg. no. 20). The latter change of law was supposed to be applicable for retrospectively and even included those in expectation of soon release according to the law in force until then.

Only four years later, the scope of Section 66 Criminal Code was enhanced once again since the Act Establishing Optional and Extended Preventive Detention (Federal Law Gazette 2002 I, p. 3344) decreed the introduction of Section 66a which provided for deferred incapacitation orders (vorbehaltene Sicherungsverwahrung) in case the dangerousness of the offender is not possible to be assessed in the course of the initial criminal procedure yet.

In 2004, the expansion of preventive detention was finally completed by the introduction of subsequent incapacitation (nachträgliche Sicherungsverwahrung) – this new law allowed a court order that permitted retrospective preventive detention in cases without

[29] Formerly, preventive detention was only to be ordered in case an offender was sentenced to a prison term of at least two years and if he or she met the following requirements: 1. Two prison sentences of at least one year (each time) prior to the pending trial, 2. completion of a prison term or incapacitation detention period of not less than two years due to one or more of the previously committed crime(s) and 3. posing a danger to the public due to the offender's propensity to commit serious offences, particularly of a kind resulting in serious emotional trauma or physical injury to the victim or serious economic damage. Facultatively, the court could order preventive detention if an person had committed three intentional offences for each of which he had incurred a sentence of imprisonment of not less than one year and had been sentenced to a term of imprisonment of not less than three years for one or more of these offences, notwithstanding that there was no prior detention. These stipulations are still valid today.

prior preventive detention order with the argument that, only before the end of the prison term, evidence comes to light that the convict poses a danger to the general public.[30]

Five years later, the European Court of Human Rights had to deal with the question whether the retroactive prolongation of preventive detention's maximum duration in 1998 (see above) was reconcilable with the European Convention on Human Rights (ECtHR, *M. v. Germany*, no. 19359/04, 17 December 2009). In the given case, the complainant had been sentenced to prison for five years in 1986 and the court had ordered preventive detention following the completion of the prison term (Kinzig 2010, 233). At the time of his conviction, Section 67d Criminal Code had provided that the duration of preventive detention – if ordered for the first time – may not exceed ten years. However, M. was not released after serving 10 years of preventive detention since the Higher Regional Court of Frankfurt considered the indeterminate continuation of his detention order to be lawful, referring to the lifting of the 10-year limit in 1998 (ibid.). After an unsuccessful appeal to the FCC (Federal Constitutional Court, decision of 5 February 2004, 2 BvR 2029/01), M. lodged a complaint with the ECtHR in 2004. The FCC dismissed the constitutional complaint as unfounded since – according to the court – the regulations on preventive detention represented an appropriate and constitutionally admissible restriction of personal liberty (Michaelsen 2012, pp. 153 et. seq.). Moreover, it argued that the changes of Section 67d Criminal Code did not portray a form of retrospective punishment[31] as – correspondent to German criminal law's twin-track system of penalties – preventive detention was not a penalty but a measure of betterment and security (ibid., p. 154).

In its seminal decision, the ECtHR judged the continuation of preventive detention (beyond ten years) in the case of M. to be a violation of Art. 5 (1) ECHR. According to the Strasbourg judges, there was no causal connection between the original conviction of

[30] According to the relevant amending law (Federal Law Gazette 2004 I, p. 1838), retrospective preventive detention could only be imposed if the offender had been convicted for a felony against life and limb, personal freedom or sexual self-determination, or a felony pursuant to section 250 (aggravated robbery) and section 251 robbery causing death), also in conjunction with section 252 (Theft and use of force to retain stolen goods) or Section 255 (blackmail and use of force or threats against life or limb), or for one of the offences introduced by the Combating of Sexual Offences and Other Dangerous Offences Act (see above).

[31] According to Art. 103 para. 2 Basic Law "[a]n act may be punished only if it was defined by a law as a criminal offence before the act was committed." Therefore, retrospective punishment is subject to an absolute prohibition.

M. in 1986 and the prolongation of preventive detention in 2001 as required by Art. 5 (1)(a) (ECtHR, *M. v. Germany*, no. 19359/04, § 100, 17 December 2009).

With respect to a violation of Art. 7 (1) ECHR[32], the Court held that – despite the distinction of penalties and measures of betterment security in German criminal law – preventive detention was to be considered a penalty in the meaning of Art. 7 and therefore noticed a breach of the latter (Michaelsen 2012, p. 157). In this connection, the ECtHR noted

> "that, just like a prison sentence, preventive detention entails a deprivation of liberty. Moreover, having regard to the manner in which preventive detention orders are executed in practice in Germany, compared to ordinary prison sentences, it is striking that persons subject to preventive detention are detained in ordinary prisons, albeit in separate wings. Minor alterations to the detention regime compared to that of an ordinary prisoner serving his sentence, including privileges such as detainees' right to wear their own clothes and to further equip their more comfortable prison cells, cannot mask the fact that there is no substantial difference between the execution of a prison sentence and that of a preventive detention order." (*M. v. Germany*, no. 19359/04, § 127, 17 December 2009).

Considerably changing the hitherto predominant view of preventive detainees, who used to be regarded as dangerous but sane (Graebsch 2013, p. 3), the German legislator reacted to the ECtHR decision by introducing the so-called Therapy Placement Act[33] (Federal Law Gazette 2010 I, p. 2305). According to Section 1 para. 1 Therapy Placement Act, a court may order therapy placement against a preventive detainee in order to observe the prohibition of retrospective punishment if he or she suffers from a mental disorder and if an overall assessment of the detainee's personality, past life and living conditions reveals

[32] Wording: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."
[33] German title: Gesetz zur Therapierung und Unterbringung psychisch gestörter Gewalttäter.

that he or she is – as a result of the mental disorder – very likely to severely harm the life, body, freedom or sexual autonomy of others and, hence, causes detention to be necessary for the protection of the public. By thus assuring that a number of offenders – who were once incapacitated not because of a mental disorder but due to their alleged dangerousness – could continue to be held in preventive detention on grounds of a mental disorder, Germany obviously circumvented the clear stipulations of the ECtHR ruling in a questionable manner (Kinzig 2012, pp- 25 et. seq.).[34] For all efforts to create a new legal basis for the continuation of preventive detention, it is still highly doubtable whether the required "mental disorder" (Section 1 Therapy Placement Act) accurately corresponds to the "persons of unsound mind" mentioned in Art. 5(e) ECHR[35] (Satzger 2013, pp. 247 et. seq.).

