Research project EUPRETRIALRIGHTS

Improving the protection of fundamental rights and access to legal aid for remand prisoners in the European Union

EMPIRICAL STUDY

The actors of legal protection, their professional practices and the use of law in detention.

Report on GERMANY

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PRELIMINARY REMARKS: ACCESS TO THE JUDGE: BUT STILL NOT TO JUSTICE?

Before referring to the details of our empirical study following the questions of the research grid as it has been used by all partners, we have to refer to a situation that is special to the German context. It is related to legal practice, to law in action as opposed to law in the books. This introductory part deals with the discrepancy between how the law on conditions of pretrial detention could be, and how it turns out to be in practice – with the latter being mainly an absence of legal action. Thus, in our empirical study we particularly focused on the question whether the system of complaints to the court was used in practice and, as a second step, why it was used so rarely.

An important impetus for conducting this research project was the suggestion that legal protection (*Rechtsschutz*) for pretrial detainees is an unexposed topic in criminal policy as well as academia. If this hypotheses could be confirmed, it would be as remarkable as alarming, since it affects hundreds of thousands of persons in Europe, and nearly 14,000 persons in Germany at one point in time (see Table 1) with 29 548 persons receiving an order of pretrial detention in 2017.[1] While all of this data only refers to persons detained in a remand prison, the number of those detained in police detention and in forensic psychiatric clinics is not represented in these statistics. However, in the context of our project, they would also have to be counted as persons in pretrial detention.

Police detention ahead of a judicial detention order (Art. 128 Federal Code of Criminal Procedure, CCP) also serves the legal purpose of safeguarding the criminal law trial proceedings. This means they are also have to be considered as pretrial detainees at this stage. The latter also to persons detained in a forensic psychiatric clinic under Art. 126a CCP. This regulation provides for placement of a defendant in a forensic psychiatric clinic if strong reasons suggest that s/he has committed a crime in the status of diminished responsibility or a complete lack of criminal responsibility. Even though aiming at prevention not just at safeguarding the trial proceeding, this is a functionally equivalent alternative to pretrial detention in a remand prison. It poses no lesser intrusions into the right to freedom and other rights of the individual but may be more adequate in case of defendants who are considered to be mentally ill because of access to medical treatment. In practice, it is probably used comparatively

1 *Statistisches Bundesamt* https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Rechtspflege/Tabellen/ErfasstePersonenUHaft.html *(accessed 21.01.2019).*

rarely with a need perceived rather in case of compelling signs of completely lacking criminal responsibility.[2]

There are also further forms of pretrial detention allowing for arresting a defendant shortly before the beginning of the trial proceedings, according to Art. 127 b CCP in case of an accelerated criminal procedure and pretrial detention ("Hauptverhandlungshaft") for up to one week preceding the trial.[3] Another additional kind of short-term pretrial detention is the possibility to detain a defendant who has not appeared in court for the trial proceedings without reasonable excuse ("Sistierhaft", Art. 230 paragraph 2 CCP). Detention is subsidiary to an arraignment. This kind of pretrial detention is highly questionable with respect to the de-facto sanctioning of violating the compulsory attendance in the light of the presumption of innocence and the lack of a time limit in the light of the proportionality principle.[4] These additional forms of pretrial detention are also problematic with respect to the lack of access to a defense lawyer pre-financed by the state because Art. 140 paragraph 1 number 4 CCP explicitly refers only to the regular type of pretrial detention in remand prison ("Untersuchungshaft") and placement in a forensic psychiatric clinic. This means that with respect to the two additional types of pretrial detention (Art. 127 b and 230 CCP) as well as for police detention no legal aid is granted, not even with respect to the order of pretrial detention – not to speak about matters of its execution, the living conditions, which is the focus of our project.

It has to be cautioned that, while we are taking about pretrial detention in a remand prison in the following, e.g. with respect to statistics, law and empirical results, we still becloud these other types of pretrial detention on which we have even less information.

While conducting our research, mainly through interviews, the hypotheses that legal protection of pretrial detention with respect to its living conditions does not work in practice, has been confirmed, like e.g. expressed by a judge: [5]

> "*Complaints against prison conditions in remand prison, this is still a dark field. It is amazing that in former times, before the pretrial detention law, when we had restrictions in bulk, we did not have more complaints, and I have been doing this job since 1989 without interruption*" (Judge, Int. 6)

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2 See for a short description Morgenstern 2018, pp. 428-429; for an empirical study with respect to practice see Ernst 2011 stating urgent demand for action with respect to the ordinance of this provisional placement in a forensic psychiatric clinic. While Morgenstern assumes that this kind of detention is not used very often, referring to 556 persons at 1st January 2014 in the "former" Western German federal states, this has to be seen with caution. As the reference to data of only the former Western part of Germany around twenty years after the unification of Germany reveals, there is no complete, current and reliable data on numbers of persons in forensic psychiatric clinics with respect to before as well as after trial.

3 Cf. Morgenstern 2018, pp. 422-424.

4 Cf. Morgenstern 2018, pp. 424-427.

5 The author uses the word 'prisoner' for each person detained in pretrial detention, and refrain from using the words 'inmate' or 'detainee' to avoid any confusion with any other different legal prison system.

Also, several lawyers including in a focus group with defense lawyers, resumed that these kinds of complaints simply do not exist in practice. The statement that no changes, no intensification of complaints by remand prisoners, was observable even after important improvements of the law, may come as a surprise with respect to the German system. Germany is usually described as a country with high standards in the legal protection of prisoners' rights because any decision, action or inactivity of the prison administration may be subjected to a judicial review by an individual complaint of the prisoner. Even though the success rate for prisoners' complaints is below 5% the complaints procedure mechanism is often described as an effective system.[6] There are reasons to challenge this view as too optimistic.[7] It would lead too far to go into detail of all the reasons for this.

May be it is sufficient to give a few examples that are taking from the field of prisoners' rights, i.e. convicted persons in which much more activity with respect to legal proceedings is visible: Prison law cases are written proceedings regularly without any personal hearing. The prisoner has to apply in German language. There are large margins of discretion for the prison administration provided in the law. Thus, in case a prisoner is successful at court this would mostly not mean that s/he will get what s/he has applied for but only a judicial decision that obligates the administration to decide again about the matter and respect the reasoning of the court in this new decision. This often leads to another rejection by the administration but this time with different reasons. Another reason is that the court procedure regularly takes very long, months or even years. Especially if, in case of discretion, they have to approach the court several times for one issue, this may only be worth the effort in case of long-term custody. There is no legal mechanism to directly force the court to decide within reasonable time, just the possibility to receive compensation later and six months are perceived as a reasonable time in this law (Art. 189 Code von Court Constitution). If the proceedings at the court last too long, and the prisoner is e.g. released, relocated or the matter is one of the past without a danger of repetition, the complaint will be rejected due to a lack of legitimate interest in the proceeding. Often not only the end of the procedure is deferred but also the possibility to begin one. If the prison rejects an application of the prisoner, the prisoner may file a complaint within two weeks. But if the prison administration does simply not react to an application, the prisoner has to wait for three months until s/he is allowed to complain to the court. This time of waiting is often much longer in practice because the prison denies that the prisoner has brought forward any motion to the administration. The prisoner is regularly unable to prove the contrary because s/he does not get any confirmation of receipt.

Additionally, prisoners often complain about the negative impact of going to court on their conditions and especially their prognosis. A sign for the prevalence of these fears is the fact that there are sayings in prisoners' language related to it: „totgeschrieben werden" (to be written to death) meaning a negative impact of e.g. complaints to the court for the prognosis the prison administration submits with respect to the prisoner. Another example is: „wer schreibt, der bleibt" (who writes, remains) – in this case not related to academia but to the prisoner who files a complaint and will thus not be released e.g. after two-thirds of the sentence.[8]

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6 E.g. Morgenstern & Dünkel 2018.

7 E.g. Graebsch 2015a.

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There are also institutions in with almost no litigation takes place which casts a dark shadow on the system. These are: youth institutions[9], forensic psychiatric institutions, women's prisons, police detention – and pretrial detention in remand prisons. This fact certainly needs explanation. We tried to find some clues in our empirical study.

The need for explanation is even more pressing with respect to the fact that the legal regulations with respect to complaints about living conditions in pretrial detention are rather favorable to those in prison law. While the law is similar to the law for prisoners in many respects, it is better with respect to the fact that there is no time limit for a complaint after the prison administration has rejected an application – as opposed to two weeks in prison law after a written decision has been received and one year without it (Art. 112 Federal Prison Act). If the prison doesn't react to an application of a remand prisoner, s/he can complain to the court after three weeks (Art. 119a paragraph 1 CCP) – as opposed to three months in prison law as a rule (Art. 113 Federal Prison Act).

It has undeniably been an important step forward when during the last decade a system of legal protection for pretrial detention was introduced that follows, by and large, the model of the long-established prison law. After shortly describing important features of this system, we will turn to the question why it is still so rarely used.

Establishing a system of legal protection for pretrial detainees

In 1972 the Federal Constitutional Court[10] had stated that intrusions into prisoners' fundamental rights like they happen in everyday life under confinement, e.g. the control of letters, need an explicit statutory basis to be in accordance with the Constitution. They are not justifiable by simply referring to statutory regulations which allow for the imprisonment of the person because they constitute additional interference with fundamental rights of the prisoner. This decision resulted in the Federal Prison Act of 1976 (Strafvollzugsgesetz, StVollzG). While this Prison Act applied only to imprisonment after a conviction, the living conditions for pre-trial-detainees continued to lack a statutory basis. There had only been a very short regulation in the Code of Criminal Procedure (former version of its Art. 119 and one in the federal Prison Act (Art. 177 StVollzG) supplemented by an administrative provision (Untersuchungshaftvollzugsordnung of 12th February 1953). A very similar situation existed at the time in the law for juveniles.

However, it was not until 2006 – more than thirty years later – that a constitutional complaint was successfully brought before the Federal Constitutional Court resulting in the allowance of a transitional period until the end of 2007 for the establishment of statutes to be passed by parliament.[11] The decision referred to the law for juveniles but it was obvious that the very same situation applied to the law on pretrial detention. The decision coincided with a shift of responsibility

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This summary evaluation of the problems with the enforcement of prisoners' rights is based on around forty years of experience with the Prisons' Archive, an institution giving legal advice to prisoners. See also e.g. Lesting 2013; Graebsch 2014.

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Graebsch 2018, 2015b.

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BVerfGE 33,1.

