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DETOUR
TOWARDS PRE-TRIAL DETENTION AS ULTIMA RATIO

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DETOUR –
Towards Pre-trial Detention as Ultima Ratio

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Content

1. Introduction: Pre-trial detention in context

Untersuchungshaft (literally: "investigation detention") in German law is the deprivation of liberty of an untried or not yet finally convicted person.[1] Its legal basis are the German constitution (*Grundgesetz* = Basic Law, BL) and the Code of Criminal Procedure (Strafprozessordnung).[2]

Pre-trial detention can be preceded by a temporary detention or "preliminary arrest" (vorläufige Festnahme) by the police of a maximum of 48 hours. According to German law and doctrine, the main objectives of pre-trial detention are to ensure the public right to a thorough investigation of a crime, to ensure a criminal procedure according to the rule of law, and – if applicable – to ensure the execution of the sentence. Nevertheless, the prevention of new (serious) crimes is also accepted as one objective of pre-trial detention, although the preventive aim it is incoherent in the system, in particular with regard to the presumption of innocence. The only way to supervise a suspect or accused in the community - and as such the only "alternative" to pre-trial detention - is the suspension of an arrest warrant. The warrant normally is suspended under conditions and obligations such as to provide a financial surety, to report to the police regularly etc.

The legal embodiment of pre-trial detention dates back to the 1870s and was not changed much until the end of the Weimar Republic. After the successive erasion of all legal standards and the rule of law in general during the Third Reich, the post-war legislator restored the legal situation of the pre-1930s in 1950. This included the restriction to only two grounds to remand an individual in custody: the risk of absconding and the risk of obscuring evidence. It took until 1964 for the risk of repeating or continuing an offence to be introduced as an additional - preventive - ground to remand. At the same time, the gravity of the offence became an autonomous ground to remand in some special cases. To comply with the strict demands of the German constitution, monitored by the very influential Federal Constitutional Court (FCC), it is however still necessary for a court, even when dealing with crimes against life, to argue that the above-mentioned aims of pre-trial detention actually would be at risk without detaining the defendant.[3]

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[1] While none of the terms exactly translate the German word (which itself is inaccurate as the detention in question may well reach beyound the investigation itself), in this report the terms "pre-trial detention", "remand detention" and "remand custody" are used synonymously for the sake of variation.

[2] A translation can be found here: https://www.gesetze-im-internet.de/englisch_stpo/ (accessed 2 September 2016).

[3] Federal Constitutional Court (FCC), 15 December 1965, official collection: BVerfGE 19, 342 (350).

Since then, the legal embodiment of pre-trial detention has seen both progress and aggravation as regards human rights and rule of law standards. That the catalogue of offences that justify pre-trial detention for preventive reasons constantly was extended must be seen as sign of a harsh, security-oriented criminal policy. Several reforms, however, strengthened the rights of the suspect by highlighting the principle of proportionality and strengthening the procedural rights as well as the role of the defence lawyer. In the 1980s, public debate received an additional liberal twist, as the use of pre-trial detention was marked to be "contrary to the rule of law, in opposition to social concerns and hopelessly outdated".[4] While this did not translate into legislative action – a comprehensive reform project by a group of scholars[5] did not have practical impact - it seems to have had influence on practitioners and slowly changed the detention practice and even culture. The excessive use of pre-trial detention was and is seen as contradictory to one of the cornerstones of German penal policy in its reductionist shape: Short-term prison sentences (less than six months, sec. 46 of the Penal Code) should not be imposed or at least be suspended because of their de-socialising consequences. Fines mostly replace them. This aim, however, only partly is met in practice, because certain groups, namely foreigners, cannot fully profit – both in the sentencing and in the pre-trial stage, where pre-trial detention of several months *de facto* anticipate the later sentence.

The German jurisdiction belongs to the continental (or civil) law tradition.[6] Its main legal features concerning the criminal proceedings are those of the principle of individual guilt that derives from the guarantee to respect human dignity and personal autonomy. Related are the duty to ascertain the truth, as well as the respect for the rule of law (*Rechtsstaatsprinzip*, including the fair trial principle), the presumption of innocence, and the court's duty to maintain neutrality. In principle, the German system adheres to the principle of legality (*Legalitätsprinzip*, as opposed to the principle of opportunity), that does only allow for court decisions about offences. Practice, however, makes ample use of the possibility to discontinue proceedings conditionally or unconditionally by decision of the public prosecution service (sec. §§ 153, 153a CCP, see also table 5). The German criminal procedure can be characterized as an accusation process, accompanied by the principle of ex officio investigation. Thus, it is neither a pure inquisition process nor a

[4] Wolter 1981, 452; a similar statement by the then Minister of Justice is mentioned in Dünkel 1994, 70 et seq., who summarises the development.

[5] Amelung et al. 1983.

[6] Hörnle 2005; for a brief account in English language, see Dammer/Albanese 2013, p. 78 et seq.

pure accusation process, and still differs siginificantly from the adversarial Anglo-American process, which is under the control of the parties.[7] During the preliminary proceedings, which lack an investigating judge in a narrower sense, the public prosecutor is the dominating actor. The judge in this stage only plays a role when certain coercive measures need to be taken, among them arrest warrants. After the opening of the court procedures, the court itself determines the proceedings.

Among the criminal justice principles, the presumption of innocence and the principle of fair trial are of utmost importance for the remand detainee and are constantly applied by the FCC when deciding upon the legal guarantees for those detained. Consequences of the fair trial principle are the right to consular assistance, the right to a lawyer in the review of a remand in custody, specific rights of the accused concerning excessive length of the proceedings or in case of undercover investigations in remand prisons. While the judge has to be neutral, the principle of public care (*Fürsorgeprinzip*) plays an important role, as it lifts a bit of the burden that procedural autonomy brings along for the defendant. In this context, especially vulnerable individuals such as foreigners incapable of speaking German or minors depend heavily on a responsible use of judicial powers. Moreover, the German constitution asks for a further justification to balance the far-reaching individual implications of the criminal proceedings against the defendant.

In March 2016 13.389 persons were held in pre-trial detention in Germany, roughly 2000 more than the year before. Within the remand detention facilities, more than 50% are foreigners, with nearly half of them coming from other EU states. Juveniles and young prisoners (up to age 21) make up 27% of all remand prisoners, but only 17% of all prisoners, which might indicate a problematic use of remand detention against young suspects. Statistics show an overall decrease in the use of remand detention. There are, however, some important exceptions, namely with regard to violent offences. Nevertheless, the rate of pre-trial detainees per 100.000 inhabitants still is, compared to other European states, relatively low (16, the European average according to Council of Europe Statistics is around 30, see below 2. for more details).

Decreasing numbers of both sentenced and in particular pre-trial prisoners have eased the situation in many prisons (see below 3.1 for details). Overcrowding is not a problem any more in most prisons and one of the most visible indicators of the burdensome situation in prisons, the suicide rate, has gone down consideraby (although not for female prisoners).[8] Nevertheless, the overall living conditions are far worse than for sentenced prisoners. In our study, the *enforcement* of pre-trial detention is of lesser importance - prison

[7] See, with further references, Roxin/Schünemann (2014, p. 94 et seq.) in a standard handbook of German law on criminal procedure.

[8] The association between prison conditions and suicide rates are not clear-cut, as many of the inmates already ave a higher sicide risk than the general population. Nevertheless some observations are possible

conditions, however, may influence policy, practice and the overall notion of a fair procedure. Therefore it is important to note, that even if basic living conditions such as a sufficient cell size, sanitary conditions or food are generally satisfactory in Germany also fo pre-trial prisoners, other prison conditions are not: The separation principle is not always implemented and in particular out-of-cell activities and contacts with the outside world leave much to desire (Morgenstern 2009 and in prep.; see also below 7.2).
Germany is characterised by a federal organization of its political and legal system. The legislative competences are split up between the Federal system and the *Länder*, with the Federation being responsible for the parameters of the criminal justice system (the "if" of an order to pre-trial detention) while the *Länder* are in charge of the legislation on the pre-trial detention regime (the "how" of enforcing pre-trial detention). Therefore, depending on the analysed aspect and its degree of centralization or federalization, regional varieties can be observed. Regional traditions and cultures seem to play a role, too, and entail huge differences between some *Länder* (see also below 3.6).

2. Legal Background

2.1 General principles

In Germany, the habeas corpus guarantees are part of the constitutionally guaranteed "basic judicial rights" *(Justizgrundrechte)*. Art. 104 BL includes nine different guarantees:

- Only a judge can order the deprivation of liberty;
- deprivation of liberty always must be regulated in law and follow the procedures prescribed,
- persons in custody may not be subjected to mental or physical mistreatment;

over time. The study by Opitz-Welke et al. (2013) looked at suicides in prison between 2000 and 2011. The authors conclude that while prisoners in Germany are clearly at a higher risk of committing suicide than the residential population is (about 6 times higher), in the study period, the suicide rate of male prisoners declined, albeit less so for pre-trial inmates. Between 2000 and 2011, the suicide rate of male prisoners decreased from 154 to 74 per 100.000 prisoners. The decline could be noted for both sentenced and pre-trial prisoners, but the suicide rates for the latter are about 5 to 6% higher than for the former, showing a clear difference between sentenced prisoners (2000: 86, 2011: 33) and pre-trial detainees (2000: 358, 2011: 283). No decline in the prison suicide rates was noted among female prisoners. The authors assumed that the decline in suicide rates could relate to the implementation of screening instruments and enrollment in suicide prevention programs or to a change in risk factors, but the data available did not allow for a clear confirmation of this. However, a significant positive relation can be found between occupation density and and the suicide rate – the declining number of prison inmates correspond to the declining number of prisoners.

- after temporary arrest the detainee must be brought before a judge as soon as possible and within an absolute maximum of 48 hours;[9]
- the person detained must be informed of the reasons for the arrest at the latest by the judge
- the individual is to be heard and may raise objections with the judge
- the judge must either issue and arrest warrant or order the release without delay
- the warrant must be written and reasoned
- relatives or a person of trust must be notified of his or her arrest and detention.

The presumption of innocence forms part of German law by the ratification of the European Convention of Human Rights (ECHR) with its Art 6 (2) and as inherent part of the Rechtsstaatsprinzip (rule of law).

In German criminal procedure, trial and conviction "in absentia" are not possible (exceptions apply). Within the German debate about constitutional guarantees during court proceedings, great emphasis is put on the presence of the accused. This is, according to the FCC, an important factor to be able both to ascertain the substantive truth and to consider individual guilt. This latter principle to assess any penalty according to individual guilt is inextricably connencted to the guarantee of human dignity. At the same time, a fair procedure and a just judicial decision requires the hearing of the suspect in person to be able to communicate directly with him or her.[10] While in German legal understanding human dignity is indispensable, it is nevertheless possible to dispose of this right to presence in the simplified (and widely used) written procedure of the penalty order (*Strafbefehl*), in which the defendant can either accept the order or object to it (*Einspruch einlegen*), only in this case the procedure is converted into a normal, oral procedure.

More precise regulations for pre-trial detention are codified in sec. 112-130 CCP. Both the provisions of the Basic Law and those of the CCP, however, required supplementary interpretation by the FCC, whose jurisprudence always had and still has a huge impact on the legal and practical situation of pre-trial detention in Germany.

Concerning detention matters, the principle of proportionality is of overriding nature. The individual right to freedom and the right of the state to inflict punishment and coercive measures must be put in a fair balance. Thus, from a legal standpoint remand detention

[9] In the words of the law, the suspect or any other person that for example because of mental health problems is deprived of his or her liberty, may not be held "longer than until the end of the day after apprehension" without being brought before the competent judge.

[10] This was emphasised recently (again) by the FCC in an Italian-German case dealing with a European Arrest Warrant, where the Italian regulations regarding trials *in absentia* were - at least in the concrete case – assessed as not being compatible with these requirements, FCC, 15 December 2015, Neue Juristische Wochenschrift (NJW) 2016, 1149, para 56-58.

is a means of last resort - *ultima ratio*. The principle of proportionality is further elaborated by leading decisions of the higher courts in the principle of expediency (*Beschleunigungsgrundsatz*): The longer the remand of the individual lasts, the more urgent the official investigations into the case become.[11] At the same time, the requirements for the prolongation of detention become stricter. This is not directly spelled out in the CCP, but derived from several provisions such as Art. 5 (3), Art. 6 (1) ECHR or the rule of law embodied in Art. 20 (3) of the Basic Law. For this reason, if the use of a coercive means is inappropriately long, the coercive is to be repealed, which accounts especially for pre-trial detention.

There are various forms of judicial control. The remand prisoner himself can make use of judicial remedies at any time to appeal against actions and measures taken during his remand detention. Additionally, an *ex officio* judicial review of the imposition and prolongation of remand detention exists. It arguably had the strongest impact on the system because key jurisprudence resulted from this kind of judicial remedy: The higher regional court (*Oberlandesgericht*) has to review the case after six months, when the regular duration of remand detention expires (§§ 121, 122 CCP) and the main trial (Hauptverhandlung) has not yet begun. Empirical data[12] suggest that this has helped to reduce the overall use - or at least the length - of remand imprisonment.

2.2 Legal prerequisites for pre-trial detention

Sec. 112 (1) CCP holds two cumulative prerequisites for pre-trial detention: There needs to be a strong (literally an "urgent" or "exigent") suspicion (*dringender Tatverdacht*) that the suspect committed the alleged offence, and there needs to be a ground to remand him or her (*Haftgrund*).

2.2.1 The suspicion

This exigent suspicion requires a high probability of the individual actually having committed the offence, assessed with the state of knowledge at the time of the remand deci-

[11] For example FCC, decision of 13 May 2009 (BVerfGK 15, 474). For an account of jurisprudence of the Higher Regional Courts (*Oberlandesgerichte*) see Dessecker 2007.

[12] Dessecker 2007, Busse 2008.

sion. It is based on a snapshot of the current findings and therefore is frequently incomplete. Additionally, the deciding judge (*Haftrichter*)[13] often is under time pressure because the 48-hour-time limit must by no means exceeded and may already be nearly used up by the other actors. Reviews of judgments reveal that judges sometimes are confronted with with a huge amount of evidentiary material, especially by means of technical surveillance, without the public prosecution having truly considered to what extent this pile of information substantiates the accusation. Some judges seem to refer swiftly and uncritically to these results of the police investigation.[14] Empiricial studies suggest that some arrest warrants are grossly flawed because already here on the evidentiary level crucial information is missing.[15]

2.2.2 The list of grounds

Sec. 112-113 CCP list four grounds to order pre-trial detention:

- flight or the risk of absconding (Flucht, Fluchtgefahr),
- the risk of obscuring evidence (Verdunkelungsgefahr,
- the risk of repeating or continuing a listed offence of a (relatively) serious nature (Wiederholungsgefahr),
- the gravity of the offence (Schwere der Tat) in cases of very serious allegations, mainly capital offences.