In 2011, the European Court of Human Rights was requested to rule on German preventive detention regulations once again. In *Haidn v. Germany* (ECtHR, no. 6587/04, 13 January 2013), the Strasbourg judges ruled that retrospective preventive detention, as introduced by the German legislator in 2004, was incompatible with Art. 5 (1) ECHR as well (Merkel 2011, p. 969). As in the case of *M. v. Germany*, the ECtHR considered the causal connection between the initial sentencing court judgement – that is to say, the conviction – and the retrospective preventive detention order to be insufficient (Michaelsen 2012, 161).

Inspired by the jurisprudence of the ECtHR, the Federal Constitutional Court delivered a judgment on the lawfulness of preventive detention on 4 May 2011 which called for a significant change in the field of correction and incapacitation.[36] The given decision summarised the constitutional complaints of four preventive detainees who either opposed the continuation of preventive detention after expiry of the ten-year limit or a retrospective detention order (Federal Constitutional Court 2011). The FCC with this judgement also substantially changed its own jurisdiction on preventive detention.

[34] For a general critcism of therapy placement following the completion of a prison term see Anders 2012, pp. 498 ff.
[35] According to Art. 5(e) ECHR, no one shall be deprived of his liberty save, amongst others, in the case of a "lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants".
[36] Federal Constitutional Court, decision of 4 May 2011, 2 BvR 2333/08, 2 BvR 2365/09, 2 BvR 571/10, 2 BvR 740/10, 2 BvR 1152/10. Published in BVerfGE 128, 326-409.

In this landmark judgment, the FCC pronounced all relevant provisions on preventive detention – both former and current versions and even those that were not tackled by the complainants – to be irreconcilable with the German Basic Law (Peglau 2011, p. 1924). According to the Court, these regulations represented a disproportionate intrusion into the applicants' fundamental right to liberty as guaranteed by Art. 2 para. 2, sentence 2 and Art. 104 para. 2 Basic Law. In view of its decision from 2004[37], the FCC held that

> "decisions of the European Court of Human Rights (ECtHR), which contain new aspects for the interpretation of the Basic Law, are equivalent to legally relevant changes, which may lead to the final and binding effect of a Federal Constitutional Court decision being transcended." (Federal Constitutional Court 2011).

As explicated by the Constitutional Judges, ECtHR decisions served as an aid for interpreting the content and scope of the fundamental rights and principles of the Basic Law (Michaelsen 2012, 163). Hence, the provisions of the ECHR – though ranking below the constitution – portrayed an important yardstick that needs to be taken into account, allowing for the fact that the Basic Law is to be interpreted in a manner that is open to international law (völlkerrechtsfreundlich).

In the light of this approach, the FCC regarded the provisions on preventive detention as a violation of the applicable principle of proportionality and especially considered the requirement of a perceivable distance (Abstandsgebot) between preventive detention and the execution of a prison sentence to be disregarded (Andenas & Bjorge 2011, p. 768). In this connection, the Court argued that

> "preventive detention is only justifiable if with regard to its arrangement, the legislature takes due account of the special character of the encroachment that it constitutes and ensures that further burdens beyond the indispensable deprivation of "external" liberty are avoided. This must be taken account of by a liberty-oriented execution aimed at therapy which

[37] Federal Constitutional Court, decision of 5 February 2004, 2 BvR 2029/01.

> clearly shows to the detainee under preventive detention and to the general public the purely preventive character of the measure." (Federal Constitutional Court 2011).

Although maintaining the view that – contrary to the ECtHR's perception of preventive detention as a penalty – preventive detention represented a measure of betterment and security, the FCC considers the retroactive prolongation of preventive detention beyond the ten-year maximum as well as retrospective preventive detention as an infringement of the rule-of-law principle of the protection of legitimate expectations which may be deduced from Art. 2 para. 2, sentence 2 in conjunction with Art. 20 para. 3 Basic Law (Michaelsen 2012, p. 164).

Consequently, the Constitutional Court regarded retrospectively that an order or prolongation of preventive detention was justified only if the 'distance requirement' was met, if a high danger of most serious crimes or sexual offences is evident due to the detainee's person or conduct and if the requirements of Art. 5 (1), sentence 2 ECHR are fulfilled (Peglau 2011, 1925). As to the latter, only Art. 5 (1), sentence 2 (e) ECHR ("person of unsound mind") may be worthy of consideration (ibid.)The main practical influence of the Therapy Placement Act with almost no case of direct implementation, was that the FCC overtook the criteria constituted by this law for detention of a person "of unsound mind". Thus, the FCC shared this idea of circumventing the jurisdiction of the ECtHR with the German legislator.

With reference to the unconstitutionality of the provisions on preventive detention, the FCC did not declare the latter as null and void but deemed them to be applicable until the creation of a new legal basis, setting 31 May 2013 as a deadline (Federal Constitutional Court 2011) if by and large the requirements of the Therapy Placement Act are met in a certain case.

In order to come up to the above-mentioned 'distance requirement', the Constitutional Judges cited several prerequisites the legislator had to observe:

1. Preventive detention may only be imposed as a last resort and if no less restrictive measures are available (ultima ratio principle).
2. An extensive and scientifically appropriate treatment examination has to be undertaken at the beginning that needs to result in a correspondent treatment programme orientated at a realistic prospect of release. In particular, the treatment has to allow for an individually conceptualised therapy programme.
3. The detainee's motivation shall be enhanced by intensive care and treatment.
4. The detention conditions must exhibit a clear – though not spatial – distance to the execution of a regular prison sentence.
5. The conception of preventive detention has to provide for relaxations and specific requirements concerning the preparation for release.
6. Preventive detainees shall have a legal claim to the application of measures that are eligible to reduce their dangerousness and shall be supported in safeguarding their interests.
7. The continuation of preventive detention shall be subject to – at least – yearly examinations and indications for a possible early release must be scrutinized immediately.

As a reaction to the Constitutional Court decision, the German legislator passed an amending act for the implementation of the 'distance requirement' as stated by the FCC (Federal Law Gazette 2012 I, p. 2425). Its central part is the newly inserted Section 66c Criminal Code which basically reiterates the preconditions listed by the FCC (Peglau 2013, pp. 250 et seq.). Other changes comprise, amongst other things, the court's duty to release a preventive detainee on probation – regardless of possibly continuous dangerousness – if he or she did not receive proper care and treatment throughout the execution of his prison sentence (ibid., p. 253). What is more, Section 67d Criminal Code now enables the release from preventive detention on grounds of disproportionality and Section 67e provides for an annual examination of the lawfulness of further detention.