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BVerfGE 116, 69.

for prison law including the law of pretrial-detention from the Federal State to the federal states. This led to today 16 separate pretrial detention acts in the federal states with one of them (Lower Saxony) including it into the same act that regulates prison law with simply a chapter of its own. A regulation in the federal law (Art. 119 a Code of Criminal Procedure, CCP) clarifies the procedural framework for complaints regarding the living conditions in connection with the acts of the federal states.

As a result, a system of access to the judge has been established during the last decade that can be described as comparable to the situation for convicted prisoners even with the improvement of a much shorter time frame for access to court in case the detention centre doesn't react to an application at all.

While Germany is usually perceived as a state with a functioning system of prison litigation much can be said about the shortcomings in the protection of prisoners' rights, as described above. However, there is at least no doubt that convicted prisoners with and without the support of a lawyer make use of this system and, even if rarely, in below 5% of the cases[12] , succeed with their complaint. As opposed to this, our interviewees unanimously resumed that litigation on living conditions in pre-trial-detention does not exist in practice. This view is confirmed by the low number of published court decisions in this field and by academic literature.[13] The situation is in sharp contrast to the number of complaints in prison. Even if in prison still only a minority of prisoners brings a complaint to court, this results in a considerable number of complains that by some was even considered as being rather high.[14]

There are probably even less complaints by detainees in a forensic psychiatric institution who are detained according to Art. 126 a CCP and nearly no complaints at all by those detained in police detention. For the latter until today no statutory regulations about living conditions exist.

Therefore, we decided the most important question for research in our country would be to analyse the reasons for this failure and especially whether the lack of legal aid for this kind of proceedings can be deemed responsible for the low number of cases.

The focus of this research project was how the legal defense of prisoners is financially organized, mainly through legal aid mechanisms. As it was assumed that funds for defending prisoners are not satisfying, further developments in this report support the fact that lawyers working with/for prisoners are struggling with finances:

> "*The better the defense is paid, the more is done because all lawyers do not work on a voluntary basis, and if a client is financially secure there is more money than just getting a*

12 Feest, Lesting & Selling 1987.

13 E.g. König in: StV 2016, 168 – 171 commenting on one of the rare court decision that refers to the successful complaint of a detainee who was allowed to use a laptop computer to read his file for the trial proceedings. König called upon his colleagues to make use of complaints regarding living conditions in pretrial detention.

14 There are no statistics available on these issues.

pretrial fee with additional detention fee. There are still many committed colleagues who are poorly paid and nevertheless have tried everything" (Lawyer, Int. 7)

A third (but not last) component of the project was to understand in which context legal defense of prisoners is performed, in terms of procedural guarantees, institutional and political commitment, public perceptions and punitiveness. One answer for the German context is that detention is considered as a normal public process rather than a place where prisoners´ rights are potentially violated and where independent, critical public control is necessary. This is how, for instance, the director of a public control authority puts it:

"We have quite a good line to the prison directors, and that alone is an important component. Because before, it was rather that my predecessor was more likely to seek a confrontational approach to the prison directors and interpreted himself more as an observer and problemfinder, having joined a slightly more controlling mode with the bureau while I´m driving a cooperative mode" (Public authority, Int. 13)[15]

The approach is obviously rather one of cooperating with prison services than primary guaranteeing protection of individuals´ rights.

1. THE NATIONAL CONTEXT

Germany has completed a strong legal process regarding prison law, including legislation dealing with pretrial detention in each of the 16 federal states (*Länder*). Today the Länder are responsible for (almost all) legal and practical aspects of prison as well as pretrial detention. Over the last decades, before this federalization and legislation process was completed in 2008, the legal basis of remand prisons consisted of one article in the Federal Code of Criminal Procedure. This respective article 119 CCP has been introduced in the 19th century, has been modified since then, but still provides some rather progressive items:

- Remand persons may provide for their own comfort and occupation, only being subjected to such restrictions as are required by the purpose of remand detention or by the need for order in the institution;
- Remand persons shall be kept separate from convicted prisoners and shall be entitled to a particular cell, except if their physical or mental state requires the presence of another person;
- the prisoner can be shackled only under certain circumstances in a situation of concrete risk (resistance, absconding, suicide), if no other less severe measure is available;

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This public authority is no more allowed to make public its yearly reports since 2017, but only hand them out to its higher authority. Reasons for this withdraw of publicity are not known. One can argue that this is due to a punitiveness trend against prisoners´ rights.

- all restrictions require a court order; only in situations of urgency, interim measures may be imposed by the prosecutor or the prison director, subject to later approval by the judge.

The public prosecution office and officials in the police force are also authorized to arrest provisionally a person (*vorläufige Festnahme*) caught in the act or being pursued, in order to proceed to the identification of the suspect and/or if grounds for a remand decision exist. Moreover, „in case of imminent danger", the prosecution and the police are authorized to make a provisional arrest while the prerequisites for issuance of a warrant of arrest have been fulfilled (Art. 127 paragraph 2 CCP). In this case the arrested person has to be brought before a judge without any delay.

> "The arrested person shall, without delay, be brought before the judge of the Local Court in whose district he was arrested at the latest on the day after his arrest, unless he has been released. The judge shall examine the person brought before him" (Art. 128 al. 1 CCP, underlying Article 104 of the German Constitution).

Provisional arrest is not legally considered as pretrial detention. The decision to remand a person into custody (*Haftbefehl*) can only be taken by a judge. If the judge does not consider the arrest justified, or if s/he considers that the reasons for it no longer apply, s/he shall order release. Otherwise, s/he shall issue a warrant of arrest or a placement order upon application by the public prosecution office or, if the public prosecutor cannot be reached, ex officio (Art. 128 CCP).

The Federal Constitutional Court had to remind several times, with a first decision in 2002[16], what an immediate arraignment to the judge means in practice, e.g. an obligation for an on-call-duty at least during the time of the day including weekends. The European Court of Human Rights confirmed this is Epple v. Germany.[17] As our interviews revealed, there are nevertheless still practical problems with this like e.g. cases in connection with the G20 summit when it took up to almost forty hours until detainees were brought before a judge.[18]

1.1 Spaces of pretrial detention

While the preliminary detention by the police is administered in police cells (respectively under the responsibility of the 16 Ministries of Interior), remand detention is always carried out in regular (remand) prisons (respectively under the responsibility of the 16 Ministries of Justice).

As to the last figures provided in 2016, 64,000 persons are held in around 200 prison facilities with a capacity of 73,400 places, meaning a prison density of 87.6%. Since all prisons are run by the respective regional states, there is no federal prison. As they are divided and spread out within the 16 federal states (*Länder*), just some of them are dedicated only for pretrial prisoners. Most remand

16 BVerfGE 105, 239.

17 No. 77909/01, 24.03.2005.

18 See also the decision by the regional court of Hamburg: Landgericht Hamburg, decision of 25.05.2018, 301 T 266/17.

prisons are thus part of larger prison institutions (housing mainly sentenced prisoners). Architecturally, remand facilities are hardly any different from facilities for sentenced prisoners. But they offer less possibilities for work, education, training and leisure time activities.

Male juvenile suspects are remanded into facilities for convicted male juvenile offenders up to the age of 24 years. If the remand prisoner has not yet reached the age of 21, pretrial imprisonment follows the rules for young offenders and is, if possible, served in institutions for young offenders (Art. 89c JGG = Juvenile Court Code). However, the court may decide to place even older prisoners (up to 24 years of age) in such institutions, which is often the case in practice. Female juvenile suspects are, because of the non-existence of autonomous juvenile facilities for women, detained in prisons for convicted female offenders. In both cases, the principle of the separation of pretrial detainees and sentenced prisoners is not guaranteed; but other solutions (e.g. isolation) are rationally considered as even worse with respect to human treatment.

According to the law, if the judge decides so in an individual case, remand prisoners shall be separated from individual or from all other prisoners (Art. 119 paragraph 1 number 4 CCP). There are no formal space requirements for the accommodation of prisoners (remand or sentenced). This was true under federal law and is also true for the now existing prison codes of the federal states. The courts have, however, increasingly intervened and established minimum standards at around six square meters per prisoner. Baden-Württemberg has, in 2010, become the first German state to set a formal space requirement in its Prison Act: nine square meters for single occupation and seven square meters per prisoner in multiple occupation. This refers, however, only to newly built prisons. Older prisons can get by with a minimum of 4 ½ square meters per prisoner in double occupation and 6 square meters in multiple occupation.[19]

Remand prisoners have a right to be accommodated in separate rooms. This has been true under the old version of Art. 119 I CCP, and all states have incorporated a similar rule into their Remand Acts. This rule allows for the following exceptions: physical or mental condition of the detained person or a written waiver by this person. No official statistics exist. In the state of Bremen, according to information from the prison administration, almost ninety percent of the remand prisoners are presently accommodated in single cells; the rest is being double-bunked[20]. Formal assessment procedures for the suitability of cellmates do not exist.

1.2 Main social characteristics of the general detained population in the country

Pretrial prisoners are only included in the short prison inventory statistics, published three times a year,[21] but not in the more comprehensive prison statistics on demographic and criminological

19 *Gesetzbuch über den Justizvollzug in Baden-Württemberg*, book 1, Art. 7.

20 Interview with prison authorities in February 2018.

21

characteristics of sentenced prisoners,[22] which says quite a lot about the attention and importance paid to pretrial prisoners. All statistics are published by the same Federal Statistic Office and are available online.[23]

Since the unification of the two German states in 1990, the total number of prisoners in Germany has increased in the early 1990s, reaching a total number of 81,000 prisoners in 2004, to almost steadily decrease up to the recent years with 54,000 prisoners. The same variation has been observed for remand prisoners, reaching its highest figure in 1994 with over 21,000 persons, and being reduced by around one third since then.

In 2013 the preliminary lowest point was reached by a total number of 10,560 remand prisoners, a percentage of 17% comparing to the total number of prisoners. Since then, the numbers are steadily rising again. As the table below shows the statistic has recorded 12,992 persons in pretrial detention on a qualifying date in 2016. The increase is above 20%. Persons in pretrial detention account for about 21% of the total prison population. These numbers must be assessed in relation to the total population. The number of pretrial prisoners in relation to every 100,000 inhabitants shows regional differences and makes the numbers internationally comparable. In 1964 23.5 out of 100,000 inhabitants were in pretrial detention. In 1983 23,6, while the number since the late 90´s dropped to a low of 13.9 in 2013. The slight increase is reflected in the figures for 2016 (16.3). What raises difficulties with respect to interpretation of these numbers is the unification of the two German states in 1990 and a census in 2011 which showed that the total population was smaller than imagined.