Among these, *the risk of absconding* is by far the most often applied, accounting for 86% of all impositions of pre-trial detention in 2014 (*Strafverfolgungsstatistik*, with an even slightly higher percentage in the years before). While the sec. 112 (1) CCP summarises the provisions as "Fluchtgefahr" (risk of flight), the exact wording includes the term "*sich verborgen halten*" (to go into hiding), usually is understood as any attempt to live within Germany in a way that makes it impossible for the authorities to find a person (for example because a false adress is given or the suspect does not actually use the residential accomodation or shelters that are provided by the state, for example for migrants or homeless persons). The risk of absconding by definition is a higher probability of the suspect staying away from the criminal procedure than of taking part in it.[16]

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[13] Literally: 'Investigation judge', but s/he is not responsible for investigations but has to authorise and monitor certain means of coercion during the investigation the public prosecutor or police requests, namely pre-trial detention. This is why s/he is sometimes called Haftrichter (detention judge).

[14] For example a higher regional court (OLG Schleswig, StraFo 2004, 351) needed to spell out: "The sheer quantity of information does not elevate mere guesswork to a proper legal suspicion (…)".

[15] Volk (1995, 113): roughly 10% of all arrest warrants in her sample had significant deficits; similar Gebauer (1987, 246) and Kowalzyck (2008, 244).

[16] Graf 2013, § 112 para. 16.

Besides this rather low threshold, its factual basis is tenuous, since no actual preparations such as booking flights etc. are necessary to evoke.[17] Instead, just possible obstacles and motivating factors for absconding are attributed to the defendant.[18] In any case these attributions are supposed to rest upon professional expertise, but criminology, as the proper science, in fact does not supply any reliable findings on that.[19]

In spite of that, legal-theoretical works provide a highly elaborated catalogue of requirements for an appropriate and thus lawful judicial prognosis for the individual's risk of absconding. This catalogue uses the numerous incentives and obstacles to abscondence such as interpersonal bonding (relationships, children), personality related criteria (illness, mental instability, behavior in previous criminal procedures, contacts abroad) and offence related criteria (type of offence, expected sentence).[20] It allows for a comprehensive check of the circumstances. A handbook for defense lawyers, who have to deal with the problems in their everyday practice, sums up this catalogue in the advice for colleagues "to make the suspect visible as a human being beyond his or her existence in a file."[21]

Nevertheless, the courts seemingly do not cope well with these requirements. All empirical research paints a rather negative picture on the reasoning of local court decisions on pretrial detention. This negative picture is backed by corresponding harsh criticism by the higher regional courts in review decision.[22] Besides rare evidence of actual preparations to abscond, the *Haftrichter* focuses regularly on only a few criteria, most importantly the length of the expected sentence[23] and the absence of permanent interpersonal relationships and/or abode.[24] When an application for an arrest warrant is submitted for the risk of absconding and this application is rejected, in only 4% of these cases the prosecution service appeals against this decision.[25] This empirically supports the assumption that this ground to remand is used more for traditional reasons rather than for actual fears of absconding.

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[17] Langner 2003, 42 et seq.

[18] Nobis 2013, 98 et seq.

[19] Gebauer 1987, 275 et seq.; Busse 2008, 16; in summary Schlothauer/Weider 2010, 568 et seq.

[20] Paeffgen 1986, 198 et seq.; Langner 2003, S. 28 et seq., for a summary Wiesneth 2010, 25.

[21] Schlothauer/Weider 2010, S. 228.

[22] In particular and with clear guidelines for the "state of the art" Kammergericht Berlin, StV 2012, 350.

[23] Gebauer 1987, 326: more than 50% of all arrest warrants were based on this ground; in Langner's study (2003, 96) even more than 70%. Very critical about the "automated use" of this ground KG Berlin, StV 2012, 350; see also for instance OLG Bremen, StV 1995, 85.

[24] Gebauer 1987, 227; Geiter 1998, 175 et seq.

[25] Geiter 1998, 339.

When on the basis of "certain facts" the accused's conduct gives rise to the strong suspicion that in freedom he would destroy, alter, remove, suppress, or falsify evidence; improperly influence the co-accused, witnesses, or experts; or cause others to do so (sec 112 (2) no. 3 a), b) or c) CCP), the judge may order an arrest warrant because of the *risk of obscuring evidence*. While the suspect or accused it not obliged to contribute actively to his or her conviction, he may not hinder other actors to establish the truth during the criminal proceedings. This distinction, however, in reality is sometimes hard to make and may conflict with rightful defence behavior, such as the denial of the accusations or of uncovering co-offenders.[26] Sometimes courts use the type of offence to establish a risk of obscuring evidence, although the type of offence is not a lawful "certain fact" in the sense § 112 (2) CCP requires to establish this ground to remand.[27]

The risk of *repeating or continuing an offence* (sec. 112a CCP) has a strong preventive connotation and is suspected to be often the actual hidden reason for remanding someone,[28] but it is harder to apply because more legal restrictions exist. The alleged offence must be one listed in sec. 112a CCP[29] – it was already mentioned that this list meanwhile is long, but it does not include minor offences. It also must be established that there is an imminent risk, that the offender "will commit further serious criminal offences of the same nature or will continue the criminal offence". This requires a relatively clear prognosis that judges may rey to avoid. Because of its preventive nature, this ground to remand faces also considerable doctrinal criticism: To some scholars' understanding, the grounds to remand are supposed to be deducible from the aims of the proceedings.[30] Criminal proceedings just aim at investigation and punishment of offences already committed, not at the prevention of future deviances in a police-like manner. Nevertheless, the FCC confirmed this ground to remand in custody to be constitutional.[31] One argument was that

[26] Kazele 2008, 47; Püschel/Barmeier/Mertens 2011, 98.

[27] Kazele 2008, 49; Langner 2003, 180 et seq.

[28] Gebauer 1987, 245, Geiter 1998, 236.

[29] The suspicion must relate to a sex offence or stalking (174, 174a, 176 to 179, or pursuant to section 238 subsections (2) and (3) of the Criminal Code) or there must be a suspicion that the suspect has "repeatedly or continually committed a criminal offence which seriously undermines the legal order" such as terrorist offence, a violent assault, aggravated theft, fraud, robbery or other serious economic crimes, arson or a serious drug offence (pursuant to section 89a, pursuant to section 125a, pursuant to sections 224 to 227, pursuant to sections 243, 244, 249 to 255, 260, pursuant to section 263, pursuant to sections 306 to 306c or section 316a of the Criminal Code or pursuant to section 29 subsection (1), numbers 1, 4 or 10, or subsection (3), section 29a subsection (1), section 30 subsection (1), section 30a subsection (1) of the Narcotics Act). The fact that fraud and aggravated theft are included in this list opens § 112a CCP up to a wide range of criminal cases.

[30] Paeffgen 1986, 141; Roxin/Schünemann 2014, 241.

[31] FCC, 15 December 1965 (BVerfGE 19, 342 [350]).

this classification supplies the individual with better remedies than he or she would have according to police law.

Analysing criminal policy and legislation, we can see an extension of this ground that is reflecting the more preventive and security-oriented *zeitgeist* in Germany and elsewhere. Starting with a strict limitation on serious sexual offences when introduced in 1964, this ground to remand has experienced frequent amendments in its scope. Looking at the statistics, especially the high percentage of its use for alleged offences against property and assets, its use likely fails to meet the initial intention of the implementation of sec. 112a CCP: It was supposed to counteract the risk of offences "so unbearable for society" that it justified a detention without grounds related in any way to the current proceedings and conflicts with the presumption of innocence, because it actually presupposes the existence of "an offence". The FCC thus asks for a rigorous case-by-case-review. This review has to come out with a "severe risk" for public security and a "high penalty" for the expected offence in question, in order to justify pre-trial detention based on this ground.[32] Again, empirical studies suggest that the reasoning given by local courts often does not come up to the standards set by the FCC.[33]

The fourth ground, the *gravity of the offence* (sec. 112 [3] CCP) is applicable in very few cases - severe terrorist offences, causing very severe bodily harm and all capital offences - and is in practice rarely used. It is criticized almost unanimously by scholars for systematic reasons: If there is no risk for the proper conduct of the criminal procedure, there is no need to detain. The mere quality of the offence itself does not impede the process nor does it justify detention for preventive reasons. Therefore, according to the FCC, the provision only meets constitutional requirements when one of the other grounds to remand is at least plausible.[34] According to some studies, in several of the cases where this ground was applied, the suspicion on which the arrest warrant was based on later could not be substantiated and the defendant later was convicted for a minor offence.[35] Consequently, sec. 112 (3) CCP only provides for a legitimate ground to remand to the extent that it is backed up by other grounds to remand. It is thus redundant and should be abolished.[36]

2.2.3 The procedure

[32] FCC, 30 May 1973 (BVerfGE 35, 185 [191 f.]).

[33] Volk 1995, 174.

[34] FCC, 15 December 1965 (BVerfGE 19, 342 [350]).

[35] Anagnostopoulos 1984, 92; Geiter 1998, 339; Dünkel/Morgenstern 2013, 87.

[36] Stuckenberg 1999, 460; Morgenstern (in preparation).

Although the outcome of the judicial decision to imprison depends largely on the submissions of the public prosecutor, from a constitutional perspective the decision of the *Haftrichter*[37] still is considered an independent one. Thus, it mus be more than merely confirming a preceding administrative decision of the prosecution[38] and a simple repetition of the wording of the CCP or otherwise insufficient reasoning is an infringement of constitutional rights of the defendant.

According to Art. 104 (2) and (3) BL, there is a strict time limit on the first decision of a judge on a detention case: "Without delay", but not later than at the end of the day after the arrest, the suspect must be brought before the judge. After that and again "without delay", the judge has to decide upon the pre-trial detention. There are two scenarios possible:

- an arrest warrant already exists and the suspect is searched for, then the procedure is based on sec. 115 CCP;
- the suspect was preliminarily arrested by the police after an alleged offence (sec. 128 CCP) - according to empirical studies, this is the more frequent scenario.[39]

The suspect has the chance to rebut the presented evidence supporting the suspicion of the alleged offence and the grounds to remand in the hearing before the judge (guaranteeing *habeas corpus* rights). He or she has the right to be assisted by a lawyer at any time, including after arrest and before and during the hearing. Since 2010, a defence lawyer, paid by the state, if necessary, is *obligatory* in all cases where remand detention is enforced (sec. 141 (3) CCP). Before that point of time, it is up to the discretion of the prosecution to ask the court to assign a duty counsel to the suspect, (for example in complex cases, for vulnerable suspects etc.). This means in practice that very often no lawyer is present at the first hearing in which the judge decides upon pre-trial detention.

At the end of this hearing, the arrest warrant must be issued to the suspect and, if necessary translated orally or, upon request, also in writing (sec. 114a CCP). Several obligations to inform the defendantt about his or her rights, including the right to have relatives and, if applicable, embassies or consulates informed, apply at this stage (se. 114b, c CCP).

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[37] He sits at the local court (Amtsgericht), sec. 125 CCP (few exceptions apply).

[38] Gärditz 2003, 191; Jarass/Pieroth/Jarass 2014, Art. 104 Rn. 19.

[39] The German High Court (Bundesgerichtshof, BGH) differentiates between § 115 and § 128 CCP on what is to be understood by "without delay": Under sec. 128 CCP, the police may make use of the 48-h-timespan to carry on with investigations to collect further evidence on the guilt (or innocence) of the arrested before presenting him to a judge. If there is already an arrest warrant (sec. 115 CCP), a judge has already been involved with the matter and has decided on a sufficient degree of suspicion against the now arrested. As a result, the police must not keep him away from a judge for the full 48-h-timespan, but has to bring him immediately before the judge. Thus, "without delay" - read as "without undue delay" - is to be understood differently in this context, namely as "immediately".

Several means may lead to a review of detention. They differ in the procedural form (written or orally), the frequency of use and the state of proceedings. The most important are the application for a review of detention (sec 117 CCP et seq.) and the complaint against a remand decision sec 304 CCP et seq.). Both aim at either a revocation of the arrest warrant (sec. 120 CCP) or the suspension of its execution (sec. 116 CCP). For the most part, it is up to the accused respectively his defence lawyer to have remedies filed, although the court and the prosecution service formally are obliged to reassess the necessity to keep up the pre-trial detention ex officio at any stage of the proceedings (sec 120 (1) CCP). At the same time, the decision upon the application or the complaint can lead to an aggravation of the defendant's situation, for instance by including further offences into the prosecution on application of the prosecutor or by changing the ground to remand.

2.2.4 Duration and prolongation of pre-trial detention

Apart from the general principles to avoid pre-trial detention, to make it as short as possible (in particular in relation to the offence allegedly committed and to the sentence expected), some more precise provisions exist in German law. "For one and the same offence", pre-trial detention must not be applied longer than six months, unless the higher regional court confirmes the application for a prolongation (sec. 121 (1) and (2) and sec. 122 CCP). This can be done in cases of "particular difficulty" or because of "the unusual extent of the investigation" or "some other important reason", which "justify continuation of remand detention". Thus, there is no absolute limitation in a narrower sense on the length of a pre-trial detention.[40]

Statistics show that about a quarter of all remand detainees have been serving more than six months of pre-trial detention at the time of their conviction (see below 3.3 for more details). This does not mean that this six-month-limit is meaningless – as indicated before, the review by the higher regional court obviously has some disciplinary effect. However, the six-month-deadline is met ("the race is won") once the application for a continuation order is filed with the higher regional court or the main proceedings commenced (sec 121 (3) CCP). Sometimes the prosecution does not use all allegations in their files to substantiate the application for an arrest warrant but holds back some to have a basis beyond "one and the same offence" to issue consecutive arrest warrants.[41] Thus, the pre-

[40] There are additional limitations on the duration, namely when in overloaded courts the trial cannot begin within three months, or where there was no more promotion of the proceedings after the opening decision (Eröffnungsbeschluss – to court acceptance of the indictment to start the trial) by the court at all. If the accused is already serving a sentence deriving from another offence, courts may not defer issuing of an arrest warrant in order to gain time.