As the execution of preventive detention lies within the states' sphere of responsibility, the federal states adopted Acts on the Execution of preventive detention[38] which – like the federal act – came into force on 1 June 2013. Strikingly, both the federal and the state laws exhibit an unmistakable similarity to existing regulations of the Federal Prison Act and the respective State Prison Acts (Pollähne 2013, pp. 257 et seq.). In this connection, the nature of the 'perceivable distance' between the execution of a prison sentence and preventive detention remains highly dubious (Feest 2012).[39] Consequently, the "perceivable distance" might only be enacted by poor standards in prison as they are actually lagging behind legal requirements.

According to the FCC preventive detention in future should only be allowed in cases where a person suffers from a mental disorder within the meaning of sect.1, para. 1 of the Therapy Placement Act ("unsound mind"), without the person having a mental disorder in the meaning of sect. 20, 21 Criminal Code, i.e. no mental disorder to, at least, diminish the criminal responsibility is necessary. In a most recent decision the ECtHR (Glien v. Germany, Case No. 7345/12, Judgement 28 Nov. 2013) pointed out, that this "unsound mind" needs a narrow definition and must be a true mental disorder in need of treatment. It can be doubted that the new German regulations fulfill these requirements, but probably years will pass until the ECtHR will have the opportunity to decide about this effort to circumvent its jurisdiction.

## 3. Institutions and organisations

There are various institutions and organisations in Germany that are responsible – in some way or another – for the execution of penal sentences and prison terms. In general, the German penal system differentiates between the execution of a sentence (beginning and termination, place of execution etc.: "Strafvollstreckung") and the way it is executed ("Strafvollzug"). As far as organisational and institutional questions are concerned, the two systems exhibit different responsibilities which are nevertheless sometimes executed

[38] For a list of the existing State Acts see http://www.strafvollzugsarchiv.de/index.php?action=archiv_beitrag&thema_id=16&beitrag_id=511&gelesen=511 (viewed 29 November 2013).
[39] For a critical examination of the new regulations on preventive detention see Pollähne 2013.

by the same authorities. Apart from numerous state organisations, the German penal system comprises a number of noteworthy non-governmental organisations.

### 3.1. Governmental purpose of incapacitation institutions

The execution of a sentence – as the last part of a criminal proceeding – encompasses all measures which are meant to enforce the sentencing of a penal court, including the summons to serve a prison term, the collection of fines, the enforcement of measures of betterment and security as well as conditional release. According to Section 451 Code of Criminal Procedure, the responsibility for the execution of a criminal court ruling resides with the prosecution office, that is to say, (with very rare exceptions) with one of the 142 local prosecution offices which are located at the Regional Courts or one of the 23 state attorneys general offices which are located at the Higher Regional Courts. As the German public prosecution service and its competencies are structured according to the different offences and the location of the crime, there may be various responsible prosecutors for one offender.

While in case of committals to a forensic facility or prison sentences for adults the prosecution office in charge is entitled to decide on the beginning of the measure/ sentence as well as the place of detention or imprisonment, it is the Juvenile Court in case of young offenders, and the Penal Court in case of pre-trial detention (the latter at the request of the prosecution).

As it comes to German correctional facilities and the execution of prison sentences or other criminal sanctions, there are a number of responsibilities and competencies that need to be distinguished. On the one hand, the federal system leads to different regional responsibilities and on the other hand, the particular criminal sanctions entail distinct operational responsibilities.

In view of the German penal institutions, there are – at the highest level – 16 different State Ministries of Justice which serve as the chief supervisory bodies (administrative and technical supervision). Subordinate to the ministries, the numerous prisons represent independently operating units which are either divided into different departments or

centralised and which have the legal task to accommodate a specific number of prisoners. In total, there are around 190 penitentiaries in Germany. Additional to these administrative systems, only one state, that is to say North-Rhine-Westphalia, has introduced an Ombudsman who both advises the Ministry of Justice in general prison matters and serves as a contact for prisoners and prison staff as it comes to complaints, suggestions, observations and petitions.

In the case of the German forensic institutions and rehabilitation centres, however, 16 Ministries of Health act as their administrative and technical supervisors, while – contrary to the prison system – there are diverse intermediate authorities (such as the Regional Association of Westphalia-Lippe).

In view of the German Probation (and at the same time Parole) Service and the execution of supervision of conduct, there are regional differences as well. Each federal state has its own organisational concept but in most cases, the Probation Service is accountable to the respective Ministry of Justice and assigned to the different district courts, the presidents of which act as its administrative and technical supervisors. Moreover, most of the Probation Offices have an executive officer who is responsible for the coordination and organisation of the Probation Service. The different regional Probation Services either act as independent bodies or share an office with the local Court Assistance Agency (Gerichtshilfe) and / or the authority that is responsible for the supervision of conduct (Führungsaufsichtsstellen). In case of the latter, the tasks of the supervision bodies are subsumed under umbrella organisations called “Social Services in the Criminal Justice System”.

One organisational specialty is represented by the Probation Service model of Baden-Württemberg, established in 2007. Following the example set by Austria, this federal state privatised the Probation Service and vested the supervisory power in the non-profit organisation “Neustart GmbH”. The Ltd operates with two chief executives, one being responsible for economic affairs, staff and organisation and the other one for social work and the coordination of nine regional offices. Basing on an agreement between the state of Baden-Württemberg and Neustart, the Ministry of Justice supervises the private

organisation while the former provides for the Probation Service free of any directives (apart from those entailed in the contract).

In case of the supervision of conduct, several actors are involved and a functional differentiation is applied. On the one hand, the court assigns a probation officer to an offender if he or she is placed under supervision of conduct. On the other hand, the convicted offender becomes subject to the supervision of a special monitoring agency (Führungsaufsichtsstelle) which is primarily designed to oversee the offender's behaviour and his or her compliance with instructions of the court in cooperation with the probation officer. Similar to the Probation Service, the supervisory agencies have evolved very differently in the federal states and presently follow diverse organisational concepts.