Nevertheless, there is a remarkable increase of remand prisoners since 2014 – see Table 1:

Table 1: Number of remand prisoners in Germany 2014-2017

(on the 30th of November)	2014	2015	2016	2017	Increase 2014-2017
Total	11,528	12,206	12,992	13,963	+ 21%
Total prison population	*61,872*	*61,737*	*62,865*	*64,351*	*+ 4%*
Remand / Total	*18,63%*	*19,77%*	*20,66%*	*21,69%*	*+16%*

(Source: German prison statistics 2017)[24]

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22 *Bestand der Gefangenen und Verwahrten in den deutschen Justizvollzugsanstalten*.

23 *Strafvollzug - Demographische und kriminologische Merkmale der Strafgefangenen*

www.destatis.de under *Rechtspflege/StrafverfolgungVollzug*

24 https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/BestandGefangeneVerwahrtePDF_5243201.pdf?__blob=publicationFile

These figures are to be compared with a total number of detained persons of around 70,000 and around 17,800 pretrial prisoners in 2001 (25% of total), and respectively 70,800 and 11,100 in 2009 (15% of total).

On which reasons the described effect is based, cannot be answered unambiguously. An often-employed consideration is a connection with the refugee influx with the peak reached in 2015. The total number of suspected migrants rose as a result of the increased number of migrants in total. Following a special evaluation by the Federal Criminal Police Office these cases mainly concern allegations of light and medium crime. The influence on the total number of pretrial prisoners therefore cannot be deduced from the expected punishment or the seriousness of the offense.

A PhD dissertation, published in 2017, shows that the named person group is above average when a risk of flight is to be predicted. The case law considers four categories: Age, social inclusion, personal or/and financial resources and the offence as well as it´s legal consequences. It was shown that the risk of flight is rated higher for young offenders, those in unsecured housing situations (like a refugee-camp), those who are far from their families, unemployed, foreign nationals with connections to a different country and the appropriate language skills and those who for some reason have to specially fear the impact of conviction. Obviously, many of these characteristics relate to migrants, especially in the first time after arrival. Whether these criteria reflect the actual risk of flight is questionable. The belief of judges who see this connection together with a higher influx of refugees could serve as a possible explanations for the rise of the pretrial detention population.

However, it is difficult and uncertain to explain this recent development with any kind of hypotheses. Conclusions from crime statistics are questionable because of some bias,[25] and since there is no precise sociodemographic and criminological picture of pretrial prisoners (as mentioned above). The refugee crisis is often mentioned as an explanative hypothesis because of the absence of legal status and therefore of legal and stable domicile of some recently arrived non-European foreign nationals.[26] Another possible explanation is due to new public-management and statistical efficiency factors, through which police activities tend to be more visible, "results"-oriented practices:

> "*Society has not become more criminal, but the police are concentrating their efforts on those individuals and offenders who are more likely to end up in custody, e.g. a backer in the narcotics scene doing kilo range*" (Judge, Int. 6)

25 Data is not related to data on criminal proceedings (*Strafverfolgungsstatistik*).

26 See statistics for "crime in the context of migration" (https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/KriminalitaetImKontextVonZuwanderung/KriminalitaetImKontextVonZuwanderung_2017.html?nn=62336 ; accessed 25.5.2018).

1.2.1 Duration of pretrial detention

Since 1975, short-term pretrial imprisonment has decreased remarkably, while long-term pretrial detention (i.e. over six months) has remained stable. As a result, the share of long-term pretrial detainees has increased. Morgenstern provides as explanation that "by the fact that courts order pretrial detention (only) in cases that are more severe and/or more complicated; therefore, the proceedings and pretrial detention last longer"[27].

The number of pretrial prisoners depends on two main factors related to the stock and the flow, i.e. the number of entries and the length of the stay. There is not much research on remand prison, but some former empirical studies showed an average of 300 days in pretrial detention during proceedings before first instance tribunals,[28] and an average of 80-90 days in a mixed sample of courts.[29] Research done on pretrial detention for juveniles provides similar outcomes: in 2010, 45% of accused juveniles were kept more than 3 months in detention, while 21% less than 4 weeks.[30]

According to statistics covering the year 2014,[31] more than half of all pretrial prisoners were held in remand detention for more than 3 months, with an increasing trend concerning the relative length of pretrial detention. In 1976, about 15% of pretrial prisoners were held between 6 and 12 months, whereas in 2014, this proportion reached 18%. More problematic, 5.5% (compared to 3.6% in 1976) were more than 1 year. In absolute numbers, this amounts to 6.256 out of 26.696 persons being detained longer than the regular maximum time-span of 6 months, and almost 1,500 of them even staying longer than 1 year. If very long pretrial detention periods are connected to an accusation regarding murder or rape – 75% of all persons accused for murder offences were held longer than 6 months, and 46% of all persons accused for rape were held longer than 6 months, statistics also show that even before first instance courts – with less serious offences, the average duration is longer than 10 months.[32]

1.2.2 Female, juvenile and foreign national prisoners

27 Morgenstern 2009.

28 Dölling et al. 2000, 180.

29 Busse 2008, 185.

30 Villmow/Savinsky/Waldmann 2012, 279.

31 Morgenstern 2016.

32 Hoch 1998; Dessecker 2007

The proportion of female prisoners among the pretrial prison population is similar to the proportion for sentenced female prisoners – around 5% of all pretrial prisoners were female.[33] As to the criteria of age, 11.9% of pretrial prisoners were under 21 years, and less than 3% under 18.

As to foreign nationals, they were always over-represented in pretrial detention statistics, while it was mostly claimed they could abscond anytime. Their share among the entire prison population amounts to 30% in 2014.[34] The share of foreigners nationals among pretrial prisoners was not recorded in official statistics, but Morgenstern has compiled some figures in 2008 and 2013,[35] which are now partly covered by the annual survey conducted for the Council of Europe.[36] The proportion of foreign national prisoners in pretrial detention has grown over the last decade, rising from 43% in 2008 up to 65% in 2016 (data N=8,308 in 2016).

1.3 Recent evolutions of initiatives to compensate juridical inequalities among prisoners

Recent evolutions of mechanisms put in place (or withdrawn e.g. due to austerity measures) at national/local level and aiming at compensating juridical and economical inequalities among prisoners.

Lawyers´ activity must be economically viable. This is an issue not only in the big cities and urban areas, but also in remote places. An appropriate adjustment of the lawyer's remuneration is urgently needed. As early as June 2016, at the occasion of the Lawyer´s Day *(Deutscher Anwaltstag*), the German Lawyer Association (*Deutscher Anwaltverein*, DAV) filed a demand for an amendment to the legally regulated remuneration of lawyers. The DAV made proposals from local lawyer associations and consortia to identify needs and to develop their position.[37] This was the basis for the work of the expert panels of DAV and the official, institutionalised umbrella organisation of lawyers (*Bundesrechtsanwaltskammer*, BRAK), which worked together in close co-operation to develop a common catalogue with the most important concrete demands. On the 16th of April 2018, the DAV and the BRAK have handed out this requests catalogue to the Ministry of Justice.[38]

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33 Zolondek 2007.

34 Council of Europe (SPACE).

35 Morgenstern 2016.

36 SPACE I, http://wp.unil.ch/space/files/2018/03/SPACE-I-2016-Final-Report-180315.pdf

37 DAT 4/16.

38 PM 11/18.

There is first a need for an adjustment volume of 13% of all funding dedicated to legal aid. Five years after the last fee amendment, the legally regulated remuneration of lawyers still needs an appropriate adjustment, if possible in 2018. Bar associations called for a reasonable increase, based on the development of collective bargaining rates of an average of 2.6 percent per year. This would have corresponded to a total adjustment volume of up to summer 2018 of a good 13 percent since the last reform of the lawyers´ fee regulation (*Rechtsanwaltsvergütungsgesetz*, RVG) – but that hasn´t happened yet.

In doing so, Bar associations consider a combination of structural improvements and an adjustment of fee amounts to be necessary. For the future - as requested to the Ministry of Justice and the Parliament - regular adjustments must be made at shorter intervals. Reasonable is a fee adjustment in each legislative period, like once in four years.

As part of this reform, bar associations are working to ensure that court fees do not rise again. In the meantime, a limit has been reached which, if exceeded, would no longer open access to the law for large sections of society. This is made clear by the continuous decline in incoming numbers of cases in the courts of all instances in recent years. In addition to the demand for a linear adjustment, the catalogue of demands also contains numerous proposals for structural changes and additions to the RVG as well as clarifications. In this way, regulations should also be adapted to the existing practice in order to ensure fair performance-based remuneration and to counteract undesirable developments in case law.

Hereby just a short list of structural requirements, without going into detail of partly very technical aspects:

- Improvement in the 0.3 additional fee for the appointment fee according to No. 1010 VV RVG
- Separate fee for the principal authorized representative (lawyer) in case of intervention of a sub-representative
- separate remuneration for each individual administrative or judicial procedure
- Billing as a new matter for each amendment or annulment of an injunction
- Improvements in the value of cases from the proceedings start
- Raising the value of cases in isolated children's matters to € 5,000 for each concerned child
- Interests to be added on late payment of lawyer fees
- Improvements in the fees in criminal matters at the pre-judicial appointment fee according to No. 4102 VV RVG
- Improvements in the reimbursement of the documentary fee for scans
- Raising the upper limit for the communication fee from the current 20 euros to 30 euros
- Increase of daily and absence funds

1.4 Litigant information

There is no available information on this issue concerning litigant statistics.

As to litigants for reasons linked with police forces, there is no available information concerning litigant statistics. However, studies and interviews can lead to the assumption that German police forces have a rather positive image in public perceptions.[39] For example, to the question how to explain that there is no complaint received by a regional Ombudsman institution concerning police forces, the answer was:

"*because we have well-trained, respectful police officers*" (Public authority, Int. 15)

This assumption conforms to what another regional public authority mentioned about its collaborative approach with prison authorities rather than playing the role of an independent, critical, citizens-near institution, as cited above.

This leads to a first possible answer to our question about why there are only so very few complaints by remand prisoners to the court. The first assumption one could make with respect to the low number of cases coming to court is that detainees have simply no reason to complain about their living conditions in pre-trial-detention. This would though not explain the difference between prison and pretrial- detention. For example, looking at the reports by CPT shows a different picture. As early as 1996 the CPT criticized that pretrial detainee were locked up 23 hours in their cells. The responses to this report revealed that no changes of this situation were to be expected. [40] There is also no indication whatsoever that this has changed for the better until today and living conditions in pretrial detention would be better than in prison. Our interviewees as well did not say so.