[41] See in detail Fahl 2004, 202 et seq. on this matter.

trial detention can easily last longer than six month. Nevertheless, the FCC stated in 2014 that a remand detention of more than one year "can only be justified in very exceptional cases", thus coming close to an absolute limit.[42]

2.3 Recent legal developments

The only reform project for pre-trial detention legislation for many years[43] aimed at strengthening the procedural rights of suspects. Most importantly, since 2010 a *defense lawyer* (paid by the state, if necessary) is obligatory in all cases where remand detention is actually enforced (see below 5.4. for details).
Additionally, in a major reform of the distribution of legislative competences between the German *Länder* and the Federation in 2006, the *Länder* gained competence for regulation of all imprisonment matters. The umbrella provision for the *execution of pre-trial detention* – § 119 CCP, a federal law – could thus no longer serve as legal basis. The provision had been criticised anayway for a long time because it was so vague that in fact administrative guidelines regulated all details of the pre-trial detention regime. By 2010, all 16 German *Länder* passed new prison acts for remand prisoners or incorporated responding regulations into existing legislation. They give the prison administration considerable competence to decide in matters that were to decide by the judge before. This was usually welcomed as a less bureaucratic way of dealing with remand prison matters. However, because some detention matters for pre-trial detainees also relate to procedural requirements, namely the prohibition to contact certain persons or receive visits, it is not always easy to decide which law regulates what and who is responsible for which decision. The 16 remand prison acts additionally differ in to some degree structure and regulations. While many of the new provisions meant progress in substance, the legislative basis as such has become much more complex and hard to overlook.

[42] FCC, Neue Zeitschrift für Strafrecht - Rechtsprechungsreport 2014, 314.

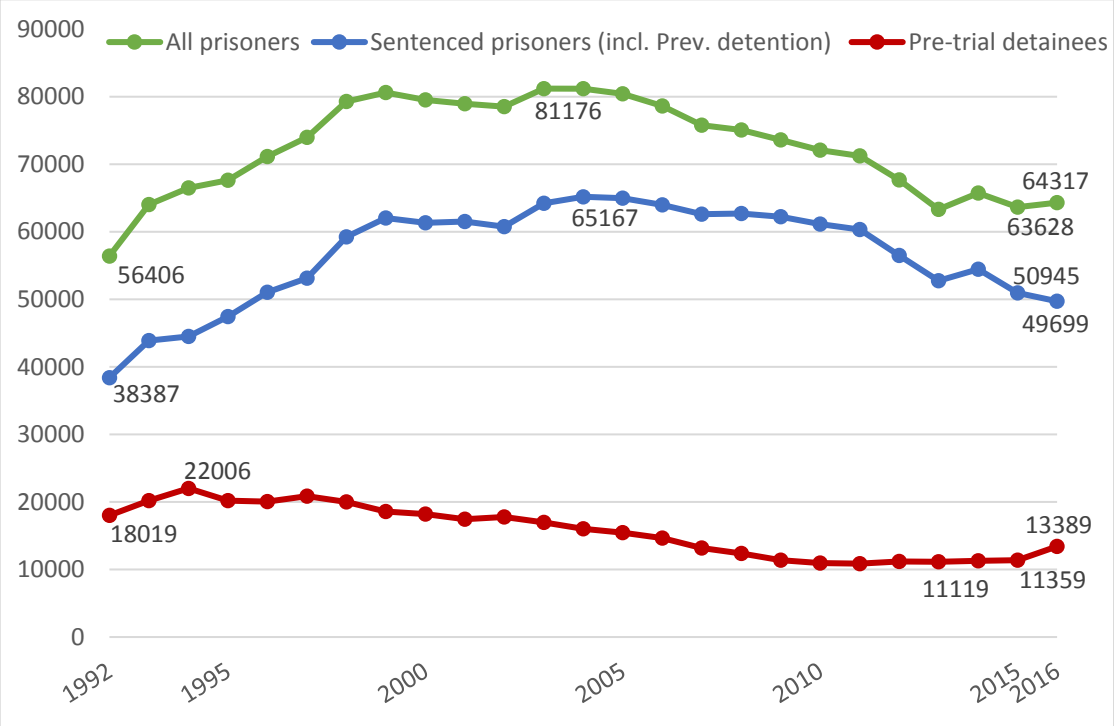
[43] In a recent reform project the Ministry of Justice assembled a large group of experts to discuss the flaws of the German criminal procedure as such and to make wide-ranging reform suggestions. Pre-trial detention, however, was not on the agenda apart from the question whether there should be mandatory defense counsel already when an arrest warrant is requested by the public prosecution. This suggestion was refused by the majority of the expert group (see Morgenstern, in prep. for more details).

3. Statistics

3.1 A longitudinal look at pre-trial detention in Germany

Within the time span since the political reunification of the two German states in 1990, the total number of prisoners as well as the number of remand prisoners in Germany has seen quite some variation, depicted in *fig. 1*. The early 1990s were marked by sharply increasing figures in both categories. While the overall number of detained persons almost continuously rose until 2004, peaking at about 81.000 detainees and reaching its low in March 2013 with 63.317, the number of remand prisoners hit a turning point already in the mid 1990s and descended slowly, but steadily until 2011. Peaking in 1994 with about 21.700 remand prisoners, the number was halved twenty years later (31 August 2013: 10.560 as the lowest number since the reunification). The share of pre-trial detainees then fell below 17%. Since then, we find increases – a moderate of 1,7% with regard to the overall numbers, a more expressive one with regard to pre-trial detainees (31 March 2016: 13.389, representing an increase of 20,4% within three years). The remand share now is 21%.

***Figure 1*: Prison Population, absolute numbers, 1992-2016**



Source: Statistisches Bundesamt 2016 (Bestand der Gefangenen und Verwahrten) and earlier. Reference date in each year: 31.3. (2001: 31.1. because of relocation of the Ministry of Justice to Berlin; 2013: 31.8.)

An explanation for this increase requires a fuller statistical picture. Unfortunately, the necessary data will either published with considerable delay,[44] or are not regularly collected at all for pre-trial detainees.[45] We have to see in how far the increase is connected to the refugee crisis – indeed there is an increase in offences allegedly committed by refugees, but they are often of a minor nature.[46] Offences *against* refugees and hate crimes may play a smaller role: Germany has seen a marked increase of these crimes;[47] however, the clearance rate is very low. Thirdly, offences such as trafficking of migrants are likely to have some influence – in autumn 2015 in Bavaria almost 800 alleged migrant smugglers were detained within several weeks.[48]

Nevertheless, the increase can be found in nearly all *Länder*, not only in border regions. Increases above or far above the German average happened in North Rine-Westphalia, the most populous state and in some of the smaller states with a small prison population (namely Bremen, Saarland and Thuringia). The Bavarian numbers even have increased below average.

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[44] This refers to data for the criminal proceedings (Strafverfolgungsstatistik), allowing for analyses regarding the nationality of convicts and the offences committed. Police statistics for 2015 show a relatively stable situation (see below table 3), the increase of about 4% as compared to 2014 are solely caused by offences against immigration and aliens legislation (Bundeskriminalamt 2016, Police Crime Statistics, p. 5; an abridged version in English language can be found on the website as well: www.bka.de).

[45] Pre-trial detainees are only included in the short prison inventory statistics, published three times a year (Bestand der Gefangenen und Verwahrten in den deutschen Justizvollzugsanstalten); not in the more comprehensive prison statistics on demographic and criminological characteristics of sentenced prisoners (Strafvollzug - Demographische und kriminologische Merkmale der Strafgefangenen). All statistics are published by the Federal Statistic Office (Bundeskriminalamt) and can be found and downloaded on the webpage (www.destatis.de) in the relevant section "Rechtspflege/StrafverfolgungVollzug".

[46] Leaving aside offences that can only be committed by non-nationals such as illegal entry to or illegal residence in Germany, the recently published statistics for "crime in the context of migration" show that about 60% of all cases were suspected theft and fraud – fare dodging being the most common offence (Bundeskriminalamt 2016, www.bmi.bund.de/SharedDocs/Kurzmeldungen/DE/2016/06/bka-lagebild-kriminalitaet-zuwandeung.html; accessed 15 August 2016).

[47] Information given by the government in response to the request of several parlamentarians, Bt.-Drs. 18/7000.

[48] According to media reports based on an official statement by the Bavarian Ministry of Justice. In March 2016, however, this number was down to 157, http://www.sueddeutsche.de/bayern/2.220/justiz-knast-nur-fuer-schleuser-entsteht-in-muehldorf-1.2918830 (accessed 15 August 2016).

Table 1: Numbers of pre-trial detainees in the 16 Länder, increase rates since 2013

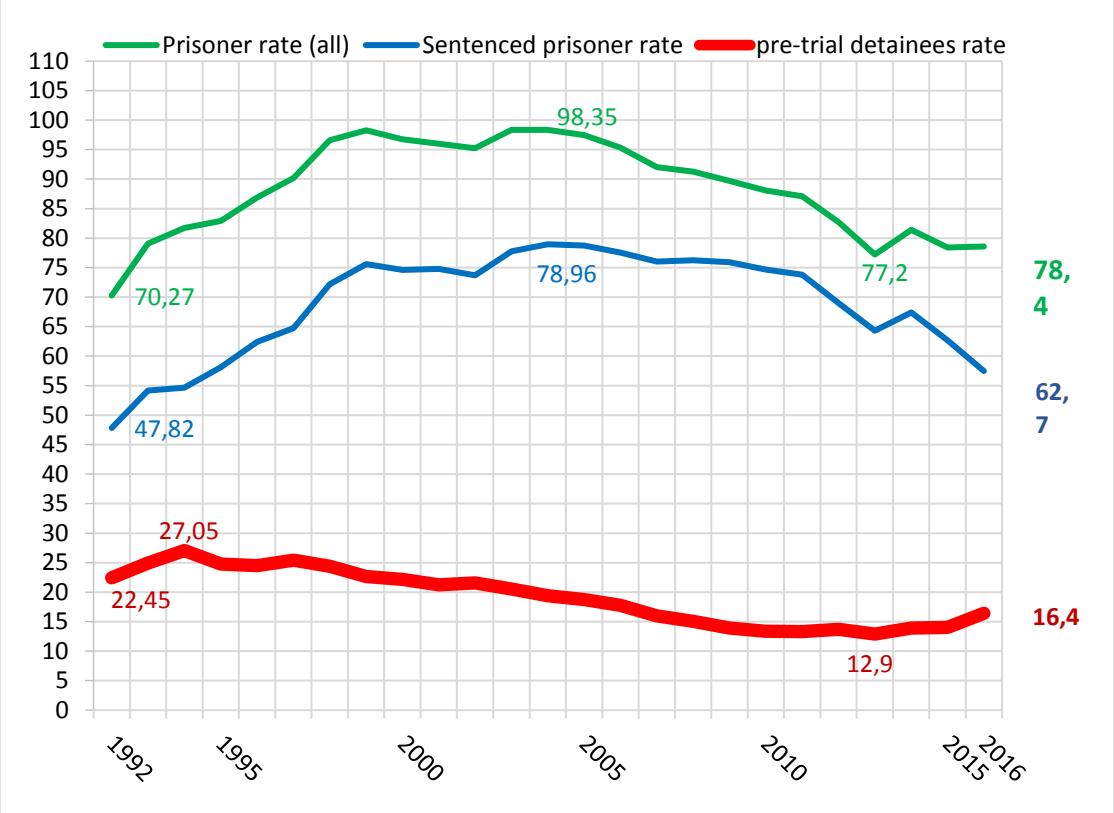
					Increase in %	
	2013	**2014**	**2015**	**2016**	**2015-2016**	**2013-2016**
Baden-Württemberg	1436	1481	1487	1783	19,9	**24,1**
Bavaria	2614	2561	2536	2925	15,3	**10,8**
Berlin	570	603	667	719	7,8	**26,1**
Brandenburg	237	251	196	249	27	**5,1**
Bremen	81	72	95	120	26,3	**48,1**
Hamburg	391	365	388	507	30,7	**29,7**
Hesse	894	926	961	1139	18,5	**27,4**
Lower Saxony	650	665	659	716	8,6	**10,2**
Mecklenburg-West Pomerania	169	167	162	162	0	**-4,1**
North Rhine-West-phalia	2292	2459	2558	3120	22	**36,1**
Rhineland-Palatinate	422	493	461	514	11,5	**21,8**
Saarland	138	111	94	151	60,6	**9,4**
Saxony	582	551	519	630	21,4	**8,2**
Saxony-Anhalt	190	162	160	185	15,6	**-2,6**
Schleswig-Holstein	216	200	230	213	-7,4	**-1,4**
Thuringia	237	193	186	256	37,6	**8**
Germany	11119	11260	11356	13389	17,9	**20,4**

Source: Own calculations based on data by the Statistisches Bundesamt 2016 (Bestand der Gefangenen und Verwahrten) and earlier. Reference date in each year: 31.3.

To provide data suitable for international and regional comparison, additionally *fig. 2* presents the pre-trial detainee *rate* (pre-trial detainees per 100.000 of the population) for Germany. The national rate in 2015 stood at 14 and rose to 16,4 a year later. Current regional disparities will be discussed in a moment. As mentioned in sec. 1 of this chapter, a considerable change in the detention practice had started at the end of the 1980s, the rates in West Germany in the time before the political reunion had been relatively high - in 1983 the rate stood at 23,6; roughly the same as 20 years earlier.[49]

[49] For a more comprehensive statistical analysis see Morgenstern (in preparation).

***Figure 2*: Imprisonment rates (prisoners per 100.000 of the population), 1992-2016**



Source: Own calculations based on data by the Statistisches Bundesamt 2016 (Bestand der Gefangenen und Verwahrten) and earlier. Reference date in each year: 31.3. (2001: 31.1. because of relocation of the Ministry of Justice to Berlin; 2013: 31.8.)

Currently German prisons operate mostly below their maximum capacity; if overcrowing occurs, it is restricted to certain prisons, mostly in bigger cities. This, however, is a relative new development; particularly in bigger cities overcrowding was a severe problem. As can be seen from *table 2* lower occupancy rates have not necessarily been caused by higher prison capacities, on the contrary – the overall capacity of German prisons has been reduced by roughly 5.000 places between 2003 and 2016. This, as media currently report for some Länder (namely North Rhine-Westphalia, Baden-Württemberg and Saxony),[50]

[50] http://www.derwesten.de/politik/in-den-gefaengnissen-des-landes-ist-kein-platz-mehr-frei-id11560498.html,; http://www.swr.de/landesschau-aktuell/bw/bw-justizminister-hat-plaene-gegen-ueberbelegung-volle-gefaengnisse-und-frustrierte-beamte/-/id=1622/did=18054276/nid=1622/15u10xs/ and http://www.swr.de/landesschau-aktuell/bw/karlsruher-gefaengnisleiter-schlaegt-alarm-gedraengel-hinter-gittern/-/id=1622/did=17888978/nid=1622/15jp7z4/index.html; http://www.mdr.de/sachsen/gefaengnisse-sachsen-ueberbelegt-100.html; all accessed 28 September 2016.

can cause new problems, as now some of the existing prisons again operate above their capacity, in particular those that host pre-trial detainees.