In spite of the above-mentioned institutional and conceptual distinction between the execution of a sentence and correctional services in Germany, they share a common supervisory authority/court. Thus, both prisoners and individuals subjected to measures of betterment and security may file complaints against decisions by the different judicial administrations at a so-called Penal Execution Chamber. The latter portrays a panel of judges located at a Regional Court in close proximity to prisons or psychiatric hospitals and rehabilitations centres and is either led by three professional judges or a single judge.

As to the personnel of German correctional facilities, there is a range of state professionals worth mentioning. At the top of the prison hierarchy, the prison director is responsible for the whole penal institution and serves as its representative. He or she holds authority to issue directives to all employees of the prison. As provided for by the law (e.g. Section 156 para. 2 Federal Prison Act), the prison director may delegate some of his or her competencies to upper-level civil servants who fulfil certain tasks as heads of the different prison departments. Many German prisons have such department chiefs.

Most of the prison tasks are executed by prison officers, including general prison officers (Allgemeiner Vollzugsdienst), administrative staff (Verwaltungsdienst) and trade instructors (Werkdienst). Additionally, German prisons employ chaplains, medical officers, teachers, psychologists and social workers. Chaplains are either employed by the state or the churches (differs between the states), but cannot be instructed by the prison

administration. The work of the chaplains is not restricted to pastoral work, but includes all kinds of social work in a broader sense.

In the course of the previous two decades, there has been an increasing tendency towards partial privatisation in the German penitentiary system. While a full prison privatisation is still considered as incompatible with the German Basic Law, sectorial privatisation has taken place all over Germany already – ranging from private employment in cases of open prison regimes, panel physicians and psychologists to the complete privatisation of areas like general supplies, vocational training and social assistance (Laubenthal 2011, pp. 26 et seqq.).

### 3.2. Non-governmental organisations and research institutes

Aside from numerous state institutions and employees, the German penal system knows diverse non-governmental organisations and volunteers that play a significant role.

Among others, there are multiple Offender Support Associations (Straffälligenhilfe) in Germany which devote themselves to the crucial problems of released prisoners such as the search for accommodation and jobs, debt settling and the contact to state administrations and relatives. Moreover, they grant temporary financial assistance to ex-prisoners in certain cases and organise community services (enabling the offenders e.g. to work off a fine). One of the major organisations in this field is the National Alliance for the Care and Resettlement of Offenders (Bundesarbeitsgemeinschaft für Straffälligenhilfe – BAG-S) which represents a union of charities that attempts to improve the aid for offenders and advises local Offender Support Associations in their daily work. In that function, the BAG-S contributes to the criminological discourse, organises conferences, produces and collects relevant literature and data on offender support and engages in public relations activities. The work is partly based within the prison and part of the so called transition management ("Übergangsmanagement") from prison to the extramural world.

Besides the voluntary offender support organisations, the German AIDS Service Organisation (Deutsche Aids-Hilfe) offers advice to HIV-positive prisoners and regularly

renews its advisory publication on AIDS and imprisonment (Deutsche Aids-Hilfe 2011), which includes medical and legal information, at least the latter being of interest to all not just HIV-positive prisoners.

Another noteworthy organisation is the Association for Social Work, Criminal Law and Criminal Policy (DBH e.V.-Fachverband für Soziale Arbeit, Strafrecht und Kriminalpolitik) which acts as an umbrella association with regional and local member organisations from the areas of offender support, probation service and victim assistance. The DBH strives to support the practice and reform of a constitutional and social criminal justice, tries to contribute to crime prevention as well as to the reduction of causes, manifestations and ramifications of criminality and assists the reintegration of prisoners.

The 'Working Group Critical Penitentiary System' (Arbeitskreis kritischer Strafvollzug – AKS) displays a further significant organisation that deals with the German penal system. Committed to a reform of the German prison regime, the AKS critically observes German penitentiaries, documents the infringement of prisoners' rights, supports cultural activities in prisons, offers advice to prisoners and aims at a critical public debate on the German penal system.

In the field of education in prison, the National Association of Teachers in Prison (Bundesarbeitsgemeinschaft der Lehrerinnen und Lehrer im Justizvollzug e. V. – BAG) plays a decisive role and coordinates the work of many prison teachers. In this framework, the BAG offers training seminars, issues respective publications and documentations and holds regular symposiums. Additionally, the state cooperation RESO-Nordverbund – also aiming at the education and vocational reintegration of offenders – develops programs and projects for offenders and released prisoners. The cooperation is comprised of the state administrations of justice from the Northern German states and initiated, among other things, e-learning platforms for prisoners.

As far as the financing of the above-mentioned non-governmental organisations is concerned, they mostly rely on membership fees, donations and state funding. Another important factor are court imposed suspension conditions to be paid to them. Nonetheless, all these non-state organisations compete for funding (with each other and the state) and therefore exhibit certain instability.

With reference to scientific research institutions focussing on the German penal system, there are a few noteworthy facilities. At first, the Centre for Criminology (Kriminologische Zentralstelle – KrimZ) has to be pointed out. Located in Wiesbaden, the research institute acts as an interface between various scientific disciplines (including criminal law and administration). The KrimZ documents research and criminological literature and intends to mediate between criminology and practice in order to strengthen cooperation in this field.

Further mentionable institutes are the Criminological Services of the states (Kriminologische Dienste der Länder), the Criminological Research Institute of Lower Saxony (Kriminologisches Forschungsinstitut Niedersachsen e.V.) and the Max Planck Institute for Foreign and International Criminal Law (Max-Planck-Institut für ausländisches und internationales Strafrecht) in Freiburg. Furthermore, a few German universities accommodate research institutes on criminology and the German penal system (e.g. Institute for Criminology at the University of Tübingen and the Institute for Criminology in Greifswald).

Last but not least, there is the Prison Archive (Strafvollzugsarchiv), located in Dortmund. This university-based institution aims at the documentation and information on law and legal reality in German prisons. In this connection, it collects legal material, literature and case law on the penitentiary system. Moreover, it offers legal information to prisoners' magazines and publishes information on German prisons. Above all, members of the Prison Archive advise prisoners on all penitentiary law-related questions.

Apart from the above-mentioned non-governmental organisations and research facilities, the German prison law provides for the inclusion of volunteers. Acting as connecting links between prisoners and the "free world", there are a lot of voluntary workers in the German penitentiary system who mainly do individual work with prisoners or group work with several prisoners, provide assistance in case of prison leaves or aid to relatives of prisoners.