This approach by public authorities that are in charge of controlling prison facilities rather reveals a need to install independent complaint and investigation institutions in Germany as recommended by the National Agency for the Prevention of Torture, the German National Preventive Mechanism under Article 3 of the Additional Protocol to the UN Convention against Torture (OPCAT).[41] For observations on ill-treatment by police and prison officers, the NGO 'Committee for Fundamental Rights' (*Grundrechtekomitee*) remains one of the few organisations publishing independent opinions.[42]

At European level, the Committee for the Prevention of Torture (CPT) has criticised the conditions of detention in police custody many times. Recently (2017-2018), activists and journalists have

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39 https://www.mpg.de/8932222/STRA_JB_2015?c=9262538

40 Cf. a summary of the situation Cernko 2014, pp. 246-250.

41 Under 5.10, https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/JAHRESBERICHT_2017_Nationale_Stelle.pdf

42 http://www.grundrechtekomitee.de/ unfortunately, no interview was managed for the project purpose.

conducted, through intensive research and after years of fighting against public and justice authorities, to (re-)open a criminal case on the death of an asylum seeker who died during his arrest in police custody in 2005.[43] These examples show an urgent need for monitoring and judicial control of police custody in Germany.

Police detention as an institution is sealed off from the surrounding world including research. One of the very rare studies about police detention in Germany as well as other European countries was the project „Medical Service Provision for Detainees with Problematic Drug and Alcohol Use in Police Detention: A Comparative Study of Selected Countries in the European Union". More than 50 interviews have been conducted in Germany. The results are mostly unpublished.[44] Nevertheless, this study provides interesting data that we have used in the following.

Even if police custody is meant to last only for a very short period of time the importance to monitor its conditions is high. Despite the fact, that the legal regulations are clear, not each person arrested by the police appears in front of a judge immediately or even – at all. Especially with respect to persons under the influence of intoxicants, a number of problems arise.

From a medical point of view, a considerable risk exists during the withdrawal of psychoactive substances, which is especially high in case of alcohol. Non-professionals - like police officers, cannot diagnose the resulting effects. Only medical professionals are able to decide whether symptoms are caused by withdrawal or indications of a skull trauma. This leads to the conclusion that all persons under the influence of intoxicants should be in the hands of medical professionals. This conclusion is supported by the results of a German study exploring cases of death in police custody between 1993 and 2003 (Heide et al. 2009). According to the results of this study, almost 3/4 of all cases in which an autopsy was ordered, were classified as preventable by adequate medical care – they would not have been occurred if the police and in some cases a doctor, who has been consulted, would have complied with all standards for adequate treatment.

Other outcomes of the interviews of our own study in 2006 were:

- Repeatedly, professionals (judges, prosecutors, police officers) stated that the involvement of a judge was only mandatory to involve in case custody exceeded 48 h – even though the Federal Constitutional Court had confirmed that a judge has to be involved immediately at least during the time of the day years before[45];

43 https://en.wikipedia.org/wiki/Death_of_Oury_Jalloh

44 The published summary and comparative report by Atkinson et al. * unfortunately it lacks the inclusion of almost all the results from the German study and contains several mistakes about the German situation, but cf. short summaries of the results in German Graebsch 2011; 2013.

45 2 BvR 2292/00, 15.05.2002.

- Police detention takes place not only in some centralised and better equipped institutions but also in any police station resulting in enormous difficulties for monitoring the medical conditions. There is a grave lack of access to medical treatment and monitoring of the detainees' health status.
- The number of people under the influence of multiple types of intoxicants rose according to the testimony of the interviewed persons.
- Especially in crime-related police custody, the criminal investigation is focused as a first priority, while medical questions may be perceived as subsidiary.
- Withdrawal symptoms are often not treated in an adequate way. In cases of addiction to opioids, tranquilizers are used instead of substitution treatment.

Police custody appears to be an even more closed system than prison or pretrial-detention in a remand prison.

Police detention often takes a back seat to pretrial-detention in a remand prison because of its comparatively short duration. However, withdrawal symptoms may occur after a very short period of detention already, inter alia depending on the time since the last consumption. Due to the deprivation of liberty, individuals are unable to take care for themselves, and are unable to access even the legal supply with opioids via substitution treatment. Additionally, the risk of death or serious health issues, withdrawal symptoms or even just the fear to suffer from withdrawal symptoms, is likely to have an impact on the ability to follow a hearing and will put investigative results gained under such conditions into a different light. While the use of a (legal) drug the affected person is used to may keep the influence on the interrogation capability low, this cannot be said for any tranquilizer used in a dosage that affects withdrawal symptoms. This is the reason for the strict prohibition of the allocation of any remedies that could affect volition in Art. 136a Code of Criminal Procedure. While it is clear that this prohibition must be applied accordingly to situations in which withdrawal symptoms could affect volition, it is – compared to the prevalence of police arrest and investigations against suspects depending on psychoactive substances – surprisingly rare that courts deal with the issue.[46]

The study conducted in 2006 obviously cannot reflect on any recent developments. However, the comparison with the current results from our project leaves the impression that the situation has at least not completely changed.

1.5 Practical means of litigation

Litigation in the field of pretrial detention could not obtain big importance yet. Comparing the number of court procedures to the number of persons in pretrial detention, the low number of cases is striking, as interviewees pointed out. Asked about their involvement in this kind of cases, lawyers answer almost in the same way as this lawyer did:

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46 E.g. Kammergericht Berlin, Decision of 08.06.1998 – (3) 1 Ss 15/98 (48/98) –, juris)

> "*Not long ago I was discussing with somebody about youth penitentiary law. I told him: that just doesn´t happen. It´s the same with (litigation in) pretrial detention. It just doesn´t happen*" (Lawyer, Int. 24)

Even lawyers who are very active in court cases related to prison law in prison-connected cases state they have no or almost no cases concerning the conditions of pretrial detention. They explain it with a divergent focus point of the detained person, their client, concerned in that concrete situation.

> *"I remember clients telling me about events which made them angry. We have been discussing the possibility to go to court. But then decided not to. Because it´s not worth it. The focus is on getting out of detention or get the trial proceedings started*" (Lawyer, Int. 24)

A reason that was very often mentioned by lawyers when asked why they do not take cases to court was that their clients were not interested in their living conditions because their priority was to get out of the institution (and to get rid of unpleasant conditions at the same time) and that their attention was occupied with the upcoming trial proceedings.

A similar argument was raised by a prison director:

> "*I don´t remember a single pretrial detention case which was brought to court. People here usually focus on other subjects. The fact of being detained or the upcoming crime-case procedure. And we are really trying to solve arising problems in personal conversation, also with the lawyers*" (Prison director, Int. 21)

Even if a large number of pretrial prisoners is deflected by the criminal procedure that is to come or in a state of shock after being arrested, these assumptions cannot explain the whole imbalance. This would also contrast with the information given by a prisoner on the basis of several prisoners he had asked for us about this problem and who concluded that their lawyers often were reluctant to bring cases on living conditions to court pointing instead to the upcoming referral to a prison. Thus, it may be that rather the lawyers, not the remand prisoners, are preoccupied with the upcoming trial proceedings and the hope to get their clients released from pretrial detention instead of trying to improve its conditions.

Accordingly, one major finding of the German empirical research is that conditions of pretrial detention are rarely addressed by lawyers because they focus either on pretrial orders and try to get their clients released, or on the indictment order and prepare the trial proceedings:

> "*Deprivation of liberty is the main topic. Therefore, I would think that most defenders focus their efforts on that, which is right. Because if you have a chance to get out, it's better than a TV*" (Lawyer, Int. 7)

"*It's so demanding to defend people. When I keep thinking about the case of the client in detention who may require a second kitchen knife but the prison officer refuses him .... I tell him "I can take care of that but you have to pay me", so this issue won´t be assessed*" (Lawyer, Int. 4)

"*Well it's like that, I want to do something useful, and I would like to accomplish something for the client in the principal proceedings case, and I do not want to get bogged down in this and that nonsense*" (Lawyer, Int. 4)

"*The forces must be assembled for defense in the preliminary proceedings, and not all the time in addition to other problems that distract from the main work*" (Lawyer. Int. 5)

These explanations were though not sufficient, because these arguments were raised by the very same lawyers who confirmed that they have cases of prison law for convicted prisoners at the same time. We had to look for further reasons.

One reason that was not often directly mentioned by our interviewees but was quite obvious during the conduction of the interviews was a **grave lack of knowledge by a considerable number of lawyers** even though they were chosen because of their assumed affinity with the subject. They were lawyers who are active in the field of prison law or attracted attention because they had brought cases to the European Court of Human Rights in the past that related to similar topics. It become clear that not all of them even knew about the laws that now have existed for around a decade. In 2010 already, Schlothauer & Weider appealed to their colleagues to make use of the new laws and to inform pretrial detainees about the scope of their defence lawyers' mandate, which also includes complaints on the living conditions in detention. They concluded, if lawyers would not fulfil this obligation, detainees would not be able to enforce their rights because the regulations were too complicated for them. Moreover, detainees themselves would only get a (negative) answer to their application by word of mouth without giving reasons in writing and without an explanation on legal remedies.[47] This situation is similar to the one in prison law but while prisoners have to apply within two weeks as a rule, there is no deadline at all for pretrial detainees. Since all pretrial detainees have a defence lawyer on their side there are a few reasons to expect more complaints from pretrial detainees than from prisoners, not less. An important question is why the opposite is the case and why even lawyers who are experienced in related areas do not know much about the rights of pretrial detainees.

The most obvious explanation for that is that **the legal regulations in this field are extremely complicated**. There is one set of rules and procedure for restrictions occurring to the detainee in connection with the reasons for the arrest warrant (Art 119 CCP) and another with respect to restrictions imposed by the detention centre in the name of security and order (Art. 119a CCP in connection with the pretrial detention acts of the federal states). Art. 119a CCP though doesn't even give a hint in its wording to the federal acts on pretrial detention. To draw a line of differentiation between Art. 119 and Art. 119a cases is also far from being simple. In one federal state (Lower Saxony) the situation is even more diffuse because according to case law Art. 119 CCP is said to be not fully applicable because it was overridden by the law of the federal state. There is also a split of jurisdiction

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Schlothauer & Weider 2010, pp. 459-460.

with the investigating judge being responsible until the indictment and the court of the main proceedings afterwards. There are 16 different laws, one for each of the federal states. Since the law of the state where the detention takes place is applicable, the court possibly has to make use of the law of a state different from the one where the court is.