Table 2: Capacacity and occupancy rate

	31.3.2003		**31.3.2010**		**31.3.2016**	
	capacity	**Occup. in %**	capacity	**Occup. in %**	capacity	**Occup. in %**
Baden-Württemberg	8080	**108**	8185	**93**	7175	**95**
Bavaria	11245	**109**	11916	**102**	12313	**92**
Berlin	5022	**108**	5147	**96**	4546	**85**
Brandenburg	2534	**94**	2308	**96**	1810	**75**
Bremen	826	**79**	748	**87**	666	**86**
Hamburg	3129	**99**	2596	**70**	2008	**83**
Hesse	5706	**107**	5767	**91**	5369	**88**
Lower Saxony	6585	**103**	7233	**81**	5938	**80**
Mecklenburg-West Pomerania	1584	**104**	1547	**94**	1351	**79**
North Rhine-Westphalia	18357	**100**	18390	**95**	18545	**87**
Rhineland-Palatinate	3914	**102**	3606	**99**	3403	**93**
Saarland	848	**110**	886	**95**	973	**80**
Saxony	4165	**103**	3840	**91**	3821	**93**
Saxony-Anhalt	2787	**103**	2456	**88**	1935	**87**
Schleswig-Holstein	1636	**100**	1695	**84**	1589	**75**
Thuringia	1761	**118**	2130	**86**	2029	**81**
Germany	78099	**104**	78450	**92**	73471	**88**

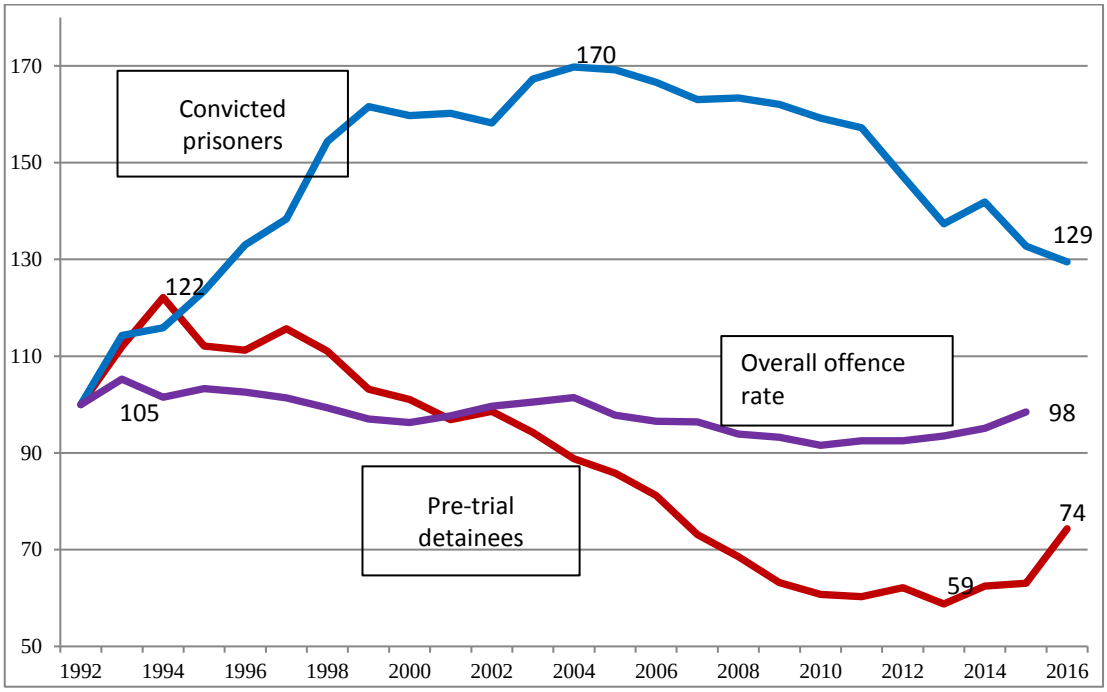
Source: Own calculations based on data by the Statistisches Bundesamt 2016 (Bestand der Gefangenen und Verwahrten) and earlier. Reference date in each year: 31.3.

3.2 Development of crime level, number of convicted persons and pre-trial-rate

Explanations for this rather positive trend in pre-trial detention are not clear-cut. A decrease in the overall crime level most probably had some effect. The police statistics for

2015 show an incidence figure (offences per 100.000 of the resident population) of about 7.300, coming down from well above 8.300 in 1993. After the reunification, very high incidence figures in East Germany troubled the public, ranging up to 20% over the correspondent figure for West Germany and peaking at about 10.000 in 1995. Since then, the figure declined faster and sharper than in West Germany, reaching the West German level in 2009. The West German figure rose in the early 1990s to some 8.000, starting to decline only in 2005. The decline comprises most categories of offences, but not some that are relevant with regard to pre-trial-relevant detention, namely some violent offences and robbery.

***Figure 3*: Context data, indexed for 1995, 1995-2015**



Source: Own calculations based on data by Statistisches Bundesamt 2016.

Nevertheless, crime trends can only be part of the explanation, as the sentenced prisoner rate developed differently (*Figure 3)*. Nor was there a parallel development of the number of persons judged (*Abgeurteilte*). This group consists of convicted (81% in 2014), acquitted (3% in 2014) and those with proceedings suspended conditionally or unconditionally by a judge (16% in 2014, mostly juveniles).[51] Until 2005, their number developed in an up and down way. The decline since then is only moderate compared to that of the number of pre-trail detainees.

[51] The cases in which the prosecution service already suspended the proceedings are not included in these statistics. In such cases the statistics do not tell if suspects were in pre-trail detention or not. Older empirical studies suggest that their number is y low (see Morgenstern, in prep., for details).

Statistics also provide data for persons judged in a certain year who were in pre-trial detention (*table 2*). Although the relevant periods differ, at least for the purpose of a rough cross-sectional observation one can generate a rate from these two figures (pre-trial-rate).

***Table 3*: Pre-trial rate among judged persons 1975-2014**

	Persons with a final decision*	**Persons with pre-trial detention**	**Pre-trial-rate**
West Germany			
1975	868.821	42.105	4,8%
1980	967.434	37.401	3,9%
1985	955.434	31.036	3,2%
1990	893.240	27.553	3,1%
1995	951.064	36.070	3,8%
2000	923.760	36.683	4,0%
2005	980.936	27.252	2,8%
Germany			
2007	1.129.790	26.793	2,4%
2008	1.105.719	29.532	2,6%
2009	1.074.909	28.309	2,6%
2010	1.034.868	26.967	2,6%
2011	1.019.467	26.513	2,7%
2012	975.171	26.420	2,7%
2013	950.289	25.135	2,6%
2014	937.034	26.696	2,8%

Source: Statistisches Bundesamt 2016 (Strafverfolgungsstatistik 2014) and earlier. Comprehensive data for all 16 Federal States are only compiled since 2007.

After sinking below 4,0% during the 1980s, in the 1990s this rate rose to 4,2 until 1999. Until 2007, the relevant statistics on judgements and convictions were collected only for West Germany. The numbers were relatively stable while the number of pre-trial detainees declined. Since then, the number of criminally judged persons decreased considerably by 18% from 1.129.790 to 923.384. During the same time-span, the number of persons with pre-trial detention hardly changed. Therefore, the pre-trial-rate rose from 2,4% to 2,8% in 201, but is still is lower than in the 1990s.

One reason for the relatively low figure of the pre-trial-rate is that it comprises all offences, including some 190.000 traffic cases. Taking out these, the pre-trial-rate stood at 3,5% in 2014. A study with data from four large districts in 1994[52] analysed the situation for lower

[52] Dölling et al. 2000.

regional courts that are competent for capital cases and all those in which a sentence of more than four years is expected. In about 80% of all cases in the sample pre-trial detention was ordered. It should be noted, however, that only about 2% of all cases are dealt with by the lower regional courts in first instance. Current criminal justice statistics (Strafverfolgungsstatistik) reveal - as expected - that high pre-trial-rates can be observed among offences against life (murder 85%; manslaughter 74%). In the category of robbery and similar offences (which may include milder forms such as snatching a handbag but also more violent forms), the rate is 26%. Well below average are the rates for theft and fraud (below 2%), but also for drug offences (less than 8%). With regard to offences against aliens' legislation about 8% of all those judges were in pre-trial detention.

3.3 Duration of pre-trial detention

The size of the remand prison population is shaped by two factors – the number of entries and the length of the stay. Older empirical studies showed an average of 300 days in pre-trial detention during proceedings at lower regional courts (see above),[53] and an average of 80-90 days in a mixed sample of courts with local courts dominating[54]. Studies on pre-trial detention for juveniles do not show considerably shorter attendances in remand: In 2010, 45% of young accused in 40 facilities had to stay there more than 3 months, while 21% stayed less than 4 weeks.[55]

According to the most recent statistics[56] covering the year 2014, more than half of all pre-trial detainees stayed in remand detention for more than three months. According to these data, the relative length of pre-trail detention is increasing. In 1976, about 15% of pre-trial detainees stayed six to twelve months, in 2014, this levelled at at almost 18%. 5,5% (with only 3,6% in 1976) had to stay more than one year. In absolute numbers this amounts to 6.256 out of 26.696 persons being detained longer than the regular maximum time-span (which can be extended, see above 2.2.4), and almost 1.500 of them even staying longer than one year.

However, the share of pre-trial detainees among all convicted persons decreased considerably in the same period. Those very long remand durations are allotted to offences of

[53] Dölling et al. 2000, 180.

[54] Busse 2008, 185.

[55] Villmow/Savinsky/Waldmann 2012, 279.

[56] From the official statistics on criminal justice cases (Strafverfolgungsstatistik), a median of length of pre-trial detention cannot be concluded. However, the statistic does show how long the pre-trial detainees have been in pre-trial detention at the point of time of their final conviction, even though this information is only contained in a classification of five categories (up to one month, one month to three months, up to six months, up to one year and more than one year).

murder and rape. 75% of all persons accused for murder offences were remanded more than 6 months. Among those accused of offences of rape, 46% stayed longer than 6 months in pre-trial detention. This leads to the assumption that courts tend to order pre-trial detention rather in difficult cases or more serious offences, which would be reasonable in the light of proportionality. Within this group of cases, the necessary time and effort for the proceedings might be bigger. From a different perspective, it appears rather odd that this should be the case in by far the majority of all cases before the lower regional courts, where - according to the studies mentioned - the average duration is longer than ten months.

Two consecutives studies of decisions by higher regional courts show that decisions of local courts frequently were scrapped because of disproportionate length of detentions. There was, however, a decline in the share of annulments of decisions from the first study (years 1990 to 1998)[57] to the second study (years 1998 to 2006).[58] Either this decline could be an indication for the higher regional courts having become less restrictive again, or for the judges at the local courts having become more careful when reviewing detention in accordance with the stricter requirements established (which would actually fall in line with the overall decline in numbers of pre-trial detainees).

3.4 The use of alternatives and surrogates to pre-trial detention

Diminishing figures of prisoners could also be caused by an increased use of alternatives. As mentioned in the introduction, German judges cannot chose from a variety of different custodial and non-custodial pre-trial measures. When they are of the opinion that it is too risky to leave the suspect at large, they need to issue an arrest warrant and later can decide to suspend its execution under conditions. Official statistics on the number of suspended arrest warrants do not exist in Germany. Only the study of *Gebauer* provides for some more comprehensive data for the year 1981 for the West Germany, somer other studies on juveniles give additional insights. With all due caution it can be said that in Germany the execution of an arrest warrants rarely is suspended immediately. If it is suspended, this usually happens after some weeks. The above-mentioned studies suggest that between 15 and 20% of all warrants are suspended at one point. Given the current number of roughly 13.000 remand prisoners, an average suspension rate of 15% would amount to less than 2000 suspects under some sort of pre-trial supervision. However, there may be some

[57] Hoch 1998.

[58] Dessecker 2007. This study also produced data on possible delays in the proceedings. They were found in 85% of all cases and usually happened during the investigation. Mostly the law enforcement agencies themselves were responsible for them, in 13% of cases the defence lawyer, experts in 9%. The suspect seldom caused a delay himself.

more, because in these cases, the monitoring time may well be longer than time in detention. While cases with alternative measures do fall under the principle of expediency in criminal proceedings, they still do not enjoy the same priority as detention cases.[59] In any case the number of unconvicted persons supervised in the community is much lower than the number of pre-trial detainees.
As for the type of supervision or conditions such as providing for a financial surety, no statistical assumptions can be made (see below 6.3 for details). However, since electronic monitoring as a pre-trial supervision measure is only available in one *Land* (Hesse) that relatively regularly reports on this practice, it is clear that currently at a given point of time hardly more than 40 persons are affected (see below 6.3.4 for details).

3.5 Female, young and foreign detainees

Taking a closer looking at the population of pre-trial detainees, one must notice that on 31.03.2016 merely 5,5% of all pre-trial detainees were female. This ranges only negligibly above the correspondent figure among sentenced prisoners; and neither share has changed much over the last couple of years.[60] Only 11,9% of pre-trial detainees age below 21 years,[61] Less than 3% are aged 18 or below.[62] In total, the share of young pre-trial detainees currently ranges at 40%, thus well above the share of pre-trial detainees among all detainees, which im March 2016 was 21%. While this share traditionally was higher (2014: 27%), this huge difference is a very new development It may have to do with the migrant crisis, but needs to be examined further.

[59] Busse 2008, 48.

[60] See in detail Zolondek 2007, 94 et seq.

[61] They are thus (potentially) treated under the Juvenile Justice Act (Jugendgerichtsgesetz, JGG) with special rules for procedure and sentencing.

[62] Overall, there were 1.590 individuals under the age of 21 in pre-trial detention (here, with 14% the proportion of females - 98 out of 738 - is somewhat higher as for the overall population). 408 were below the age of 18. The total number of inmates in juvenile prisons was 3945.