Every prison has an advisory council – composed of honorary societal members of the "free world" such as parliamentarians, pastors and members of unions or employer's associations – the objective of which it is to form a link between the penitentiary and the

outside public, to control the realisation of the goals of imprisonments as well as to perform advisory and conciliatory tasks within the prison.

## 4. Policies, programmes and coordination mechanisms

### 4.1. Policies

The coalition agreement of the new German Government includes some points dealing with penal law: Introduction of a driving ban as a penalty; review the system of committals to a forensic psychiatric hospital; introduction of an ex post therapy placement [again a concealed form of retrospective preventive detention]; and introduction of a legal basis for (already practised) long time police observations of those released from preventive detention (Coalition agreement between CDU, CSU and SPD, Rheinbach, December 2013, pp.101-102).

### 4.2. Training

At the beginning there is a two year training for general prison officers. The other staff has an education according to the requirements of the job (lawyer, psychologist, teacher, social worker, vocational training etc.).

Later staff training for general prison officers is mostly organised by the prison itself or on state level. Other groups participate partly in conferences etc. organised by professional or scientific organisations. The same applies to the members of the other groups.

Judges at criminal courts dealing with prisoner's complaints have studied law and had two years of practical training, as every German lawyer has. However, research shows that these judges have no further formal education on this special field but the situation is one of "learning by doing" or "learning on the job".[40]

[40] Matt (2012), p. 14.

# Annex 1: International and EU documents

***UN Treatises***

| **Entry into force** | **Name of the treaty** | **Signed - date** | **Ratified – date** |
|---|---|---|---|
| 3 September 1981 | Convention of the elimination of all Forms of Discrimination against Women | 17 Jul 1980 | 10 Jul 1985 |
| 4 January 1969 | Convention of Elimination of all Forms of Racial Discrimination | 10 February 1967 | 16 May 1969 |
| 2 September 1990 | Convention on the Rights of the Child (UN) (For the direct applicability see: BVerfG, Nichtannahmebeschluss vom 05. Juli 2013 – 2 BvR 708/12 –, juris) | 26 Jan 1990 | 6 Mar 1992 |
| 23 March 1976 | International Covenant on Civil and Political Rights (1966) | 9 Oct 1968 | 17 Dec 1973 |
| 3 January 1976 | International Covenant on Economic, Social and Cultural Rights (1966) | 9 Oct 1968 | 17 Dec 1973 |
| 26 June 1987 | UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) | 13 Oct 1986 | 1 Oct 1990 |
| 22 June 2006 | Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment | 20 Sep 2006 | 4 Dec 2008 |

***Council of Europe legislation***

| **Entry into force** | **Name of the treaty** | **Signed - date** | **Ratified - date** |
|---|---|---|---|
| 3 September 1953 | European Convention on Human Rights and Fundamental freedoms (1950) | 4 Nov 1950 | 5 Dec 1952 |
| 1 April 2005 | Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms (2000) | 4 Nov 2000 | Not ratified yet |
| 1 February 1989 | European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) | 26 Nov 1987 | 21 Feb 1990 |
| 22 August 1975 | Convention on the Supervision of Conditionally Sentenced of Conditionally Released Offenders | 30 Nov 1964 | Not implemented → substi-tuted by the Council Framework Decision 2008/947/ JHA |

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## Annex 2: Imprisonment statistics

**All statistics should be indicated at 31 December of each year.**

Note (Germany): The main data is not of 31 December, because of a statistical change in Germany. Data is published for 31 March, 31 August and 30 November; since 2002 the data was published for 31 December, and numbers for this day were significantly lower (about 10%) for various reasons, e.g. amnesties at Christmas for those having only a few weeks of the sentence left (in 2006 over 2000 prisoners). Thus, the data chosen refers to 30 November of each year. However, since the official statistics take into account those prisoners actually present, numbers on weekends are lower (this is to be taken into account for 2007, 2008 and 2012).

**Table 1.** Prison population

| | **2004** | **2005** | **2006** | **2007** | **2008** | **2009** | **2010** | **2011** | **2012** |
|---|---|---|---|---|---|---|---|---|---|
| Prison population total | 79452 | 78664 | 76629 | 72656 | 72259 | 70817 | 69385 | 68099 | 65889 |
| Prison population rate (per 100,000 inhabitants) | 96 | 95 | 93 | 88 | 88 | 87 | 85 | 85 | 82 |
| Not included in the statistics because of home leave etc. | 1481 | 1537 | 1434 | 2497 | 1534 | 1478 | 1442 | 1544 | 2644 |
| Entries to penitentiary institutions in a given year | 129152 | 123184 | 116789 | 109996 | 105657 | 108832 | 114596 | 112437 | 101376 |
| Rate of entries to penitentiary institutions (per 100,000 inhabitants) in a given year | 157 | 149 | 142 | 134 | 129 | 133 | 140 | 140 | 126 |
| Pre-trial/ remand | 15783 | 15228 | 13330 | 12357 | 11577 | 11138 | 10781 | 10793 | 10982 |
| Rate of pre-trial/ remand (per 100.000 inhabitants) | 19 | 18 | 16 | 15 | 14 | 14 | 13 | 13 | 14 |

The number on "prison population total" refers to sentenced prisoners (including juveniles), preventive detention, remand and others, the latter are mostly persons detained awaiting deportation – but only those held in prison, not those in special institutions -,

and arrest in the military forces; not included are those in forensic institutions (psychiatry and drug/ alcohol treatment).

The rates per 100,000 inhabitants are own calculations, based upon the official number of inhabitants on 31 December of the given year (n.b. the 2011 micro census revealed that the statistical number of inhabitants was about 1.5 million, i.e. about 2%, too high – changes influenced the numbers for 2011 and 2012).

Entries into penitentiary institutions account for persons out of freedom in the whole year.

**Table 2.** Prison population by socio-demographic characteristics (total numbers)

| | | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|---|
| Females | | 3975 | 4020 | 4066 | 3875 | 3841 | 3779 | 3755 | 3842 | 3787 |
| Minors | | 758 | 727 | 740 | 780 | 663 | 637 | 640 | 587 | 581 |
| Age structure of sentenced prisoners | 14-16 (-1day) | 758 | 41 | 51 | 55 | 47 | 43 | 34 | 30 | 36 |
| | 16-18 (-1day) | | 686 | 689 | 725 | 616 | 594 | 606 | 557 | 545 |
| | 18-21 (-1day) | 3717 | 3656 | 3516 | 3566 | 3378 | 3359 | 3297 | 3110 | 2916 |
| | 21-25 (-1day) | 9128 | 8890 | 8657 | 8475 | 7821 | 7811 | 7585 | 7664 | 7353 |
| | 25-40 (-1day) | 31716 | 31479 | 31898 | 31656 | 30361 | 29972 | 29323 | 28827 | 27977 |
| | 40-60 (-1day) | 16397 | 16664 | 17541 | 17878 | 17787 | 17565 | 17269 | 17296 | 16738 |
| | 60+ | 1657 | 1767 | 1785 | 1918 | 1890 | 2043 | 2043 | 2079 | 2083 |

The numbers of age structure/ minors refer to 31 March; the number on minor refer to the age (below 18 years), and not those being held in juvenile institutions.