The situation in pretrial-detention executed in a hospital due to mental health issues is even more confusing. Art. 126a para. 2 CCP states, that Art. 119, 119a CCP are applicable. In addition some of the federal states ordered the direct, others the indirect applicability of their own law for convicted inmates in a forensic psychiatric clinic ('Maßregelvollzugsgesetze'), sometimes with smaller modifications. As opposed to this, North Rhine Westphalia decided to apply the regulations for pretrial-detention, in Baden-Wuerttemberg a combination of the law on forensic psychiatric clinics and the law on pretrial detention are applicable in combination with reference to a law that meanwhile ceased to be in force, in Lower Saxony a regulation of this matter is still missing resulting in a normative vacuum.[48]

Even though the complexity of the matter is intense, it cannot be the only reason for the low number of cases. A few of our interviewees were well informed about the legal situation, one of our interviewees is even author of a book on rights in pretrial detention. But even this lawyer did not take cases to court when it comes to the living conditions in pretrial detention.

Our interviewees told us about mainly three alternative approaches to a complaint with respect to living conditions under Art. 119a CCP. One was the initiation of criminal investigation proceedings against certain members of the staff. This approach shows that a perception of serious violations in pretrial detention exists.

An important reason why this road is not taken, is an **expected ineffectiveness of legal remedies** in this field. At first glance this is not a very good explanation because the very same lawyers take cases of convicted prisoners to court which by and large bare the same kind of problems, e.g. discretion and a broad margin of appreciation that is credited to the detention center. But apart from the complexity of legal regulations the situation is better than in prison law (no deadline, complaint against failure to act after three weeks already etc.). Thus the question occurs, why the prospects of success are judged to be lower. The most important reason that was mentioned is the fact that the point in time when pretrial detention will end is unknown but always perceived as being close. After the end of pretrial detention the court will conclude that there is a lack of legitimate interest in the proceedings and will close the case even if the detainee will be convicted and move to prison where s/he may have similar problems to the ones complained about in pretrial detention. Experienced lawyers report that courts tend to wait for this point in time with their decision to avoid having to deal with the problems of the case. While the law foresees the rather progressive possibility of a complaint against the detention center, there is no effective remedy for enforcing a decision of the court. Lawyers also pointed out that it was rather unlikely to be successful at the first instance level if a court decision could be gained in time. One would have to take the case further for a higher probability of success but this would also take even more time. This perceived ineffectiveness of the system could be extracted as one important reason for the low number of cases in pretrial detention as compared to prison. In principle,

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Lindemann in Feest, Lesting & Lindemann 2017, § 1 LandesR, marginal 17.

the same problem exists in prison law but there will always be prisoners who know that they will have to stay there for years.

The defence lawyer who is pre-financed by the government has the right to represent the client with respect to living conditions in pretrial detention. This is automatically included in his or her mandate. But this also means that no extra fee can be claimed for if a lawyer takes a case on living conditions to the court. We tried to find out in how far this lack of funding by legal aid is responsible for the low number of cases. Some lawyers said it was, others claimed that they work pro bono in similar cases and their decision would not be influenced to a noteworthy extent by the question of financing. This contrasts to the perspective of the prisoners who have been asked (indirectly), as described above. There is actually a small minority of lawyers who will engage with a case not depending on being financed for it, and it is quite likely that these lawyers were overrepresented in our sample.

Apart from this, it became clear that if cases on living conditions in pretrial detention would be financed separately by legal aid, this would strengthen the perceived importance of this area. A special fee would rivet attention to this kind of complaint and presumably initiate training of lawyers and other forms of knowledge transfer between colleagues. These problems were identified as indirect effects of the lack of (separate) legal aid.

Some of the interviewed lawyers pointed out that the lack of time was more relevant to them than the lack of financing when it comes to the question of taking over a case on detention conditions while engaging with the defence in a criminal law case with the defendant in pretrial detention which is much more time consuming and has a straighter schedule than a case with a client who is not incarcerated. This may point to the necessity of not only granting legal aid for the complaint on detention decisions but also to allow for a different lawyer taking over this aspect of the case that is not connected to the criminal law proceedings anyway. When the law is split into two fractions, one referring to conditions related to the reasons for pretrial detention (Art. 119 CCP) and one related to security and order (Art. 119a CCP), there is no reason to treat them as inextricably linked in lawyers' remuneration law.

1.6 Reasons for few litigation and legal procedures of pretrial detained persons at police custody stage

One hurdle that appeared during the research is that many arrested persons never appear in front of a judge. Even if written law gives no choice on that question, in practice there are many violations. Most visible cases are those in which the capability to follow the hearing at the court is put into question due to intoxication or withdrawal symptoms. According to the constitution, as mentioned above, in any case of deprivation of liberty a judge has to be involved immediately. The decision of the judge should be based on a hearing. If a hearing appears to be impossible, judges – at least in the jurisdiction where this interview took place – issue a restraining order with the omission of a hearing. Like a judge said:

> "*MMMMhhh, there are cases in which police tells us, the person cannot be brought forward, he is under the influence of drugs or completely plastered*" *(Judge, Int. 17)*

And another judge:

> "*Not every case leads to a hearing. If the affected person sleeps or is intoxicated, he will not be strained here to have his hearing. These will have their hearing when they have sobered up"* (Judge, Int. 22)

Years ago it seems to have been usual for the police to not even inform the court about arrested people who are drunken or in a high state of arousal. After clarification by the Higher Administrative Court of Bremen[49] that the inability of following the hearing doesn´t exempt from having a judge to decide about the legality of the deprivation of liberty by different courts, the practice seems to have changed. All interviewed professionals claim to get into contact with the court immediately after arresting a person.

> "*Each person entering this custody it made known to the judge via fax to apply for the decision of the judge. No matter what this person is here for.*" (Police officer, Int. 23)

Now the courts seem to issue arrest warrants without a hearing, as the judge pointed out. The question arises whether these are preliminary decisions in the sense that they will actually be corrected by a final decision later on – even though this would still be problematic because the judge did not gain a personal impression about the detainee and his/her situation at the time of issuing an arrest warrant. However, it is also questionable whether a hearing actually takes place later.

> "*If somebody riots in the street or molests people, he will be brought here. We are trying to reach the judge on a phone number which is known by the police officer in duty. During the night there is an emergency service. All night long. But sometimes the phone is switched off. In that case the police officer makes the decision. Otherwise the judge, of course. If the arrested person is here to sober up, the decision can be fetched later.*
>
> *No, calling the judge at night isn´t necessary in these cases. That can be done the next day. If custody shall be longer than 9 o´clock in the morning the judge will be called by that time"* (Police officer, Int. 20)

It should be mentioned that call-on-duty for judges, apart from special situations like big demonstrations, exist only starting from 4 a.m. in summer and 6 p.m. in winter and lasts until 9 p.m. This is what "night" refers to in the statement of the police officer.

And after question the police officer added:

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See e.g. in the case law of the Higher Administrative Court of the State of Bremen: Oberverwaltungsgericht der Freien Hansestadt Bremen, 23.09.2014, 1 A 45/12.

"*Exactly. By the time the judge appears, most of them have been released. And in daytime mostly our homeless clients disappear. They have other problems. They don´t care about any judge*" (Police officer, Int. 20)

Since these cases mostly affect **people who are arrested to sober up** (detained in connection to or independent from suspicion of having committed a crime) and this mainly happens at night and at weekends, due to the obligation to release them after they reach a stable condition, most of the arrested people never show up in front of the judge. Many of the arrested persons will be released before.

"*Usually the biggest part of the cases appearing overnight are things of the past by the time the regular office hours start. Calling the police station that did the report overnight gives you a view on the current situation. Most of the arrested persons have already been released or are expected to be released soon, which makes a hearing redundant*" (Judge, Int. 22)

The conclusion can be drawn that mainly people who seem to be incapable for interrogation never see a judge. Consequently, the question, who shall assess if somebody is capable to be would have to be answered. Since the **question of incapability of interrogation is a medical question**, and since this judgement leads to the described consequences, the decision should be made by a medical expert, not a police officer or judge. Being released without having seen a judge or without being the subject of a court decision also means that you are released without any written instruction in your hand in which legal remedies are provided. That increases the barrier for judicial protection to a level which can´t be tackled by most of affected persons.

"*That question is discussed on the phone. I trust in what officers tell me. If they tell me, the affected person riots or is sleeping, I don´t order this person to be brought here with a lot of difficulties. That can be solved by a restrain order or later that day*" *(Judge, Int. 22)*

Either a judicial decision is completely denied on this basis or this results in a (preliminary) judicial order of arrest on the basis of a telephone call with the police – completely denying the purpose of judicial control and reframing it as the mere fulfillment of a formal order.

According to Art. 104 para. 2 al. 1 of the German Constitution, only a judge is supposed to order deprivation of liberty. In violation of this, many federal state's police acts state that a judge is only to be involved in cases in which the affected person is able to follow a hearing. In 2012 and 2014, the absoluteness of the judicial decision and the illegality of any deprivation disregarding this, was confirmed by the Administrative Court of Justice in Baden-Wurttemberg and the Higher Administrative Court in Bremen. Both courts held that the judicial decision is not for disposition by police acts or any other acts of legislation, which cannot change the constitution. The judge is not only under the obligation to review the decision of the police about deprivation of liberty but come to his/her own decision.[50]

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These court decisions as well as described situations mostly refer to cases of police detention according to the police acts of the federal states (detention for sobering up framed as detention for protection: Schutzgewahrsam), not to pretrial detention related to criminal law. However, if there is no control by a judge, it will not turn out on which legal grounds the detention was intended to be based by the police.

Resulting from our interviews, we also received descriptions of situations in which the police based detention often on criminal law as pretrial detention but then switched to police law (detention for the prevention of future crimes) if it turned out that judge would probably decline an order of pretrial detention. Detention during the G20 summit in Hamburg in July 2017 offered large amounts of illustrative material about how even access to the judge – as the first necessary step of access of justice – was interfered with. In addition, the following interview shows, how the access of a defense lawyer of their own choice was hampered.

As mentioned before, the courts are obliged to establish emergency services when and wherever there is to be expected that decisions about the deprivation of liberty are to be made. During the G20 summit in Hamburg in 2017, the Hamburg local court installed a field office next to the detention centre, which was located on an exhibition ground.