***Table 4*: Foreign pre-trial detainees in Germany, 2008 and 2013**

Land	Pre-trial detainees		Foreign pre-trial detainees				foreign pre-trial detainees from EU- states			
	absolute numbers		absolute numbers		share (of column 3)		absolute		share (of column 3)	
	2008	**2.013**	2008	**2013**	2008	**2013**	2008	**2013**	2008	**2013**
Baden-Württemberg	1.600	**1.401**	763	**830**	48%	**59%**	279	**379**	17%	**27%**
Bavaria	2.537	**2.509**	1.095	**1.379**	43%	**55%**	474	**811**	19%	**32%**
Berlin	739	**617**	408	**415**	55%	**67%**	124	**179**	17%	**29%**
Brandenburg	220	**204**	50	**80**	23%	**39%**	31	**73**	14%	**36%**
Bremen	97	**76**	53	**26**	56%	**34%**	8	**11**	8%	**14%**
Hamburg	359	**344**	205	**260**	57%	**76%**	54	**113**	15%	**33%**
Hesse	950	**891**	523	**490**	55%	**55%**	207	**197**	22%	**22%**
Mecklenburg- W.-Pommerania	215	**194**	21	**54**	10%	**28%**	14	**40**	7%	**21%**
North Rhine-Westphalia	2.843	**2.435**	1.125	**1.352**	40%	**56%**	379	**622**	13%	**26%**
Lower Saxony	917	**657**	322	**371**	35%	**40%**	90	**126**	10%	**19%**
Rhineland-Palatinate	357	**472**	137	**210**	38%	**44%**	36	**88**	10%	**19%**
Saarland	136	**137**	38	**72**	28%	**53%**	18	**44**	13%	**32%**
Saxony	491	**576**	136	**175**	27%	**31%**	64	**85**	13%	**15%**
Saxony-Anhalt	202	**170**	34	**34**	17%	**20%**	10	**17**	5%	**10%**
Schleswig-Holstein	203	**185**	69	**61**	34%	**33%**	22	**20**	11%	**11%**
Thuringia	220	**193**	26	**48**	12%	**20%**	9	**28**	5%	**15%**
Total (16 *Länder*)	**12.086**	**11.061**	**5.005**	**5.857**	**41%**	**53%**	**1.819**	**2.833**	**15%**	**26%**

Source: Own surveys among prison administrations and Ministries of Justice of the 16 *Länder*.

Most importantly for taking stock of the practice of pre-trial detention in Germany is the recording of the share of foreigners. This share of foreigners among the entire prison population amounts to 30% in 2014.[63] The share of foreigners among pre-trial detainees is not recorded in official statistics, but is taken from two surveys the author conducted with the Ministries of Justice of the *Länder* in 2008 and 2013 (see *table 3*). Meanwhile the German Ministry of Justice also provides this number for the Statistics compiled on behalf of the Council of Europe (SPACE).

For a few years now, foreigners outnumber Germans in pre-trial detention. Their share among all pre-trial detainees in Germany rose from 43% in 2008 to 53% in 2013 (data provided for SPACE show a share of 52% for 2014) and show considerable regional disparities (from 20% in Thuringia to 76% in Hamburg in 2013). This applies also for EU nationals, whose share rose from 15% to 26%. Among sentenced prisoners, in March 2015 25% were foreigners. This reflects the share of foreigners among suspects that 2015 was at 25,7%. Among convicted persons, the share of foreigners in 2008 was at 19,8%, in 2014 it was at 26%. Comparing the absolute figure for 2008 and 2013, the rise with foreign suspects was at 13% and with foreign convicts just 3%. The growth of the foreign remand prison population, however, amounted to 16.6%, showing a clear overrepresentation in comparison with the context data.

3.6 Regional disparities

The pre-trial detention population rates for the *Länder* vary between 7,0 and 20,9 pre-trial detainees per 100.000 of the resident population, with an average across Germany at 12,9 (see *table 4*). Remarkably – and in contrast to the above mentioned overall crime rates -, the rate of pre-trial detainees in East Germany is significantly lower than in West Germany. An explanation for that could be that the majority of urban centers are situated in the West (Berlin is included in the West German figure). The higher rates for instance in Hamburg (20,9) and Berlin (15,2) fall in line with the higher crime level. Another reason for the disparate rates in East and West are differing shares of foreigners among the resident population and the suspects.

Besides that, a comparison just between the West German *Länder* illustrates that regional judicial cultures and traditions with differing practices on ordering remand custody must play a role, too. For the purpose of illustration of the differences, *table 4* contrasts the pre-trial detention population rate, the overall prison population rate, the crime level (by means of the incidence figure of offences) and the diversion rate.

[63] These data are only provided for the Statistics compiled on behald of the Council of Europe (SPACE), in the German statistics only the number of sentenced foreign prisoners are published.

***Table 5*: Some indicators for regional diversity in justice cultures, descending sorted by Pre-trial detention population rate, 2012/2013**[64]

	Pre-trial detention population rate	Prison population rate	Incidence figure (all offences)	Diversion rate (adults)
1. Hamburg	20,9	**85,7 (03)**	13.724 (02)	**61% (02)**
2. Bavaria	19,3	**88,9 (02)**	5.073 (16)	**41% (15)**
3. Berlin	15,2	**107,9 (01)**	14.908 (01)	**51% (11)**
4. Saarland	13,9	**78,0 (09)**	7.296 (09)	**49% (13)**
5. Hesse	13,2	**76,7 (11)**	6.429 (14)	**60% (03)**
6. Baden-Württemberg	13,0	**62,2 (13)**	5.450 (15)	**41% (15)**
7. Saxony	13,0	**82,9 (06)**	7.716 (07)	**45% (14)**
8. North Rhine-Westphalia	12,7	**85,4 (04)**	8.459 (05)	**57% (05)**
9. Rhineland-Palatinate	11,5	**79,3 (07)**	6.702 (12)	**54% (08)**
10. Bremen	11,0	**83,5 (05)**	13.059 (03)	**56% (06)**
11. Thuringia	9,1	**78,0 (09)**	6.557 (13)	**52% (10)**
12. Mecklenburg – W. Pomerania	8,6	**74,3 (12)**	7.529 (08)	**51% (11)**
13. Brandenburg	7,9	**55,6 (14)**	8.052 (06)	**54% (08)**
14. Lower Saxony	7,8	**60,0 (15)**	7.015 (11)	**55% (07)**
15. Saxony-Anhalt	7,8	**79,0 (08)**	8.581 (04)	**58% (04)**
16. Schleswig-Holstein	7,0	**41,6 (16)**	7.125 (10)	**66% (01)**
Germany	12,9	**77,2**	7.404	**52%**

Against a popular misunderstanding and against the principle of legality (*Legalitätsprinzip*, see above), the German Prosecution Service diverts roughly half of all offences from the courts by unconditional waivers of the proceedings (in minor cases) or conditional suspensions of the proceedings (sec. 153 et seq. CCP). It is not always clear what leads to high diversion rates – a liberal approach with regard to minor crimes as well as overloaded public prosecution services may explain them.

Bavaria as a territorial state has the lowest crime level of all, but still has a pre-trial detention population rate of 19,3, which is comparable to the rate of the two bigger city states Hamburg

[64] Because the diversion rate could only be calculated from older data (the data are taken from Heinz 2014, 67 f.), also the other indicators date from these years. Despite some changes, mainly increases for the incidence figure and the pre-trial detainee rate, the differences as such remain the same.

and Berlin. The territorial state Lower Saxony, however, has a pre-trial detention population rate of only 7,8. Bavarian prosecutors additionally are not as fond of diverting measures as most of their colleagues in other *Länder*. Since the Prosecution Service also in Germany is not fully independent, because the General Public Prosecutor in each *Land* may issue binding guidelines, political influence can be discerned. The lowest pre-trial detention population rate traditionally can be found in Schleswig-Holstein. This *Land* also always has the (by far) lowest prison population rate and the highest diversion rate. Concerning the crime level however, it is only average, ranking number 10 of the 16 *Länder*. A liberal approach is rooted in criminal policy here for many years and still seems to influence the criminal justice culture.[65]
Berlin, Bavaria and Hamburg have both a high pre-trial detention population rate and a high prison population rate. In contrast to that, the neighbouring countries Lower Saxony and Schleswig-Holstein as well as Brandenburg are low on both figures. The inner-German comparison, however, also confirms what we can see in international comparisons:[66] The pre-trial detention and the overall prison population rate do not necessarily develop congruently. Saxony-Anhalt, for example, is below average on the pre-trial but above average on the prison population rate. The same accounts for Bremen and North Rhine-Westphalia. Without presenting a detailed analysis of the differing regional developments of crime levels or regional penal policy, it can be said that in the light of a uniform legal basis this regional diversity is remarkable.

3.7 Outcomes of pre-trial detention cases

The criminal justice statistics (Strafverfolgungsstatistik) also contain information on the outcome of proceedings in which pre-trial detention had been ordered. In 2014, in only 4,3% of all those, the person affected was not convicted: In 1,8% the court terminated the proceedings by diverting measures, in 0,9% the an isolated measure was ordered (for example because of mental health problems). Acquittals ranged at 1,5%.
Anyhow, not all pre-trial detention proceedings resulted in an immediate prison sentence, as one might expect in the light of the principle of proportionality. In 2014, this happened in only 49,1% of the cases. More than 45% of proceedings ended with a non-custodial sanction: In about 8% there was a sentence of a fine; in about 36% the prison sentence or juvenile prison sentence were suspended (mostly under conditions, for example to be supervised by the probation service); the rest of the cases comprissed of juvenile cases with other non-custodial sanctions for juveniles. These figures have not changed much for years. This means that a considerable number of inmates experiences imprisonment only in the form that can just be regarded as incompatible with the 'rehabilitative ideal', i.e. in remand custody.

[65] See for a longitudinal perspective Dünkel/Geng/Morgenstern 2010, 26, Heinz 2014, 67 f.

[66] See Morgenstern 2013, p. 190.

4. Literature review

Pre-trial detention has always been seen "as the very trouble spot of criminal procedure" by scholars because of its nature as a "both dangerous and tempting instrument of executing state power", which makes it "a special touchstone for the thresholds of the rule of law and of public welfare provided by the [German] constitution".[67] The academic literature in Germany is dominated by legal-theoretical works with the most important studies dating back to the 1980s. Neither in criminal policy nor in academia pre-trial detention in Germany currently is seen as a "hot topic".

4.1 Legal-theoretical research

The fundamental theoretical research was presented in 1986 by *Paeffgen*.[68] It examines thoroughly the basic justifications for this form of detention in the context of the aims of the criminal procedure and its legitimation in the light of the presumption of innocence. *Paeffgen* derives detailed requirements for the proportionality of the detention. In his view every pre-trial detention in principle is infringing the non-conviced persons's rights and therefore must be compensated. While his study was and still is highly influential in academic circles, legislator and practictioners did not respond too well. Five years before that, *Wolter* had published an analysis of the compatibility of pre-trial detention with the presumption of innocence and what he called "foreclosed punishments". He saw a need for a reform of the pre-trial detention "from scratch"[69] and concluded with a number of precise legislative proposals – which remained unheard. The above mentioned academic reform project that aimed at redressing the problems[70] did not intend to provide an academic study but also started with a valuable stock-taking and analysis of the pre-trial detention law and practice.

As it became clear that it was rather practice than law that influences the situation of pre-trial detention in Germany, some studies focussed on the relevant jurisprudence, for example *Kazele* (2008) with an analysis of FCC and higher regional court decisions. Especially noteworthy are his portrayals concerning the proportionality of the first imposition of remand detention respectively the proportionality of any continuation order. Additionally he comments on the consequences of the jurisprudence of the European Court of Human rights (EctHR) for

[67] All quotes from a group of scholars who drafted a whole new concept and legislative amendments for the reform of pre-trial detention, Amelung et al. 1983, 23-24.

[68] The title translates "Preliminary considerations on the dogmatics of the law of pre-trial detention", Paeffgen 1986.

[69] Wolter 1981, 452.

[70] Amelung et al. 1983.

the German law on pre-trial detention. This focus on the implications of the ECtHR-jurisprudence was also chosen by *Unfried* in 2004, with a special emphasis on the principle of expedition of proceedings and the right to access to the files. Since 1989, *Paeffgen* published annually synopses on the jurisprudence concerning pre-trial detention of higher regional courts. In 2011, *Schultheis* succeeded *Paeffgen* in compiling these synopses, which are supposed to enable the "necessary critical supervision by the professional audience"[71]. Finally, based on an analysis of jurisprudence, *Freund* (2010) examined possible interdependencies between the practical applications of a European Arrest Warrant (EWA) and national arrest warrants concerning EU-non-nationals. He comes to the conclusion, that to some point, "a certain re-adjustment of the national detention law" has already taken place – that at least with regard to EU-citizens the fact that someone does not hold a German passport does not necessarily lead to pre-trial detention.[72]

Several works focused on certain grounds to remand:[73] *Hermes* analysed the risk of obscuring evidence in respect of its historical development, *Langner* focused on the requirements for the judges to predict the risks of obscuring evidence or of repeating or continuing an offence. *Anagnostopoulos* and *Schloth* published on the question whether the gravity of the offence and the risk of repeating an offence are alien to the system of pre-trial detention. In a wider scope, *Wehner* examined the genesis of the grounds to remand, including the exposition of political influence and compromises which hardly meet legal-theoretical parameters.[74]

Three doctoral theses dealt with the important issue of crediting pre-trial detention against the later imposed prison sentence:[75] *Seidel* puts an emphasis on the origins of this legal institute while *Wenzel* examines the use of crediting empirically with the focus on Hamburg. *Hentschel* comments on the question, whether ex-post-crediting and thus in a way legitimising makes pre-trial detention a "conditional punishment". All three studies are very valuable as they explore the dilemma of crediting pre-trial detention in contrast to the presumption of innocence and the prohibition of anticipated punishment.

Finally, two studies used a comparative approach to analyse German law and practice of pre-trial detention by contrasting it to a foreign jurisdiction. While Markwordt Skehan (2013) rather superficially describes the German situation as opposed to those in three U.S. jurisdictions, in particular with regard to the use of financial bail, the study published by Weiß (2015)

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[71] Paeffgen 1989, 417.

[72] Freund 2010, 302.

[73] Hermes 1992; Langner 2003; Anagnostopoulos 1984; Schloth 1999 and Wehner 2006.

[74] A further study (Nordhues 2013) attempted to "evaluate and reduce apocryphal grounds to detention" (as promises the subtitle of his book), but didn't quite reach up to this promising set target, using only a few outdated examples of jurisprudence, anecdotic findings and an only derivative analysis of published material on the matter, instead of going for a systematic, empirical lining.

[75] Seidel 2004; Wenzel 2004; Hentschel 2012.

thoroughly examines both the French and the German situation. He rightly points to the importance of the first (police) arrest and highlights some flaws and risks for the suspect's rights in both jurisdictions.

4.2 Criminological Research

Especially in the 1980s and the early 1990s several comprehensive criminological studies dealt with the practical aspects of pre-trial detention, with some of them combining theoretical legal aspects with the criminological perspective. The focus was influenced by the slogan "in Germany pre-trial detention is imposed too much, too easily and for too long time"[76] and conceptionally took into account in particular the labelling approach. Differences of the law in the books and the law in action were made visible, for instance that the public prosecutor is in fact not as much in control of the investigation as he is supposed to be, but depends heavily on the preliminary work of the police.[77]

Furthermore, some studies looked at pronounced and potential hidden ("apocryphical") grounds to remand. In addition, special attention was put on the quality of the reasons of a decision, as there have always been allegations about a supposed "ticking-boxes-approach" and the lacking profoundness of the reasoning. The methodological instruments consisted (mostly) of file evaluations, (rarely) observations and (sometimes) surveys with practitioners. Some studies addressed the regional differences in the decisions to remand.