The numbers of age structure/ minors refer to sentenced prisoners only.

The numbers of 2004 were published differently.

The age group 18-21 is called “Heranwachsende”, i.e. young adult or old juvenile, in criminal law the applicability of juvenile or adult law depends on how mature the person is presumed.

Many prisoners in juvenile detention are up to 24 years old (sometimes older).

**Table 3.** Prison population by offences (total numbers)[41]

| **Type of offence** | | **2004** | **2005** | **2006** | **2007** | **2008** | **2009** | **2010** | **2011** | **2012** |
|---|---|---|---|---|---|---|---|---|---|---|
| Criminal offenders total | | 63677 | 63533 | 64512 | 64700 | 62348 | 61878 | 60693 | 60067 | 58073 |
| Major traffic offences | | 4108 | 3612 | 3428 | 3099 | 2794 | 2687 | 2629 | 2337 | 2321 |
| Intentional homicide | | 4192 | 4069 | 4094 | 3940 | 3991 | 3953 | 3901 | 3777 | 4205 |
| Bodily injury (assault) | Total | 6486 | 6695 | 7055 | 7525 | 7399 | 7513 | 7658 | 7626 | 7508 |
| | *of which:* Aggravated bodily injury | 3684<br>365 | 3839<br>325 | 3970<br>384 | 4198<br>368 | 4241<br>338 | 4299<br>340 | 4497<br>320 | 4468<br>290 | 4386<br>286 |
| Sexual assault | Total | 4796 | 4907 | 4925 | 4997 | 4955 | 4716 | 4440 | 4306 | 4101 |
| | *of which:* Rape | 2694 | 2702 | 2739 | 2652 | 1762 | 2450 | 2294 | 2178 | 2471 |
| | *of which:* Sexual abuse of a child | 1787 | 1894 | 1957 | 2086 | 2094 | 2047 | 1939 | 1893 | 652 |
| Robbery | | 8111 | 8188 | 8141 | 8063 | 7712 | 7696 | 7517 | 7437 | 7378 |
| Theft | | 14112 | 13868 | 13853 | 13523 | 12791 | 12720 | 12574 | 12635 | 12371 |
| Drug offences | | 9221 | 9277 | 9579 | 9665 | 9540 | 9283 | 8880 | 8841 | 8126 |
| Smuggling | | - | - | - | - | - | - | - | - | - |
| Fraud | | 5634 | 5946 | 6643 | 6926 | 6665 | 6829 | 6821 | 6903 | 6553 |
| Crimes in office | | 39 | 45 | 36 | 41 | 34 | 31 | 23 | 38 | 32 |
| Migration law offences | | 493 | 440 | 331 | 324 | 254 | 214 | 189 | 165 | 157 |
| Tax fraud | | 288 | 333 | 301 | 294 | 284 | 268 | 307 | 310 | 323 |

The data refers to the 31 March of the given Year.

The definitions of crimes vary even from one annual statistic to the other (sexual offences against a child).

The statistics only count offenders and not the number of offences or sentences; only the most severe crime is taken into account, e.g. a person committing a sexual offence against a child and killing her/ him afterwards, will enter the statistics at "offences against life (without traffic offences)", subcategory "murder" or "manslaughter".

The number in the category "intentional homicide" excludes attempted murder/ manslaughter.

[41] Fill this table if you see it is necessary or write a few sentences for which criminal offences mostly people are in prisons.

Aggravated bodily harm includes two sub-categories: first, “dangerous bodily harm”, i.e. by dangerous means (e.g. with a weapon), second, grevious bodily harm (certain results) and bodily harm combined with involuntary manslaughter.

“Sexual offences” (for “sexual assault”) in the German statistics is a very broad category, e.g. including indecent exposure.

We added “crimes in office” and migration law offence, because this might be vulnerable groups, and tax fraud as an example for “white collar crime”.

**Table 4.** Prison population by length of sentence (percentage) and average length of imprisonment (months)

| | | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|---|
| Prison population by length of sentence (percentage) | Less than 1 month | 1.3 | 1.3 | 1.8 | 1.7 | 1.5 | 1.6 | 1.6 | 1.6 | 1.5 |
| | From 1 month to less than 3 months | 8.1 | 7.6 | 8.6 | 9.4 | 8.7 | 8.8 | 8.9 | 9.0 | 9.4 |
| | From 3 months to less than 6 months | 12.7 | 12.8 | 12.9 | 14.4 | 12.9 | 12.8 | 12.9 | 13.1 | 13.6 |
| | From 6 months + to l year | 21.2 | 20.6 | 20.8 | 19.4 | 19.4 | 20.0 | 20.4 | 20.8 | 22.2 |
| | From 1 year + to 2 years | 20.1 | 20.6 | 20.0 | 20.6 | 19.6 | 19.9 | 19.6 | 19.9 | 21.3 |
| | From 2 years + to 5 years | 25.2 | 25.6 | 26.6 | 27.2 | 26.5 | 25.6 | 25.1 | 25.0 | 26.7 |
| | From 5 years + to 10 years | 8.5 | 8.4 | 8.5 | 8.7 | 8.6 | 8.3 | 7.8 | 7.5 | 7.7 |
| | From 10 years + to 15 years | 1.7 | 1.6 | 1.6 | 1.5 | 1.5 | 1.5 | 1.4 | 1.4 | 757 |
| | From 15 years to less than 20 years | | | | | | | | | |
| | 20 years and over | | | | | | | | | |
| | Life imprisonment | 2.9 | 3.0 | 3.1 | 3.3 | 3.3 | 3.3 | 3.4 | 3.5 | 3.8 |
| Average length of | Imposed by the court | | | | | | | | | |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| imprisonment (months) | Factual[42] | | | | | | | | | |

Numbers refer to 31 March of the given year.