> "*There was a central detention centre, organized by Hamburg police for people who were arrested within the anti-G20-summit protest context. They were already arrested and we got big difficulties getting in contact with them. Imagine that detention centre as a huge block of prison containers, surrounded by a high fence with NATO barb wire on top. The field office of the local court was in the same area*" (NGO, Int. 25)

> "*What made the situation difficult was the lack of cooperation by Hamburg police. On request we´ve been told the person wasn´t in detention. In one case in a really stubborn way. Later it appeared that this person, in accordance with our prior information, had actually been there and had been about to be presented to the judge. Not guided by us, but one of the colleagues sitting in the hallways of the court like chicks on the roost. Things like that happened a lot. People who have been in contact with one lawyer in the detention area couldn´t do the hearing with that lawyer but with another unprepared lawyer. The court didn´t ask or inform the assigned lawyer, even if they were known*" (NGO, Int. 25)

The court was unable to do the hearings in a structure that enabled lawyers to be in the hearing with their client. The lawyer emergency service was split in to several groups. While some were waiting outside the detention centre, trying to get in contact with the arrested persons, others were located in the hallways of the courts filed office, trying to avoid hearings to be made in the absence of the chosen lawyer. The court didn´t inform the assigned lawyers about the time and place of the hearing:

Administrative Court of Justice Baden-Wurttemberg: Verwaltungsgerichtshof Baden-Württemberg, Beschluss vom 10. Januar 2012 – 1 S 2963/11 –,marginal no. 7, juris.

"*The reason [*for the bad situation concerning the advisory task] *were organizational issues caused by Police. It appeared to be unwanted to have an effective advisory or representation situation. It happened that the lawyers already had left the area by the time the hearing was to be conducted. In one case it was after almost 40 hours. Corresponding to the time passed and the lack of information, some colleagues left the area to rest and could have returned for the hearing*" (NGO, Int. 25)

Some of the cases out of the G20 summit led to further court proceedings about the dramatic legal conditions observed during this period. According to media reports, 1889 criminal proceedings have been initiated by the prosecution service, 635 against known offenders.[51] In only 38 cases of persons who had finally seen a judge appealed against this decision to further detain them. In 24 of this cases, a violation of the principle of immediateness was confirmed.[52] They had been brought before the judge within up to forty hours instead of a maximum of three hours.[53] The court also found further violations like strip-searches, having to go to the toilet under observation. [54] These were violations with respect to the conditions of detention which is the focus of our project. However, it is remarkable that even in a heated-up political atmosphere, like the one in relation to the G20 summit and protest against it, only a small minority of former detainees seeks justice afterwards. One important and rather obvious reason for this is probably that it was not possible to effectively complain about these conditions while they still continued. Another reason can be found in the very complex nature of the law that is involved with respect to deprivation of liberty because it is difficult to spot the court that is responsible for a certain kind of decision under a variety of possibilities, e.g. differentiating between detention according to criminal law or police law, differentiating between whether a judge had already been involved while the deprivation of liberty continued etc. In these situations not only different courts are responsible but also different laws apply.

Even in cases in which a hearing has taken place and the deprivation of liberty has been ordered by a judge, the incapability of interrogation can be challenged. In cases of withdrawal symptoms, high arousal and suicidal thoughts, detained persons are screened by a doctor. The used medicines can affect the capability of interrogation as can withdrawal symptoms.

"*If any arrested person suffers from withdrawal symptoms the doctor needs to be called. He prescribes some medicine. As far as I know mostly tranquilizers*" (Police officer, Int. 23)

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51 http://www.fr.de/politik/g-20-krawalle-1889-verfahren-153-anklagen-a-1539676 (accessed 21.01.2019).

52 http://www.taz.de/!5511644/ (accessed 21.01.2019).

53 E.g. Landgericht Hamburg, decision of 25.05.2018, 301 T 266/17.

54 http://www.taz.de/!5511644/ (accessed 21.01.2019).

> "*We only got three drugs which are suitable in these cases. Diazepam, Rohypnol and Codeine. I ask them which of them they know. Most have tried Codeine, not all. An usual dose would be up to 50 units of Codeine combined with 1 mg Rohynol or 20 mg Diazepam*" (Doctor, Int. 19)

> "*I am trying to keep the balance, get them through the night without too much trouble. The next morning, when the hearing is about to appear I am trying to be even more careful. If they appear stunned in front of the court this is no help at all*" (Doctor, Int. 19)

Even if the use and effect of tranquilizers is known, the capability of interrogation seems to be unquestioned. This is startling with respect to the absolute prohibition of administering substance according to Art. 136 a parapgraph 1 CCP.

> "*This cannot be said in general. I never got a feedback, blaming us to have treated a person in a dimension which lead to inability to talk to the judge. One the other hand, strong withdrawal symptoms which lead to incapability of interrogation are an infrequent phenomenon too. Usually the drugs are given to avoid withdrawal symptoms, to not let them slide into withdrawal symptoms*" (Doctor, Int. 19)

> "*I don´t remember any person leaving the impression of being unable to follow the hearing. I definitely had people with alcohol caused failure symptoms. Which seemed to be befogged. But none of these gave me the feeling of inability to communicate or interact*" (Judge, Int.17)

Even though an addicted person will obviously be in a better health status after receiving adequate medication than under withdrawal symptoms. However, still the ease of treating detainees with substances that will often be different from what they would take outside detention and the ignorance about the consequences is remarkable. The possibility that detainees feel forced to talk to the police to get these substances is also not recognized as a problem by the judges (as opposed to Art. 136a CCP).

> "*I have never been of the impression that people show up for the hearing being tranquilized. Some are decelerated, but not in a way that excludes the ability to speak or to follow the conversation. In that case I would interrupt the hearing*" (Judge, Int. 22)

> "*I cannot exclude this in every thinkable case. But I never had a person in a hearing who was in a status of incapability for the interrogation caused by drugs or alcohol*" (Judge, Int. 17)

> "*No. I definitely had people in various conditions. Angry, frustrated, depressed. Apathetic too. But none of them left a feeling of.... being … under withdrawal symptoms or any kind of intoxication*" (Judge, Int. 17)

2. LEGAL PRACTITIONERS - LAWYERS

Lawyers: defined according to the National Council of lawyers

2.1 Lawyers and litigation work

About the law on living conditions in pretrial detention, referring to one main concept idea of the present research project, all professions admit that there is a weak knowledge concerning its legal aspects:

> "*I have to admit, that is also a grey area for me*" (Public authority, Int. 13)

> "*In detention, many have a lawyer because they have been assigned one by the court to the process. But they often have no idea about pretrial detention law, just as little as the normal defense lawyer has little idea of the prison law*" (Professor, Int. 1)

The consequence of this lack of interest for legal protection in pretrial detention is an under-developed protection of prisoners´ rights:

> "*The experience of legal protection in remand prison is a disaster, it does not exist. If you really want to protect someone quickly, then it takes half a year or more. I used to think, if one had interim orders ... then it's quick but that's an illusion, it's nonsense. And mostly it does not work that way. I tend to work on a prison management level, talk to them, see what's there, sometimes clients tell different stories than the prison staff, that's often very different, and it just makes sense to start the conversation*" (Lawyer, Int. 2)

Altogether, the problem is systemic because the whole system is not promoting legal defense of prisoners´ rights, but rather inciting to informal negotiation processes between aggrieved parties and responsible authorities:

> "*I would not say that the conditions in remand prison are very good. But the prison will say first that a complaint to the court has little chance of success. You have to think, you are the prisoner. First of all, I don´t like something, but it can be very informal. And as a prisoner I have to think "what can I achieve?" The prison official tells me anyway "whether you complain or not, nothing will come of it", a large part is filtered away by this informal process. And it is said "it does not work". And if you want to know, then it goes to the next review level with the head of department. And before this complaint goes to court, the head of department will consider whether that complies with the pretrial detention law or not. The head officer also has no demand for writing many pages, and perhaps it is already settled there at the institutional level, if one sees that the prisoner is right. Otherwise, you go to the prison director, who is also a lawyer, who will also consider what the district court would do - or the district court, depending on the jurisdiction, and he has no interest that the appeal is successful. So much is filtered out by the law. And what's passed to the court does not have much chance of success*" (Judge, Int. 6)

As one can read in this interview, tiny chances of success and complexity of proceedings are reasons for few requests and weak legal protection. A reciprocal effect is the use of informal ways to deal with issues raised in detention. As long as they work "in the shadow of the law" and in fact lead to compliance of the prison administration, it would actually be a success of the law without making use of the courts. However, obviously, such a system relies on a number of existing court decision because otherwise the law will not develop any further. Success of the law would further require that the prison administration actually complies with the intention of the law and its material guarantees not just in a formal way sticking to the letter of the law in a way that withholds the prisoner what s/he really wants at the same time.

Even when informal ways of solving problems are effective for the prisoner, they remain a financial burden for lawyers:

> "*Especially with the informal solution is the problem, there is no compensation provided. Of course you have to weigh up what is still acceptable and what is affordable*" (Lawyer, Int. 14)

This could lead to reluctance in making use of these informal conversations beyond exceptional cases. Other lawyers share the same experience and practice refraining themselves to launch procedural demands:

> "*I rarely try for a court order*" (Lawyer, Int. 4)

> "*That's mostly ... I would not say informal, but mostly informal. And then, during the main trial, you can officially discuss the conditions of detention*" (Lawyer, Int. 5)

This means that some lawyers tend to use the cause of bad conditions of detention during the principal proceedings in front of the court, in order to reach a shorter prison sentence because of these conditions or to explain the difficulty to prepare the defence case under these conditions of detention. A number of decisions by the Federal Supreme Court confirms that conditions of pretrial detention can influence sentencing. Art. 51 para. 4 of the Criminal Code states: "For the purpose of crediting a fine against time in detention, or vice versa, one day of detention shall correspond to one daily unit. If a foreign sentence or time in detention is to be credited, the court shall determine the rate as it sees fit." The conclusion drawn is that disadvantages that the remand prisoner suffers from can influence the rate on which the time in detention is to be credited.[55] That only applies in cases in which the conditions differ from usual pretrial detention cases. Jurisdiction has assumed this in case of mental illness caused by the imprisonment[56] or the inability to communicate in any common language and the resulting social isolation.[57]

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55 BGH 16.11.2005, 2 StR 296/05.