The study with the most comprehensive approach was conducted by *Gebauer*, based on representative data of the year 1981 and published in 1987.[78] Although by now with a data base that is 35 years old, it is still a valuable reference for analyses, because it included the evaluation of 800 case files from all *Länder* but Lower Saxony[79], observations and surveys with practitioners from the police, public prosecution services and courts. The information in the case files consisted of social data of the suspects, the offence that caused the issue of the arrest warrant, spelled out grounds to remand, length of the pre-trial detention and measures to suspend an arrest warrant. In 1985 *Jehle* had approached pre-trial detention from the perspective of the remand prison regime, his investigation focused on the situation of the detainees before and during incarceration – bringing to light a quite problematic situation.

Volk (1995) analysed the quality of the given grounds for pre-trial detention and their conformity with the wording and the ratio of the responsive rule (sec. 114 CCP) by examining files including arrest warrants in Rhineland-Palatinate.[80] The study of *Langner* (2003) also fo-

[76] Amelung et al. (for „Arbeitskreis Strafrechtsreform") 1983, 25.

[77] E.g. Blankenburg/Sessar/Steffen 1978; Gebauer 1987, 348.

[78] For the methodological approach see in detail Gebauer 1987, 80 et seq.

[79] Lower Saxony was covered by a simultaneously conducted study by Jabel (1988).

[80] Volk 1995, 39 et seq.

cused on the reasoning by looking at jurisprudence from a criminological and dogmatic angle.[81] He concludes that there is a sufficient legal framework and that the courts do use default patterns of argumentation, but only schematically, thereby with an insufficient focus on the individual case.[82]

Descriptive works with the focus on the disproportionately high share of foreigners among pre-trial detainees were published by *Gebauer* in 1993 and by *Staudinger* in 2001 (for yound defendants), both indicating that while a higher proportion of foreigners may partly be explained by the different quality of offences charged, other cases point to a disproportionate use of arrest warrants solely because of the suspect's foreign nationality.

Several research studies were conducted with regard to the length of pre-trial detention. A cluster of studies by *Schöch*, *Jehle* and *Busse* and others found early consultation of a defence lawyer to have specific effects on the reduction of time spend in pre-trial detention.[83] The last study published by *Busse* in 2008 could substantiate this finding by counterchecking with a control group. With the same focus, two studies building on each other looked at the decision of the higher regional courts to control decision on pre-trial detention. They analysed all published decision between 1990 and 1998 (*Hoch* 1998) and 1999 to 2006 (*Dessecker* 2007a) respectively. These control decisions are deemed to have a limitative and overall reductionist effect on the length of the time spent in remand detention and thus to contribute to lower prisoner numbers.[84]

Eventually, some more studies dealt with the avoidance or at least abbreviation of pre-trial detention by providing appropriate alternatives or organisational precautions. The available studies as well as the practical approaches mainly focus on juveniles.[85] For adults, this topic has only been addressed in the 1980s and early 1990s, for instance by a cluster of projects on social work and legal aid.[86] A study on the transfer of adult drug addicted offender from pre-trial detention into therapy analysed attitudes of judges towards drug counselling centres.[87] A study on the potential surplus provided by the inclusion of court aid (Gerichtshilfe) and social enquiry reports into the decision-making process was published in 1998, already stating that this approach was not popular any more.[88] More recently, *Fissenebert* and *Veenhoff* documented their own practical work[89] on options to abbreviate detention based on data from a

[81] Langner 2003, 24 et seq.

[82] Langner 2003, 223.

[83] Gebauer 1994, 622 et seq.; Schöch 1998, 48; Jehle 2004, 39 et seq.; Busse 2008.

[84] Schöch 1998, 32; Dessecker 2997b, 273 et seq.

[85] Kowalzyck 2008 on Mecklenburg-West Pommerania; Villmow 2007, 252 on Hamburg.

[86] For example see Cornel 1987 and 1994 with further information on other projects.

[87] Holler/Knahl 1991, 56 et seq.

[88] Geiter 1998, 119 et seq.

[89] Fissenebert/Veenhoeff 2013.

single prison. While this does not fulfil scientific demands, it at least offers some selective insights on the matter.

5. Pre-trial detention and the media

Without being able to present a fully-fledged media analysis, it is safe to say that pre-trial detention rarely is in the focus of both "quality" and tabloid newspapers or other news media. If the term "pre-trial detention" appears, media usually report on persons taken in custody rather than present context information. In a case study, we researched the archives of one of the most important national newspapers, the liberal "Süddeutsche Zeitung", under the keyword "Untersuchungshaft" ("pre.trial detention") between 2 November 2014 and 2 November 2016. We received 1620 hits,[90] but only 71 contained more information than just the fact that somebody was taken into custody in Germany or aborad.[91] The more substantial reporting peaked with regard to two important pre-trial detention cases in November 2014 and October 2016. The first was a spectacular case against an influential corporate manager who later was sentenced for embezzlement (35 hits). Here some of the articles included background information on financial bail,[92] others dealt with the fact that the defendant had complained about inhuman treatment because he was intensely supervised because of a perceived suicide risk.[93] The same topic was of interest about two years later when a person suspected of preparing terrorist attacks in Germany and belonging to a terror organisation committed suicide in pre-trial detention. Here, several of the 15 articles found that the authoritites had not done enough to supervise the suspect although he allegedly was prepared to die in a planned suicide attack, while others reported that a 24-hour-supervision, in particular in a special cell, poses problems with regard to human dignity.[94]

The rest of the articles dealt with various different themes, for example occasionally with criminal policy regarding new possibilities to detain suspected terrorists or, somewhat more often, the length of pre-trial detention. In that case, overloaded prosecution and judicial systems or

[90] www.sueddeutsche.de. All types of written pieces were included, namely articles, short reports by news agencies, comments or (rarely) interviews.

[91] In the time span studied, these articles mostly referred to pre-trial detention of suspected terrorists in France and Belgium and the consequences of the coup d'état in Turkey.

[92] For example „Haftentlassung für Middelhoff verzögert sich", Süddeutsche Zeitung, 27 April 2016.

[93] For example "Der Fall Middelhoff: Brutale Fürsorge", Leyendecker/Ritzer, Süddeutsche Zeitung, 8 April 2015; see also "Suizidprävention im Gefängnis: Schwieriger Schutz", Geuther, Deutschlandfunk, 28.5.2015 (http://www.deutschlandradiokultur.de/suizidpraevention-im-gefaengnis, accessed 2 November 2016).

[94] „Die Behörden sollen vom Fall al-Bakr lernen – aber was?", Rietzschel, Süddeutsche Zeitung, 18 October 2016; „Wenn Verständigung nicht möglich ist", Fischhaber/Kock, 13 October 2016.

sometimes the defense are blamed for prolonging the proceedings.[95] Additionally, the release of defendants following decisions by higher regional courts on disproportionately long pre-trial detention sometimes is scandalised.[96] In this sample, we only found very few examples of direct criticism of the judiciary of being too mild,[97] although this seems to be a more frequent theme in other media, in particular with regard to violent offences allegedly committed by juveniles.[98]

It should be noted that the media self-regulates through the German Press Code. Section 13 of this Code sets out a 'Presumption of Innocence' which states that: 'Reports on investigations, criminal court proceedings and other formal procedures must be free from prejudice. The principle of the presumption of innocence also applies to the press.' The media hence rarely publishes information other than the initials (or the first name) of persons suspected of a criminal offence even when their identities become known by other sources (as it was recently the case at least initially even with regard to the mentioned suspect, allegedly being a member of IS and planning terrorist attacks in Germany). Pictures are pixelated.[99] Tabloid media, however, sometimes risk the more symbolic process before the press council (Presserat)[100] and the protection of the suspects' privacy becomes more and more difficult in times of unrestricted internet communication, in particular for more prominent persons.

6. Alternatives

6.1 The conditional suspension of an arrest arrant

As mentioned in the section on statistics (above 3.4), alternatives to pre-trial detention play a comparably small role in Germany. This partly is due to the systematic concept of supervision in the community: While other countries have a "stage model" – from no restrictions to more restriction to a full restriction of freedom (detention) that have different legal prerequsities, the German model is a substitute model (see *fig. 4*). The judge always has to comply with the requirements for pre-trail detention and issue an arrest warrant. Only if these prerequisites are met, he can – and because of the principle of proportionality *de jure* must - chose less

[95] For example „Frankfurter Oberlandesgericht Gericht überlastet - Haftbefehl gegen Terrorverdächtigen aufgehoben", Borufka/dpa, Süddeutsche Zeitung, 25 February 2016).

[96] For example „Rechtsprechung in Zeitlupe", *Käppner*, Süddeutsche Zeitung, 14 October 2015; „Justiz muss Verdächtige wegen Überlastung freilassen", Süddeutsche Zeitung, 22 August 2015.

[97] „Und das Strafrecht, das hat Zähne…doch die Zähne zeigt es nicht." Prantl, Süddeutsche Zeitung, 27 January 2016.

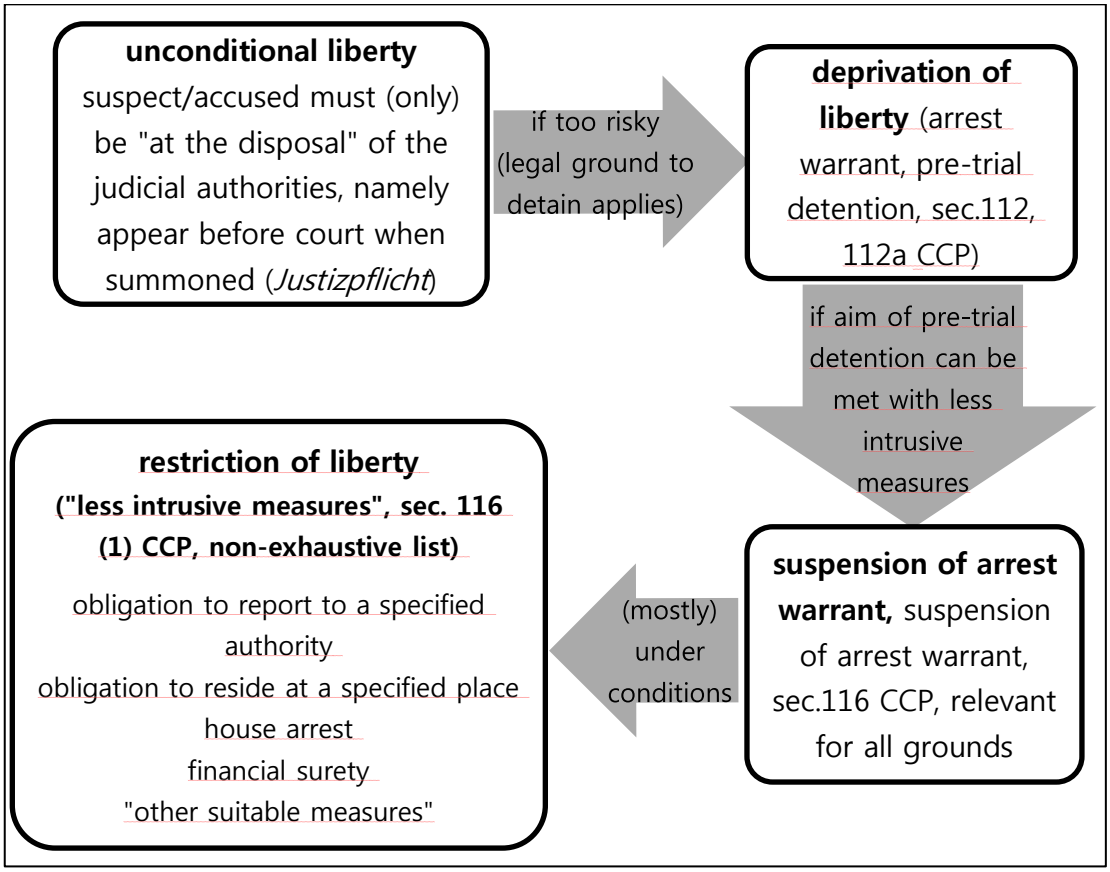
[98] Morgenstern (in prep.) for more details.

[99] For example http://www.taz.de/!5341435/; http://www.heute.de/terrorverdaechtiger-jaber-a.-erhaengt-sich-in-seiner-zelle-in-jva-leipzig-45618100.html (both accessed 2 November 2016).

[100] An overview can be found here: http://www.presserat.de/pressekodex/ein-fall-fuer-den-presserat/.

restrictive ways; that is, release the suspect or accused under certain conditions (suspend the arrest warrant, *Haftverschonung,* sec. 116 CCP). As a result, this mechanism rather effects a reduction of the time in detention than it avoids custody from the start. According to the study by *Gebauer* an estimated immediate suspension rate of 10% would have to be considered generous – while these data refer to the early 1980s, nothing hints at at general change of practice.[101]

Figure 4: **The German „substitution model" (the same thresholds apply for detention and non-custodial measures)**



Many deplore the general reluctance to use substitute measures.[102] Indeed, considering that an increased use of suspension could reduce prison numbers, this is an unfortunate development.

[101] See Busse 2008, p. 270 et seq.

[102] They suggest that while keeping all requirements now used for ordering detention (arrest warrant), the first step then has to be to order a non-custodial meausre. Only if this does not seem to be sufficient - and the judge would have to give reasons why this is not the case - an arrest warrant could be filed. Such an approach was taken during the 2015 meeting of the German defense lawyers (http://www.strafverteidigervereinigungen.org/Strafverteidigertage/strafverteidigertag2015.html,

In addition, concerning the detainees who are in prison often without support and meaningful activities,[103] non-custodial alternatives would be preferable. On the other hand, it is to note that the German organization of pre-trial detention seems to have an overall reductionist effect, producing comparably low numbers/rates of pre-trial detainees (see above 2.1) without replacing them by a high number of supervisees.