The lowest and the highest day of the sentence differ from those given in the methodology partly.

There are no numbers on the average length imposed by the court and on the factual average length of imprisonment.

On the one hand, prison sentences below six month of imprisonment should not be imposed, on the other hand, people will serve shorter prison sentences, e.g. failing to pay a fine for a criminal offence (Ersatzfreiheitsstrafe, see below)

**Table 5.** Number of different facilities and number of prisoners in different types of facilities (total numbers)[43]

| | | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|---|
| Pre-trial/ remand[44] | Number of pre-trial/ remand facilities | | | | | | | | | |
| | Number of prisoners | 15783 | 15228 | 13330 | 12357 | 11577 | 11138 | 10781 | 10793 | 10982 |
| Juvenile prisons | Number of prisoners | 6737 | 6517 | 6632 | 6091 | 6062 | 5880 | 5782 | 5563 | 5370 |
| | In open prisons | 577 | 581 | 561 | 386 | 510 | 442 | 471 | 472 | 411 |
| Open prisons | Number of Institutions | 21 | 20 | 19 | 19 | 18 | 17 | 16 | 15 | 15 |
| | Number of prisoners | 10229 | 10058 | 9843 | 8505 | 9226 | 8956 | 8852 | 8795 | 7477 |
| Social Therapy | Number of prisons | 43 | 45 | 43 | 47 | 47 | 52 | 56 | 61 | 63 |
| | Number of prisoners | 1297 | 1401 | 1466 | 1435 | 1547 | 1557 | 1505 | 1583 | 1575 |
| Ersatz-freiheitsstrafe | Number of Prisoners | 3758 | 3600 | 3945 | 3643 | 3815 | 3886 | 3776 | 3802 | 3929 |
| Preventive detention | Number of institutions | | | | | | | | | |

[42] Please explain how these data are counted in your country.

[43] This is only the suggestion how to categorize different facilities. You should categorize different facilities according to the situation in your country and explain what are the functions of these different facilities (you can do this in the section **2.3 Institutions and organizations**).

[44] Please explain how the concept of „pre-trial/remand“ is undrestood in your country.

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| centers | Number of prisoners | 342 | 365 | 398 | 424 | 461 | 512 | 503 | 466 | 460 |
| Persons in Forensic Institutions | Psychiatry | 5390 | 5640 | 5917 | 6061 | 6287 | 6440 | 6569 | 6620 | 6750 |
| | Drug/ alcohol | 2412 | 2473 | 2619 | 2603 | 2656 | 2811 | 3021 | 3354 | 3526 |
| Relaxations (number of incidents) | Leaving the Prison without staff regularly | | | | 17345 | | | | 21627 | |
| | Leaving the Prison without staff | | | | 615057 | | | | 696783 | |
| | "vacations" | | | | 240177 | | | | 235386 | |
| Total number of different facilities | | | | | | | | | | |

Often the Prison Institutions are combined, i.e. an open or remand prison might be part of an ordinary prison (department) or vise versa; the statistical data refers to the status of the main institution.

Open Prisons refer to the security standard only, it does not mean that all prisoners have relaxations like outside work, home leave etc.

Social Therapy: Institutions or departments are part of the prison system in which different kinds of therapy take place (prisoners are not seen as mentally/ psychologically ill). The number of facilities (independent or as part of another prison) according to S. Niemz, Sozialtherapie im Strafvollzug 2013, Wiesbaden 2013, p. 50, however her numbers of prisoners in these institutions are higher than those referred to above.

"Ersatzfreiheitsstrafe": Person is unable to pay for the fine imposed for a criminal offence and is imprisoned instead.

Persons held in forensic institutions have committed a crime, but were found to have acted in a state of diminished or no criminal responsibility, because of either a psychological state or because of substance/ alcohol abuse in connection with the crime. Those in forensic institutions for substance/ alcohol abuse do not include those who undergo a voluntary therapy.

Numbers refer to the "old states" of Germany (including the former eastern Berlin) only (about 80% of the population lives in the "old states"). Numbers of some states partly refer to the number of persons of the previous year.

**Table 6.** Situation of penal institutions

| | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|
| Total capacity of penal institutions/ prisons | 79209 | 79687 | 79960 | 80708 | 79713 | 78921 | 77944 | 78529 | 77578 |
| Density per 100 places | 100 | 99 | 96 | 90 | 91 | 90 | 89 | 87 | 85 |
| Surface area per prisoner (in $m^2$) | | | | | | | | | |

No such data available.

**Table 7.** Persons under parole, probation and surveillance orders (total numbers)[45]

| | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|
| **Probation** (including the attached measures) | 116784 | 118609 | 120933 | 122306 | 125671 | 124654 | 121987 | 123307 | |
| Of which are adults | 88238 | 90283 | 92335 | 94230 | 97351 | 97445 | 96806 | 98799 | |
| Of which are juveniles | 28546 | 28326 | 28598 | 28076 | 28320 | 27209 | 25181 | 24508 | |
| **Parole** (including the attached measures) | 44795 | 44441 | 45114 | 44970 | 45828 | 46378 | 46334 | 47219 | |
| Of which are adults | 38381 | 38122 | 38806 | 38821 | 39679 | 40017 | 40124 | 40838 | |
| Of which are juveniles | 6414 | 6319 | 6308 | 6149 | 6149 | 6361 | 6210 | 6381 | |
| Surveillance orders | | | | | | | | | |

Numbers refer to 31 December of a given year. Numbers refer to "old states" only (excluding Hamburg, but including former eastern Berlin).

The official statistics do not include persons without a full time probation/ parole officer. However most suspended sentences (adults) do not include surveillance by a full time probation officer. Many cases of parole (adults) have no parole officer.

There are no official statistics on surveillance orders.

There are no official statistics on attached measures.

[45] Please explain how these concepts are understood in your country.