56 BGH StV 1984, 151.

57 BGB 16.11.2005, 2 StR 296/05

Consequently, official cases are getting rare, which is confirmed by case-law analysis and by responsible authorities describing the situation:

> "*I have no complaint from prisoners against prison decisions violating prisoners´ rights*" (Judge, Int. 8)

> "*Little complaint, and I do not remember being overturned in anything*" (Prison manager, Int. 9)

To understand why litigation is so rare in this area, we also conducted a focus group with specialized lawyers, who are organized in a defense lawyers' organization. The focus group was a roundtable at one of the regular meetings. It was announced as a short training/information in the subject of litigation on conditions of pretrial detention. All the participants were active defense lawyers, many of them designated as "lawyer specialized in criminal law" ("Fachanwalt für Strafrecht"[58]), many of them are practicing in the field of prison law (convicted prisoners). The main arguments of the lawyers, which have been broadly debated but agreed upon by most, can be summarized as follows:

- Detainees in pretrial detention focus on different questions (especially: being released), so do defense lawyers.

- The main issue that is addressed by detainees is the contact with their family – an issue that usually falls under the law on conditions related to the grounds for pretrial detention (Art. 119 Code of Criminal Procedure). Other problems are, according to the lawyers, usually not addressed by detainees.

- Even experienced prisoners act differently when in pre-trial detention, they are more fatalistic than in prison, according to the lawyers. This may be due to their situation in pretrial detention, i.a. its conditions (often 23 hours inside their closed cell) resulting in a vicious circle.

- There is fear to question the seriousness of an appeal to end custody when fighting the conditions at the same time. The fear is that the judge would interpret a complaint regarding conditions as a statement that the detention as such is accepted.

- Conditions of detention that are connected to the criminal trial (like the use of a laptop in preparation of the main proceedings) are not fought out in a separate procedure on conditions, but usually in the course of the criminal trial. The defense lawyer will complain at

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As mentioned in WP2 under 3.2 a lawyer can be designated Fachanwalt für Strafrecht (lawyer specialised in criminal law). To obtain this status, advanced training courses in a minimal amount of 15 hours are to be completed every year.

the beginning of the main proceedings that his/her client could not prepare properly for the trial. This could lead to the identification of a considerable delay by the court resulting in the possibility of a reduction to the sentence.

- Conditions in pre-trial detention only refer to a comparatively short period of time. At least this is what usually detainees usually hope for as well as their lawyers. They never know how long it will last and hope that the end is near, which would render complaints about conditions useless. Cases would be closed without a material decision by the end of pre-trial detention. Due to the length of those procedures, most cases end without a substantial decision. Detainees and lawyers will usually not even try to push arguments for why they still have a legitimate interest in the proceedings even after the end of pretrial detention – because this is considered as having no prospect of success, at least not at the lower court instances. As consented, this would rather be a case for the Federal Constitutional Court and thus time-consuming work.

- There is no funding and the lawyer would feel bad taking extra money for something that is seemingly of mere momentary importance. Moreover, one never knows how long pretrial detention lasts and whether the efforts are in vain. Some detainees can expect to stay in pretrial detention for a longer time, e.g. if they stay after a conviction by the regional court ('Landgericht') waiting for a decision about their application for revision to the Federal Supreme Court ("Bundesgerichtshof"). However, lawyers pointed out that even in these cases, the decision will be there unannounced and sudden without any possibility to plan how long it will take.

- Pre-trial detention cases show up without warning for the lawyer because suddenly a person is arrested and needs immediate and usually intensive help. Pretrial detention cases require full commitment right from the start. The most important limiting element for what a lawyer is going to do is time. Since all the urgent needs take a big amount of time, there seems to be no time left to talk or act about the conditions in pre-trial detention. Lawyers would then rather invest their remaining time in another case, even one on prison law, than investing more time for the same client (without reasonable hope for success).

- For the detainees, there are more effective ways to fulfill their needs than contacting their lawyer and paying for his/her work. Access to a mobile phone can be reached easier, cheaper and more effective at the black market than by taking the legal road.

- Lawyers also give higher priority on conditions while the client is serving the sentence because prison usually lasts longer than pretrial detention and prison conditions after conviction also influence the likelihood of early release and the conditions of release.

- The court should assign an additional lawyer, a person different from the defence lawyer for questions of living conditions. That would probably be helpful. Lawyers expect though this proposal will be dismissed with reference to a corresponding duty of the defence lawyer to take care of these issues.

General policy of the Bar (and of unions of lawyers) on legal counsel for prisoners[59]

In Germany, as in many countries, some liberal professions as notaries or pharmacists are subjected to legal obligations regarding their duties, the maximal number of profession members, etc. Therefore, they are represented in official, institutionalised discussion with public authorities under an umbrella organisation (different from "private" unions purely defending the interests of the profession). As to lawyers, the official umbrella organisation is called *Bundesrechtsanwaltskammer* (BRAK) and deals with legal status, obligations and rights of the lawyer profession.[60] It has regional offices in all 16 federal states and all lawyers are members by law.[61]

As to private organisations representing lawyers, the biggest German lawyer union (*Deutscher Anwaltverein*, DAV) has around 65,000 members in 250 local groups.[62] It publishes legal texts around lawyer activities and edits a journal. It also organises vocational training and workshops through its own "academy".[63]

There is also a federal Association of penal lawyers,[64] representing many lawyers dealing with prisoners´ rights.

The Republican Lawyers Association (*Republikanischer Anwältinnen- und Anwälterverein*, RAV), member of the association "European Democratic Lawyers",[65] is also is worth mentioning . The RAV is co-author of the yearly report "On the situation of citizens and human rights in Germany" (*Grundrechtereport*)[66] – together among others with the NGO 'Committee for Fundamental Rights' (*Grundrechtekomitee*) mentioned above. Besides, there is a working group from the DAV on criminal

59 For German speakers, all documentations proposed by the umbrella organisation of lawyer https://www.brak.de/fuer-anwaelte/publikationen/

60 https://www.brak.de/

61 For instance in the city-state of Bremen https://www.rak-bremen.de/

62 https://anwaltverein.de/de/

63 https://www.anwaltakademie.de/

64 https://www.strafverteidigervereinigungen.org/index.htm

65 http://www.aeud.org/members/

66 http://www.grundrechte-report.de/2017/

issues,[67] as well as local and regional associations of penal lawyers who are active in this field, e.g. a joined group of penal lawyers in Low-Saxony together with those of the city of Bremen.[68]

This means that in bigger cities one finds often two lawyers´ associations and two groups of criminal law lawyers. Some practitioners are members in two associations, and lawyer associations and specialized lawyer groups work occasionally together as to vocational training and workshops.

General profile of lawyers active on litigation

There is no information available on what type of lawyer with which characteristics (age, gender, nationality, etc.) is active in defending pretrial prisoners. There are diverse opinions on how to describe the typical kind of lawyer that is active in this field:

> "*Many colleagues do that by saying, "ok, the client should shut up, I decide what's going on in the process, and I do not care about the rest – I will see trip off as much money as possible." But that's not my way*" (Lawyer, Int. 2)

Since mandatory lawyers receive fixed fees, notwithstanding how much time they spend on a case, some are not strongly committed to their client.

> "*Mandatory lawyers sometimes do not really work deep in the case, not very intense, a bit superficial. Maybe a private lawyer would work differently. Relatives tell me that mandatory lawyers do not have time, "you cannot get an appointment with him, he gets rid of you on the phone*." (NGO, Int. 10)

Besides the dichotomy "committed" versus "greedy for money", there is another one concerning the attitude towards law enforcement agencies:

> "*There are always lawyers like this and lawyers like that. There are those who are basically against the prison management, no matter what we do "the poor client who is innocent, we enslave him", but there are also a lot of lawyers who are cooperative and say "if there is a problem then let me know and I will talk to him"*" *(Prison manager, Int. 9)*

German lawyers, on local and regional initiative of bar associations, propose a 24/7 'Lawyer emergency service' (*Anwaltsnotdienst*).[69] Arrested, suspected or other persons can call there at any

67 https://www.ag-strafrecht.de

68 http://www.strafverteidiger-vnbs.de/index.php?id=3

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time to be legally assisted for the first hours of the encountered situation, before the calling person might decide to choose personally and directly a defense lawyer for his/her case. A deeper analysis of the lawyers working on a voluntary basis at these services could provide a better understanding of their profile.

Difficulty to change the mandatory lawyer

A good legal defense depends at one point on a good relationship between the client and the lawyer. Since each person ordered to pretrial detention has a right to a mandatory lawyer in case he/she doesn´t know any or can´t name any,[70] mandatory lawyers are designated by the detention judge:

> "*The way of designating a mandatory lawyer is a huge problem because people in the situation cannot think clearly and then say "I do not know anybody" and finished, instead of talking to the family two days later, talking to friends about it, and then it will be too late*" (Lawyer, Int. 7)

> "*The problem is, if the client knows no one, then he says "tell me about one, Mr. judge". Then the magistrate calls a "yes-sayer", "confession companion", "judgment mediator", and that is taken. And so much for the fair trial: it is hardly possible to change the lawyer if you have a mandatory lawyer*" (Lawyer, Int. 4)

"Yes-sayer" refers to a lawyer who won´t challenge decisions of the detention judge, of the prosecutor or the court during trial. There is consistent jurisprudence on this issue, so that detention judges are not obliged to choose a mandatory lawyer according to any predefined procedure (random, alphabetic, etc.…) but are free to choose a lawyer they like.

> "*The detention judge has free discretion and takes whoever he wants. That he then takes someone who he knows, you cannot blame him. The fact that he would choose one of which he knows he makes problems, you cannot really expect that. Judges are only human, and not necessarily better than others*" (Lawyer, Int. 16)

This illustrates also a common issue that arose from interviews: lawyers claim that it is difficult to work with judges and prosecutors since they have the well-reasoned impression that, due to sociological factors – among others the same law school background, magistrates build a consolidated front facing lawyers, notwithstanding that judges and prosecutors have different, separated powers that should be balanced and checked one from another.

For instance organised by the Frankfurt a.M bar association https://www.frankfurter-anwaltsverein.de/buergerservice/anwaltsnotdienst/

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§ 140 code of criminal procedure (StPO).

"*I have filed a bias request but it was rejected without further execution by the judge, although I had executed it on several pages. Moreover, he did not accept me, I have 20 days of proceedings without gaining any money for it, because he refused to designate me as mandatory lawyer. That's what the client wanted, but before that someone else had been selected and he was not removed. The client had refused him, but judges said "we don't care about this". "Compulsoty lawyer" it can be called*" (Lawyer, Int. 11)

Legal relief specialization

Some of the lawyers that have been interviewed, have accomplished a specialisation training (with exams) on criminal law and are thus entitled to wear the nomination "specialised lawyer for criminal law" (*Fachanwalt für Strafrecht*).[71] It is not compulsory have achieved this title it in order to defend a client at a trial. One factor might be the age of the lawyer, those graduating after its introduction in 1997 being automatically more influenced to pass it. However, even young(er) lawyers, very active in criminal cases, do not always see the added-value of this 'title'. Another factor, as observed during the present research, is the need of wearing it as an added-value to acquire clients.