For the current model it is important to emphasise that a warrant which is disproportionate (for example exists for disproportionately long time) has to be lifted, rather than being suspended with the use of alternatives to pre-trial detention.[104] But apparently the regional high courts still have to explicitly state that fact in appeal decisions: Even though the alternative to detention may seem like a benefit to the defendant because of imprisonment looming otherwise, it does not change the fact that the mere existence of the warrant, especially when restrictive conditions apply, interferes with the personal freedom of the defendant.[105]

6.2 Social work strategies: Providing information and/or support

One strategy to reduce pre-trial detention could be the involvement of criminal justice social work to aid the defendants to rebut legal grounds for pre-trial detention. This can be done both by providing additional information about his or her social situation and providing social support and/or supervision (most notably, aiding the accused to find housing and therefore an address to reduce the fear of absonding). Today, however, in Germany only two projects systematically work in this area as regards adult defendants.[106]

Since 2003, a social worker and a social-education worker are working in the prison *Bielefeld-Brackenwede* to help to place pre-trial detainees in housing projects or to find other suitable ways of avoiding detention. All new entries to pre-trial detention are registered and checked for eligibility. There is a number of criteria, including unclear residence permit status, being charged with sexual, serious violent or severe drug offences, which exclude defendants from the project. In 2013, 40% of the defendants who had their warrants suspended in *Bielefeld-Brackenwede* had a foreign citizenship. Even though this percentage is still below the overall

accessed 2 Sepember 2016). A similar approach was taken some thirty years earlier by the reform project mentioned above, see Amelung et. al. 1983, p. 73 ff. For more details Morgenstern (in prep.).

[103] See for example Morgenstern 2009 and 2013 with regard to detention conditions in Germany.

[104] The FCC already stated that in 1980 (BVerfGE 53, p. 152), in a decision regarding a 13 year lasting warrant.

[105] For example OLG Dresden wistra 2014, p. 78.

[106] Even after long and careful inquiries, we could not find more projects. Since the juvenile justice system in particular with regard to supporting activities differs significantly from the adult system, no systematic review in those projects has taken place. Youth court aid, for example is very active and an integral part of the criminal procedure for juveniles and parlty young adults. Nevertheless even here, the prevention of pre-trial detention does not seem to be a special focus of their work. For a summary of the current situation, see Dorenburg (in prep.)

share of foreigners in pre-trial detention (see above 2.5), they are not in principle excluded from the project. The project takes care of about 400 to 500 cases a year (2013: 440).[107]
According to internal prison statistics, about one third of all pre-trial detainees in Bielefeld prison are released under conditions after less than 100 days. This is considered a success for the project, since it started with the goal to reduce detention duration within the project below the nationwide average of 100 days. However, it has to be kept in mind that a precise estimate of average pre-trial detention duration is not possible due to the design of the official statistics (see above 2.3). Moreover, the fact that 100 days is deemed acceptable is highly problematic: Especially considering the group of people affected, who often have not committed serious crimes, it seems to be a rather humble goal. Nevertheless, in 2013 in about 70% of cases the warrant was suspended within the first 40 days after initial arrest, which leads to the assumption that the project achieved a considerable reduction in overall detention days. According to the project documentation of the last five years, no noticeable changes in the development of the duration of pre-trial detention can be seen, despite the above-mentioned reforms of 2010, most notably the earlier mandatory assignment of legal counsel.
A similar project exists in Bremen, initiated by the non-profi-organisation *Hoppenbank* that has a long tradition in criminal justice social work. Even though they mainly focus on avoiding imprisonment for default of payment for a monetary fine, they also provide assistance for pre-trial detainees, mostly homeless ones that are provided with shelter, assistance and an address at the *Haus Fedelhören*. In 2014, however, only two of the 28 new entrants to the house were pre-trial detention detainees.[108]
Especially the results in Bielefeld show that there is room to expand social work activities and to involve organisations as early as possible during the process of criminal prosecution. Most of the new pre-trial detention prison acts by the *Länder* indeed stipulate social support and counseling as a possibility to avoid further execution of the pre-trial detention and encourage prison administrations to cooperate with specialised organisations,[109] but this is in practice not backed-up by the introduction of adequate mechanisms. The question remains why efforts to reduce the time in prison are left to institutions within the prison and start so late - why was it in suitable cases not possible to avoid imprisonment from the beginning?
However, arguing for more measures to avoid pre-trial detention always raises concerns in two different regards. First, if the social projects starts doing correctional work, the measure can get a sanctioning character that leads to a conflict with the presumption of innocence.[110] Indeed, this problem arises when the measure to avoid pre-trial detention already tries to work

[107] According to their annual report: v. Bodelschwingsche Stiftungen Bethel, KIM – Soziale Arbeit e.V. Paderborn 2014, p. 11-18 und Fissenebert/Veenhoff 2013.

[108] In 2013 it was one of 26; see Hoppenbank e.V. 2015.

[109] For example Art. 155 Prison Act of Lower Saxony (NJVollZG); see also: Ostendorf 2012 Art. 1 marginal note 34; Cornel et al. 2015, p. 72 ff.

[110] This is why Plemper 1987, 29 called the idea of an alternative to pre-trial detention in form of a social intervention contradictory.

with the defendant on the offence presumably committed. Even though the mentioned project in Bielefeld does focus on the principle of voluntariness, one of the mentioned topics of conversation with the subjects is analyzing the reason of the offence ("There is no offence without a motive.").[111] Discussing motives of an offence before the defendant had an opportunity to fully defend himself in court and actually is convicted is prohibited, even if the social workers are bound to professional confidentiality.
Furthermore, net-widening effects have to be considered. If the law enforcement agencies get more possibilities to control subjects as an alternative to pre-trial detention it is possible that those measures are not used to replace an arrest warrant, but rather in cases were there would have been no supervision otherwise. Even if there is no empirical evidence for either of those concerns, there are at least two instances in which they seem particularly relevant: Escaping detention for agreeing to undergo therapy (see below 6.3.2) and electronic monitoring (6.3.3).

6.3 Conditions and supervision measures (sec. 116 CCP)

6.3.1 Financial surety (bail)

Bail in the form of a financial surety has the purpose to induce the suspect to show up for his trial (and if sentenced for the following sentence), because otherwise the provided financial deposit falls to the treasury (sec. 116 StPO). Someone on behalf of the defendant can make a deposit. The effect then is supposed to be an obligation felt by the defendant based on personal relationship that urges him not to forfeit the money. While some assume that access to family money could be achieved by pressure, there are case examples in German jurisprudence that refer to a potential bonding power of this form of financial aid.[112]
To common knowledge, bail in the form of a monetary surety is the best-known alternative to pre-trial detention. While it has a long tradition in Germany,[113] it never became as popular as, for example, in the U.S. The reluctant use of bail has to do with it to be seen as some kind of privilege for the rich.[114] Practicioners often regret this.[115] In publications, they even promote the U.S. practice as role model because it is deemed to avoid pre-trial detention and the Eighth

[111] Fissenebert/Veenhoff 2013, 14.

[112] For example: OLG Zweibrücken Strafverteidiger 2011, 164; OLG Köln Straftverteidiger 2010, 29.

[113] Johann Anselm von Feuerbach, one of the founders of German penal theory and author of a reformed Bavarian penal code, which became a model for several other countries, back in 1801 tried to establish hierarchical system of security measures to avoid flight, with a monetary "caution" being suitable for lesser crimes (see Morgenstern, in prep., for details.)

[114] Rather sceptical for example Meyer-Goßner/Schmitt 2014, § 116, marginal note 10, in the most popular commentary on the CCP.

[115] Schlothauer/Weider 2010, 269; Herrmann 2008, 370; Münchhalffen/Gatzweiler 2009, 107 f.

constitutional amendment prohibits disproportionally high bail sums.[116] However, this seems to be a rather naive view on the matter. The U.S. system accepts commercial "bail bonds" which provide the monetary bail for people who could not afford it otherwise, at the same time they can hire so-called "bounty hunters" to track down defaulting debtors. They have far-reaching powers to arrest those defendants and to use coercive measures. According to research, this system disproportionately affects the poor[117] and there are signs of net-widening as well.[118]
This system therefore cannot be a role model for Germany, but that does not necessarily mean that a broader use of financial bail cannot be an alternative for pre-trial detention. The legal framework can prevent misuse of the system; the scope of application to cover also less wealthy defendants can be braodened adjusting the sum requested to the financial situation of the accused, the same way it is done with the fine (in a day fine system). However, it has to be taken into account that the importance of the case as well as the incentive to flight are also relevant for the suerety requested. This is why wealthier people may more likely be able to afford financial bail in cases of more serious offences. Another problem that would disproportionally affect the poor would be, that the reclaim against the state could be seized, which means potential debtors can seize this claim even if the defendant fulfils his or her obligation and has no other potential assets.[119]
A review of recent jurisprudence of the German high courts reveals that judges usually demand relatively low sums of money as bail, mostly sums between 1500 and 7500 €.[120] But under certain circumstances bail can also be set at one Million €, if that seems to be the adequate way to reduce the risk of absconding.[121] However, the review also shows that judges in particular in cases with lower bail sums often add other measures, which raises the question whether this cocktail of conditions is necessary. Another result was that different from what is often expected, not only cases of economic and corporate crime, but a wide variety of offences were subject to financial bail. It is fair to assume that bail assignments often stem from concrete requests by the defendantsupported by with their lawyers. Since Art. 257c CCP (a law regulating plea bargaining) was enacted, the recorded cases show that alternatives to pre-trial detention and the amount of bail are often subject to negotiations.[122]

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[116] Markwort Skehan 2011, 500.

[117] Maruna/Dabney/Topalli 2012, 316 f.; Viano 2012, 812.

[118] Maruna/Dabney/Topalli 2012, 316 f. According to an enquiry of the US Department of Justice the percentage of defendants with financial bail rose from about 50% to 66% between 1990 and 2004, whereas the percentage of those detained stayed about the same and the percentage of those who were bailed unconditionally decreased (Cohen/Reaves 2007, 2). This indicates a strong net-widening effect.

[119] Schlothauer 2009, p. 1040.

[120] OLG Köln, 15.11.2011 - 2 Ws 709/11; OLG Zweibrücken Strafverteidiger 2011, 16.

[121] OLG Hamm, 22.02.2011 – 4 Ws 54/11.

[122] For example OLG Koblenz, 19.08.2013 – 2 Ws 510/13.

6.3.2. Financial surety for foreigners in minor cases

The German law foresees two further possibilities to secure the presence of a foreign suspect in a later trial by financial surety (se. 127a and sec. 132 CCP), both relate minor offences. The latter is an exception to the surrogate model, because it can also be applied when the requirements for an arrest warrant are not fulfilled. It is not clear how often these measures are used – mostly, as anecdotical evidence suggest, in border regions in cases of traffic or customs offences. Both mechanisms requires somebody in Germany who acts as sort of process agent, more specifically provides an address where summons can be sent to. These can be relatives, lawyers, but also public officials, mainly court clerks – even police officers resume that position. The authorities appreciate this procedure as effective in minor cases. The fact that the defendant may not show up for trial seems to be condoned – the amount of money requested must, according to internal guidelines, correspond roughly to the fine expected. It can thus be assessed as anticipated sentence, conflicting with the presumption of innocence. This is even more problematic as in the case of sec. 132 CCP even the police can order the financial surety as a matter of urgency and the defendant has to provide it, otherwise other assets – for example the car – can be seized preliminarily. If the suspect later is convicted, the money provided is deducted from the fine.[123]

6.3.3. Therapeutic measures

"Other suitable measures" in sec. 116 (1) CCP include placement in a therapeutic institution or social work setting. Measures for the homeless were already mentioned. Measures for drug addicts and mentally ill defendants also play a role because prison administrations have an interest in placing them in institutions that are more appropriate than prisons.

When therapy in various forms later becomes the sanction itself, again the risk exists that the pre-trial placement anticipates the criminal sanction (in particular for drug addicts, when later a prison sentence is suspended under the condition to undergo therapy as the German legislation foresees (sec. 29 V, 31a II, 35, 37 of the German Narcotics Law = Betäubungsmittelgesetz, BtmG). Therefore, these measures have to be requested or alt least accepted by the defendant voluntarily in order to preserve the presumption of innocence. In how far consent is truly voluntary when prison is the other option is an old question and cannot be discussed further here.

Currently no specialised projects to avoid or shorten pre-trial detention of drug-addicted defendants are known to us. We assume, however, that on a case-by-case basis defense lawyers and prison social workers manages to place them in suitable institutions. The need is there - according to the documentation of the Bielefeld prison project about 45% of pre-trial detainees

[123] See for more details Morgenstern (in prep.)

in the JVA Bielefeld-Brackenwede had addiction problems.[124] A research report commissioned by the German Ministry of Health and published in 1991 documented the demand for systematic social work in pre-detention with the goal of initiating a therapy as non-custodial alternative to pre-trial detention and analysed the prospects of success of various projects.[125] The authors acknowledge the problem of anticipating the criminal sanction and tension with the presumption of innocence. They also highlight the different views between the different professions: Social workers and drug counselors want to focus on the clients needs, not "wasting" time in pre-trial detention without treatment, while prosecutors and judges use the information acquired by the social workers to determine whether there is danger of repeating offences, escape, etc.[126]

6.3.4 Electronic monitoring as an alternative to pre-trial detention

While, as mentioned above, electronic monitoring (EM) quantitatively does play not role in Germany, the possibility to substitute pre-trial detention by electronically monitored house arrest currently is under discussion frequently – influenced also by the development in other European countries. Like with financial bail, in particular some defense lawyers advocate a more frequent use in the case of the risk of absconding.[127]

Electronic monitoring to avoid pre-trial detention[128] means strict curfew or house arrest that is controlled by a small transmitter the defendant has to wear on his or her body all the time. If he or she violates this obligation or the conditions of this house arrest the responsible agency is notified immediately. Another possible way of electronic monitoring would be using gps-trackers to be able to track down the exact location of the accused at any given time. Hessen, the only *Land* in Germany currently applying electronic monitoring to prevent pre-trial detention, applies the house-arrest-model.[129] It is implemented as "another suitable measure" in the non-exclusive catalogue of conditions for the suspension of an arrest warrant (sec. 116 CCP). Between 2004 and 2013 altogether about 1100 people were under electronic monitoring in

[124] 33% drugs, 9% alcohol, 3% gambling and others (data for 2012), Fissenebert/Veenhoff 2013, 10.

[125] Holler/Knahl 1991.

[126] Not surprisingly, best results were achieved when a place in a therapy programme was found in agreement with the defendant and responsibility for the costs (the criminal justice system, the health system, the social system?) was sorted out beforehand (Holler/Knahl 1991, 58). Without downplaying the legal problems with regard to the presumption of innocence, it should be noted that in most cases included in the study, the defendants had confessed and the offences committed clearly had the purpose to finance a drug addiction.

[127] For example Neuhaus 1999, 345f.; Schlothauer/Weider 2010, 268; more cautios Püschel/Bartmeier/Mertens 2010, 127.

[128] EM is more popular and used in all 16 Federal States as a post-sentence supervision measure. For a recent evaluation see Bräuchle/Kinzig 2016.

[129] For an introduction see Mayer 2004.