**Table 8.** Groups of (possibly vulnerable) prisoners (total numbers)

| | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|
| Foreigners | 13840 | 13880 | 14026 | 14235 | 13595 | 13560 | 13374 | 13626 | 13232 |
| Ethnic/ cultural/ religious groups | | | | | | | | | |
| Alcohol addicted persons | | | | | | | | | |
| Persons addicted to other drugs than alcohol (excluding nicotine) | | | | | | | | | |
| Mentally handicapped persons (e.g., lower IQ) | | | | | | | | | |
| Persons with a psychiatric handicap | | | | | | | | | |
| Physically handicapped persons | | | | | | | | | |
| HIV/AIDS | | | | | | | | | |
| "Querulous persons"/ "trouble makers" | | | | | | | | | |
| Sexual offenders | | | | | | | | | |
| Former police officers, prosecutors, judges, etc. | | | | | | | | | |
| (Functional) illiterates | | | | | | | | | |
| Persons not speaking the local language | | | | | | | | | |
| Old prisoners (reached retirement age; or ≥ 60 years) | | | | | | | | | |

Data refers to 31 March; sentenced adults and juveniles.

Foreigner means having no German citizenship, i.e. people with more than one citizenship 8including the German) are accounted for as Germans, those with no citizenship are accounted for as foreigners; the place of birth is not relevant directly.

**Table 9.** Deaths and injuries in penal institutions (total numbers)

| | | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|---|
| Deaths | Total | | | | | | | (131) | (128) | |
| | *of which*: natural death | | | | | | | | | |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | *of which*: suicides | 94 | 93 | 75 | 71 | 67 | 62 | 61 (58) | (53) | |
| | *of which*: accidents | | | | | | | (4) | (2) | |
| | *of which*: homicides | | | | | | | | | |
| | *of which*: other (*please specify*) | | | | | | | | | |
| Injuries | Total | | | | | | | | | |
| | *of which*: assaults | | | | | | | | | |
| | *of which*: accidents | | | | | | | | | |
| | *of which*: self-harm | | | | | | | | | |
| | *of which*: other (*please specify*) | | | | | | | | | |

Suicides: Data refers to Katharina Bennefeld-Kersten, Suizide von Gefangenen in Deutschland 2000 bis 2010, Celle 2012.

Numbers in brackets: official statistics.

**Table 9a.** Deaths and injuries in penal institutions in Lower Saxony (total numbers)

| | | **2004** | **2005** | **2006** | **2007** | **2008** | **2009** | **2010** | **2011** | **2012** |
|---|---|---|---|---|---|---|---|---|---|---|
| Number of Prisoners | | 6865 | 6787 | 6626 | 6239 | 6326 | 5867 | | | |
| Percentage of prisoners in Germany | | 8.6 | 8.6 | 8.8 | 8.6 | 8.8 | 8.3 | | | |
| Deaths | Total | 23 | 18 | 17 | 9 | 16 | 22 | | | |
| | *of which*: natural death | 12 | 6 | 11 | 4 | 9 | 9 | | | |
| | *of which*: suicides | 10 | 11 | 5 | 4 | 6 | 8 | | | |
| | *of which*: work accidents | | | | | | 1 | | | |
| | *of which*: traffic accidents | | | 1 | | | 2 | | | |
| | *of which*: homicides | | | | | | | | | |
| | *of which*: other (drug use) | 1 | 1 | | 1 | 1 | 1 | | | |
| | *of which*: so far unknown | | | | | | 1 | | | |

Published data is available for the State of Lower Saxony for 2003-2009. Landtagsdrucksache 16/2366, pp.46-49

**Table 10.** NGO, volunteers, re-socialisation programs, legal advice (total numbers)

| | | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|---|
| NGO's collaborating with penitentiary institutions | Total | | | | | | | | | |
| | *of which*: prisons | | | | | | | | | |
| | *of which*: probation agencies | | | | | | | | | |
| Volunteers[46] | Total | | | | | | | | | |
| | *of which*: in prisons | | | | | | | | | |
| | *of which*: in pre-trial/ remand | | | | | | | | | |
| | *of which*: in probation agencies | | | | | | | | | |
| Re-socialisation (rehabilitation) programs | Number of programs | | | | | | | | | |
| | Number of persons attending such programs | | | | | | | | | |
| Legal advice in penal institutions free of charge or via legal aid | | | | | | | | | | |

There is no data available due to the different concepts in the 16 states of Germany.

Legal advice: All states would say that there is at least legal aid for prisoners. In practice legal aid for cases involving claims against the prison administration needs a good chance for winning the case, thus nearly no prisoner is getting legal aid in practice – unless the prisoner is winning the case in which s/he does not need to get legal aid. For detainees in preventive detention this should be different since about half a year, however, one has to observe the practice. In cases determining whether to terminate the sentence it depends on the time served, whether an expert assessment is needed, or the local practice or whether being held in preventive detention or forensic placement – in latter cases depending partly on the local practice – legal aid is available.

[46] Please explain how the concept of volunteer is understood in your country.

**Table 11.** Prisoners who are studying and/or working (total numbers)

| | | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|---|
| Number of prisoners who are studying at a given year (high school, vocational school, university) | | | | | | | | | | |
| Number of graduated prisoners at a given year | | | | | | | | | | |
| Other education (skills improvement) (*please specify*) | | | | | | | | | | |
| Number of prisoners who are working at a given year | In a state companies / In private firms | | | | | | | | | |
| | Involved in individual work, creative or other activity | | | | | | | | | |
| | Working fatigue in penal institutions | | | | | | | | | |
| | Total | | | | | | | | | |

No such data available

**Table 12.** Financing of penal institutions (total numbers in euros)

| | | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 |
|---|---|---|---|---|---|---|---|---|---|---|
| Total budget of penal institutions | | | | | | | | | | |
| Average amount spent per day for one prisoner[47] | | | | | | | | | | |
| Average amount spent per day for | Nutrition | | | | | | | | | |
| | clothing and bedding | | | | | | | | | |
| | Medicines | | | | | | | | | |

[47] Please explain which expenses are included and which are excluded.

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| one prisoner for: | social rehabilitation programmes and services | | | | | | | | | |
| | drug substitution (methadone) | | | | | | | | | |
| | harm reduction | | | | | | | | | |

There are at least 16 different state budgets. They differ to a large extend, e.g. in- or excluding building costs, in- or excluding pension schemes, outsourcing of education or advice programmes, etc. State benefits from prison work or reductions of medical costs outside prison etc.$are usually not taken into account.

As in 2006 (Freie Hansestadt Bremen, Bremen Benchmarking Report, 2007, p. 64):

The number of prisoners of the different states varied between 55 and 156 (average 95) per 100,000 inhabitants; the prison costs per day and inmate (without building costs) varied between EUR 61.90 and 105.90 (average EUR 84.70), the costs of the prison system for each state inhabitant varied between EUR 18.20 and 55.40 (average EUR 27.00).