Hesse, with just about one third of them cases of sec. 116 (1) CCP. It is unclear whether these were initial suspension of the arrest warrant or the defendants were released from pre-trial detention beforehand. EM involves a plan with specific times when the defendant has to be at home or at work. This, according to one worker in the project, allows control ”around the clock” with the possibility of immediate intervention in case of violations and intensive assistance as well as practicing a structured daily routine.[130] About 90% of the measures were completed without violation of the conditions according to a documentation of the project.[131] No difference in the treatment of electronically monitored probationers and people who are monitored to avoid pre-trial detention seems to exist. This is problematic regarding the presumption of innocence and the intended educational effect on the life of the person concerned. Because of the strong involvement of probation officers in the process if electronic monitoring means some kind of “preliminary probation”. It is widely assumend for both forms, that the high success rate is most likely due to the personal support as well as a previous selection of candidates.[132] Only persons with a permanent residence as well as an occupation are eligible. These requirements also raise doubts regarding the suitability as alternative to pre-trial detention because it excludes in principle many of those that are targeted by pre-trial detention, namely homeless and foreign defendants.

In general, EM meets severe criticism by legal and criminological scholars in Germany.[133] So far, however, courts not often had the chance to rule about this measure; it remains unclear, for example, whether it is a mere restriction or amounts to a deprivation of freedom. In a decision regarding house arrest without electronic supervision, the German Federal High Court ruled that it just constituted a restriction of freedom.[134] This distinction is important for certain legal consequences, for example how to credit time under electronic monitoring – when later a prison sentence or a fine is imposed, one day in pre-trial detention counts as one day in prison or as one day unit and accordingly has to be deducted from the sentence still to serve. This, however, is not the case for EM as the practice in Hesse shows.[135] Equally, the principle of expediency does not apply fully; in particular the judicial authorities must not meet the deadlines mentioned above. At least for the first years of the project an evaluative study therefore found an increased duration of the whole procedure, leading to a form of net-widening. This is why defendants under EM in the current mode take some risks: Aside from a long lasting supervision and a long trial, they also risk a longer imprisonment in the end. This is the

[130] Weinandt 2013, 17.

[131] Weinandt 2013, 22, in 2013 96 people received electronic monitored house arrest, 34 of them to avoid pre-trial detention. On 3 April 2016, 42 persons were monitored as condition of a suspended arrest warrant (Dünkel et al. 2016, 4), most of them in one single court district.

[132] Morgenstern 2002, 380; Mayer 2004; Dünkel et al. 2016, 40.

[133] Morgenstern 2002, p. 378 ff; Hochmayr 2013, p. 13 ff; Harders 2014, p.165 ff. For an up-to-date overview in English language see Dünkel et al. 2016.

[134] BGH NJW 1998, 767, critical: Harders 2014, 118.

[135] Mayer 2004, 20.

reason some accused have retrospectively regretted their decision to agree to electronic monitoring.[136]

Whether this is in line with European jurisprudence is a matter of discussion. The most relevant factor when classifying electronically monitored house arrest is the concrete organization, most notably, how strict the daily routine is structured and how many hours he or she is allowed to spend freely. In a very recent judgement, the European Court has ruled that the qualification of house arrest under EM as deprivation of liberty in the sense of Art. 5 ECHR depends on how restrictive this measure actually is – a monitoring time of nine hours per day and the obligation to report to the Police daily or several times a week does not deprive the defendant of his liberty. [137] The ECHR in principle takes the same approach, and in conrete cases argued that house arrest under very strict conditions and lasting a long time may qualify as deprivation of liberty ("my house is my prison"), although in the cases decided no EM was involved. [138] It moreover expressed severe doubts whether EM can be a suitable way of securing the criminal proceedings and especially preventing escapes[139] – this doubt, again, is shared at least by some German scholars and practicioners.[140]

Considering the suitability of electronic monitoring one indeed has to consider that in cases of urgent risk of flight, an electronic bracelet might be useless after all: The model in Hesse only controls during the time the person is supposed to be at home. If an accused, instead of going to work, takes a train abroad, the system would not recognize this up until the accused is supposed to return home in the evening – two electronically monitored probationers actually did escape the authorities in Hessen.[141] But a person determined to flee would most likely not be stopped by a GPS-tracker either, if he gets rid of the tracker, there is no way he can be located and by the time the police is called may have already vanished.

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[136] Mayer 2004, 24.

[137] EC (Fourth Chamber), 28 July 2016, C‑294/16 PPU, para 57: "… a nine-hour night-time curfew, in conjunction with the monitoring of the person concerned by means of an electronic tag, an obligation to report to a police station at fixed times on a daily basis or several times a week, and a ban on applying for foreign travel documents, are not, in principle, having regard to the type, duration, effects and manner of implementation of all those measures, so restrictive as to give rise to a deprivation of liberty comparable to that arising from imprisonment and thus to be classified as 'detention'…".

[138] ECtHR, 2 August 2001 – 44955/98 (Mancini ./. Italy), para. 17; 28 November 2002 – 58442/00 (Lavents ./. Latvia), para. 64 and 30 March 2006 – 50358/99 (Pekov ./. Bulgaria), para. 83 (the latter house arrest had lasted six years).

[139] ECtHR, 23 October 2013 - 30138/12 (Bolech ./. Switzerland), para. 66.

[140] See Mayer 2004, 3, Dünkel et al. 2016, 12.

[141] At least that is what the press reported even though no further details emerged: www.faz.net/aktuell/rhein-main/weitere-salafisten-trotz-fussfessel-aus-hessen-geflohen-13274494.html, accessed 24 August 2016.

7. The “European Element”

7.1 The ECHR and the European Court of Human Rights

Even if the European influence by the ECHR and by the case law of the ECtHR may be stronger in other countries, the convention is also consulted decisively in German criminal proceedings related to pre-trial detention. Due to the strong backup of the individual criminal procedural rights by the constitution and the jurisprudence of the FCC, the case law of the ECtHR is perceived as being of lesser importance. Nevertheless, the ECtHR has convicted Germany several times in recent years for breaches of the convention by law and practice of the pre-trial detention. The judgements related to the length of pre-trial detention and to the right to inspect files in order to ensure fairness in the review proceedings.

In three judgments against Germany for an overlong duration of the pre-trial detention, the ECtHR did not see the excessive length of detention justified by the complexity of the case or the duration of the investigation,[142] or criticized a lack of adequate promotion of the proceedings by the judiciary,[143] thus declaring it an infringement of art. 5 (3) ECtHR in each of the three cases. However, in more recent cases the ECtHR did not rule German proceedings (especially with terrorist backgrounds) to be an infringement of the convention and upheld the now more thoughtful approaches of the German law enforcement agencies and the reasoning of the courts given in their decision on the prolongation of the pre-trial detention.[144] That is to say, the earlier ECtHR-jurisprudence tightened up the jurisprudence of the higher regional courts.

Concerning the right to file inspection, according to the old legislation in sec. 147 (2) CCP access to the files could be denied if it endangered the purposes of the criminal investigations. To establish the principle of equality of arms (art. 6 ECHR) in the proceedings, however, the accused must have sufficient information for his procedural defence against the arrest warrant. The ECtHR was not satisfied with the German practice (however accepted by the FCC),[145] especially not with the practice to issue selected parts of the file only or to inform merely

[142] ECtHR, 5 July 2001 – 38321/97 (Erdem ./. Germany), para. 45 et seq., with 5 years and 11 months of pre-trial detention preceding.

[143] ECtHR, 29 October 2004 –- 49746/99 (Čevizović ./. Germany), para. 52 et seq., with 4 years and 9 months of pre-trial dentention preceding; ECtHR, 10 November 2005 – 65745/01 (Dzelili / Germany), para. 78 et seq., with 5 years and 4 months preceding.

[144] ECtHR, 22 May 2012 – 17603/07 (Batuzov ./. Germany), with almost 6 years of pre-trial detention preceding; ECtHR, 6 November 2014 – 67522/09 (Ereren ./. Germany), para. 62, 65, with 5 years and 8 months of pre-trial detention preceding.

[145] BVerfG, NJW 1994, 3219 f.; criticized by Roxin/Schünemann 2014, 133.

orally.[146] In a direct reaction to the jurisprudence by the ECtHR, the German legislator improved the situation of the defendant by amending the law accordingly.

7.2 Committee for the Prevention of Torture (CPT) and the Recommendations of the European Council

Impulses from the European level are also observable in the field of the practice to arrest people and in the field of the organization and control of the pre-trial prison regime. This accounts especially for the country reports and the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, or shortly Committee for the Prevention of Torture (CPT). Attention is also paid to the "soft-law" recommendations of the European Council, notably the European Prison Rules and the recommendations related to pre-trial detention of 2006. These standards and instruments were included to reform legislation on the obligation to inform the arrested person about his or her rights as suspect (sec. 114a-114c CCP). Some *Länder* considered them also when drafting their new Remand Prison Acts.

As regards ordering pre-trial detention, the FCC[147] already in 1965 drew on the relevant recommendation of the Council of Europe, when it had to decide upon the constitutionality of the provisions regulating remand detention. The crucial point was the question of proportionality. To account for what it called "state-of-the art legal development", the FCC consulted the (now obsolete) Resolution (65) 11 on "Remand in Custody". Some thirty years later, the FCC seems increasingly inclined to draw on the Council of Europe's soft law when needed. It has argued in a decision on juvenile prison legislation that it "may hint at a practice that does not comply with requirements of the German constitution" when "standards and requirements of international law referring to human rights as can be found in the guidelines and recommendations of the United Nations or the Council of Europe are not considered or are not met."[148]

Another decision of the FCC referred to the conditions of remand detention, where various standards set by the CPT as well as the current recommendation on "remand in custody"[149] were used to show that certain practices (in this case locking-up remand prisoners most of the

[146] ECtHR, 13.12.2007 – 11364/03 (Mooren ./. Germany) and ECtHR, 9.7.2009 (Great Chamber) on the same case, with reference to earlier cases against Germany: ECtHR, 13.2.2001 – 24479/94 (Lietzow ./. Germany); ECtHR, 13.2.2001 – 23541/94 (Garcia Alva ./. Germany); ECtHR, 5.7.2001 – 38321/97 (Erdem ./. Germany).

[147] BVerfGE 19, 342 (345).

[148] The first was a decision of the Federal Constitutional Court relating to Juvenile Justice in 2006, BVerfGE 116, 69 (90). See also BVerfG, 13.11.2007 – 2 BvR 939/07; and the Constitutional Court of Berlin, VerfGH Berlin, Beschl. v. 03.11.2009 – 184/07. Other courts, however, have not adopted this view, namely the Constitutional Court of Bavaria VerfGH Bayern Vf. 3-VI-09, Vf. 3 VI/09.

[149] Recommendation (2006) 13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

day in their cells while sentenced prisoners were allowed to move relatively freely within the prison or certain areas) were incompatible with Human Rights in the German Basic Law.[150] In yet another decision, CPT standards for prison cell size were used to show that in the respective case the human dignity of the prisoner was not affected (even if the cell only measured 6 m²).[151]

7.3 European Union

In the meantime, even influence from the European Union on the national criminal procedure evolved, although the German attitude - both by scholars and by the judiciary - towards such a development has been a seriously sceptical one for quite some time. In particular the FCC highlights the cultural, historical and linguistical imprint of penal law in its judgement concerning the Treaty of Lisbon.[152] It even joins in with critical criminology ("governing through crime") in pointing at the risk of criminal law being misused as a technical instrument for carrying out international cooperation.[153] In spite of these fears, German law enforcement agencies in practice seem to have accepted the new possibilities of EU legislation at least to some degree and for example make use of the EAW rather briskly.[154] Slowly German courts also accept at least for EU-citizens that the fact that someone holds a foreign passport and lives abroad does not necessarily justify pre-trial detention.[155] The European Supervision Order (ESO), however, aiming at facilitating pre-trial supervision in the community 'at home' was transposed into German legislation only with considerable delay and has not been used in practice yet.[156]

8. Conclusion and Outlook

Is pre-trial detention in Germany actually used as a means of last resort, as *ultima ratio*? The number of pre-trail detainees is – compared to other European countries – relatively low and point in that direction. Equally, the legal provisions as shaped by the high court jurisprudence,

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[150] FCC, 17.10.2012 - 2 BvR 736/11 (= published in Strafverteidiger 2013, p. 521 et seq.).

[151] FCC, 7. 11. 2012 - 2 BvR 1567/11.

[152] BVerfGE 123, 267.

[153] BVerfGE 123, 267 para. 352.

[154] Between 2009 and 2014, every year roughly 2000 European Arrest Warrants were sent from Germany to other EU-states (Statistics are compiled by the *Bundesamt für Justiz*, http://www.bmjv.de/DE/Service/Statistiken/Statistiken_node.html. accessed 2 November 2016.

[155] Freund (2010).

[156] For an introduction see Morgenstern 2014. During a court visit in the exploratory phase of this study a judge reported that he had used this tool in a German-Spanish case, but he did not know about the outcome and the nothing about the case is published.

including the Federal Constitutional Court and the European Court of Human Rights should provide for a restrictive use of pre-trial detention.

Nevertheless, there is no reason to lean back and be content: The situation may prove less stable than it seems, given the latest increases in prisoner numbers. Moreover, pre-trial detention disproportionately affects those in weaker social positions – everybody that cannot present a fixed abode, namely homeless (or those living in shelters) suspects, persons with addicions and (some) foreigners. These results from desktop research were tentatively confirmed in the exploratory phase of this study. At the time of writing, we have had the opportunity to observe 15 hearings and to discuss them informally with the judges (14 in Berlin and 1 in Stralsund, a small northeastern town in Germany). Most of the defendants were foreigners. Hearings usually were short, formally fair but superficial, with the judge as central figure. Interpreters were involved in many cases. Except in two cases dealing with juveniles, the professionals involved seemed to have few ideas how to deal better with the problematic clientele described above, although no serious cases were heard – if alternatives were discussed, it was exclusively the question whether reporting to the police would be sufficient to secure the defendant's availability in the proceedings. Defense lawyers did not contribute to more "creative" solutions; a social work approach at least in Berlin was not used. It remained unclear, so far, whether the judges and the other professionals involved in the hearings (defense lawyers and, in most cases, the public prosecutor) would regard more or swifter cross-border options (to transfer cases, to get information) helpful.

The further steps of the study will therefore focus on these issues:

- What contributed to the sharp decline in pre-trial prisoner numbers? Legislation did not substantially change – was it a change in practice or "culture"? Will it remain stable and resist political pressure (for example when suspected terrorsts are arrested or refugees are suspected of crimes)?
- Which groups cannot profit from this development and why?
- What, in practitioners view, could help to change this? More/other alternatives?
- What can be the role of the defense? In how far would the obligatory presence of a defense lawyers in the first hearing change the situation?
- When dealing with foreing defendants - is there a need for (more) cross-border tools? How should they look like? What about the European Supervision order?

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