2.2 How is litigation case work financed?

"*Of course, these are practically pro bono activities. I cannot tell the client "I do not care*" (Lawyer, Int. 5)

The 2013 reform of the lawyers´ fee regulation (*Rechtsanwaltsvergütungsgesetz, RVG*) had a rather positive impact on lawyers' capacities to overtake prisoners as clients within a mandatory defence procedure.

In a report related to the lawyers´ fee regulation impacted by this 2013 reform,[72] the first positive aspect was the increase of fee amounts. Throughout the section 4 RVG it was intended to improve both amounts and fixed fees for the mandatory lawyer.

Paragraph 1 of the preamble has been editorially amended to include a clarification that the basic fee is "in addition to the procedural fee". Legislators have always intended - unlike some comments in the literature - to charge the basic fee and the procedural fee at the same time, so that the basic fee is an

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This specialisation was introduced in 1997. Legal specialisation for lawyers covers all disciplines (e.g. civil, family, tax, labour law), introduced for the first time in 1936 for tax law, and generalised to more and more disciplines since 1986.

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Spezialreport „Die RVG-Reform" 2013, www.rvg-news.de, 2013.

additional fee and this never arises alone. The justification for this reform was following: A procedural fee already arises with the receipt of information - a first-time incorporation (= formation of the basic fee) in the case can only be done with the appropriate information.

On that basis, a good support should be guaranteed. At least the access to a qualified advisor is ensured. A good supply though is restricted by the question of financing. Any proceedings concerning the conditions and circumstances of detention are covered by the standing charge[73] related to the criminal law case. Additional charges can only arise in case of court hearings[74] or very few other matters causing a schedule fee.[75] In most cases no additional fees arise. A defence lawyer appointed by the defendant can compensate this by an individual payment agreement. But for the court-assigned lawyer (i.e. mandatory lawyer), any payment received by the client will shrink the claim that can be made to the state according to the law.

Court proceedings can in some cases be financed by legal aid out of *Prozesskostenhilfe* (PKH). The respective act is the Code of Civil Procedure (*Zivilprozessordnung*). While Section 120 para. 2 Federal Prison Act explicitly holds the regulations on legal aid as stated in the Code of Civil Procedure to be applicable to cases of prison litigation, there is no similar rule in the law on pretrial detention. The Code of Civil Procedure is not applicable to other branches of law without such a reference and there is also no reasoning, neither in literature nor in jurisprudence, for applying it to cases of pretrial detention by supplementary interpretation.

The situation is different when it comes to extraordinary remedy. The extraordinary remedy of a constitutional complaint (*Verfassungsbeschwerde*) is designed to monitor possible infringements of fundamental rights. Since extraordinary remedy requires a final court decision, this financing option appears on a quite late point. Even if legal aid for court proceedings (*Prozesskostenhilfe*) may be granted in this procedure, due to the jurisprudence of the Federal Constitutional Court, the hurdles are high.[76] Because of the fact that the procedure is free of charge and being represented by a lawyer is not mandatory, only good prospects for the case and a good reason for the client needing assistance will lead to approval.[77]

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73 Nr. 4107 VV Lawyer´s Remuneration Act, http://www.gesetze-im-internet.de/englisch_rvg/index.html

74 Nr. 4105 VV Lawyer´s Remuneration Act, http://www.gesetze-im-internet.de/englisch_rvg/index.html

75 Enders, L. II. Strafsachen, marginal no. 27 ff.

76 BVerfGE 1, 109, 110f; BVerfGE 27, 57.

77 Beschluss vom 09.07.2010 2 BvR 2258/09.

One of the claims made by the German bar association "*Strafverteidigervereinigungen*" in their policy paper "*Neuordnung der Pflichtverteidigerbeiordnung*" is to secure financing of all proceedings depending to the crime case (see under 2.1).

The costs of a court proceeding depending on pretrial detention are in most cases to be carried by the litigant. Even if no court fees arise and the representation by a lawyer is not mandatory, the prospects of success may depend on legal representation. As shown in some of the interviews, even through preliminary proceedings a decision to appeal was not possible without the help of a lawyer.

Those implementations lead to the conclusion that the costs of legal procedures and judicial protection are, apart from a few exceptions, to by carried by the litigant.

As many lawyers – and above them lawyer associations – stated, remuneration of legal aid as a mandatory lawyer is not satisfying. Even if there is the possibility to obtain a further fee – called flat fee (*Pauschgebühr*),[78] it doesn't solve this financial problem.

> "*If you mean the mandatory lawyer fees: for custody with surcharge it´s 192 €, for preparing it´s a procedural fee of 161 €. For a longer lasting pretrial detention that is actually too little. There is of course the flat fee, it must be a huge case. I admit, I have not tried this for ages, because that's a bit complicated ... but I admit, you might have to do that. If you do not do that ...*" (Lawyer, Int. 16)

A consequence of this budgetary constraint is that relatively few lawyers tend to take over cases of insolvent clients:

> "*This law firm is well-paid for doing business, but they have a heart for people who cannot pay and do things without pay or only with compulsory fees. But that's the exception that good lawyers do that too*" (Professor, Int. 1)

When doing so, lawyers are aware that they won´t work for a living on these cases:

> *"Such a duty defense in the 63rd area [= forensic] means a hearing once a year and is paid through the mandatory defense fees. What you do during the year - meetings, phone calls, letters, which is not paid. You get around 600 euros or so, but there is already the value-added tax in it, and there is not more"* (Lawyer, Int. 2)

Generally, literature and research come to a similar conclusion:

78 § 51 Lawyers´ fee regulation (RVG).

> "*It is not satisfactorily remunerated at all. The fee regulations for mandatory defense are terrible. If you measure that in the work you have, in hours, in responsibility, the burden that comes with it, that is not adequately remunerated*" (Lawyer, Int. 5)

Consequently, legal defense of insolvent clients suffers of this dysfunction:

> "*Sure, if you measure that at the public defender's fees, you have no time for it, it is not with gassed. Of course, it would be much more encouraged if the conditions of the mandatory defense would be better*" (Lawyer, Int. 7)

Still, there are few other justice professionals considering, to the contrary, that lawyers earn well and can´t complain:

> "*Process fees are sometimes quite high, it is good money for lawyers*" (Judge, Int. 8)

One lawyer is also keen on accepting the current lawyer fee system:

> "*Compensation for mandatory lawyers is now appropriate. Many colleagues will contradict me. It is also the question, "What do you have for an apparatus behind you? What costs do you have in the office? ", And there are certainly some who have such an apparatus and costs that turn it to be not enough*" (Lawyer, Int. 11)

From observing, comparing and analysing several lawyer firms, the present consideration of "appropriate fees" is due to the fact that this lawyer has varied his defense activities, being able to find a profitable financial balance between few mandatory clients and many private ones.
As disclosed during an interview:

> *"We have a mixed calculation throughout the law firm. We know that I cannot earn so much money with prison, but no one looks so closely at my gains because I'm present in the prison and asked if a client is looking for a lawyer" (Lawyer, Int. 14)*

The same person indicates some extra-financial sources, many practitioners have drawn a similar picture of these proceedings:

> "*There is also the possibility to make a request to receive flat fees, higher fees. But the cost of such applications, and the risk of being rejected, are too high, so I do not do it. The number of lever arch files you would have to work through already exceeds what could come out of it*" (Lawyer, Int. 14)

2.3 Access of lawyers to their clients

In general, all interviewees consider access of lawyers to their clients as unproblematic.

> "*Over the past 5-6 years, this has improved in terms of access to the client in prison or police detention, allowing them to talk in a quiet manner in a reasonably decent atmosphere. Access to clients is no problem at all*" (Lawyer, Int. 11)

However, there is a need to differentiate between access to police custody and remand prison.

2.3.1 Access of lawyers in police custody

Situations seem to differ either if a person has already a known and mandated lawyer who shall be/is informed of the police custody, or if a lawyer is trying to contact/visit the arrested person after being informed by relatives, friends or via the emergency service.

> "*As a result, the legal protection in police custody is not respected, it just doesn´t exist. It is often the case that my clients report that they have unsuccessfully requested several times to call the lawyers and make contact. I have actually experienced that I have been waiting in the big room outside and heard from the cell someone who has repeatedly said "I want to speak to a lawyer, I want to speak a lawyer," that was ignored. Then, in other cases, I rely on hearsay, but they are clients whom I believe that they are telling me the truth*" (Lawyer, Int. 14)

> "*The person´s rights read by the police are as we know for a long time: not complete and wrong. There are also things in this respect that have nothing to do in this - a police officer here had always talked about the "fucking lawyer", but these are the little things*" (Lawyer, Int. 4)

As a consequence, and surely because police custody is quite short compared to pretrial detention, to the question how often lawyers come to see their clients, the head of police detention in a big German city[79] answered:

> "*Very rare. I am here for 6 years and I do not know any current case where a lawyer took care of his client. If so, when the criminal investigation police is interrogating the client, and that's 1-2 cases a year, a homicide for example. Otherwise, arrested persons usually stay here only 3-4 hours in general, no longer, even if we have up to 48 hours according to the Code of Criminal Procedure to keep the person here. But the detention judge decides "I don´t need to do anything today, I can do that tomorrow", depending on when he has time for us*" (Head of police detention, Int. 3)

79 Between 400 000 and 600 000 inhabitants.

Taking these elements into account, one explanation of the absence of lawyers during police detention is due to a significant disinterest - and as such professional misbehavior – of police officers towards lawyer´s presence during police custody.

> "*The client is instructed, he can call a lawyer, then he says "yes, I want to consult a lawyer" and calls my phone number and says - it is stated in the interrogation protocol - "I call my lawyer and he rips your ass", But he does not reach me. And then he says something and then the police continue to ask, and he keeps talking, and still wants to talk to his lawyer on seven pages of protocol*" (Lawyer, Int. 4)

Another one is due to a lack of cooperation, even once the lawyer is present in the police detention:

> "*It is often impossible to get inside police custody, because you have to be in a very massive presence in terms of time and resources to really see someone in police custody. I often find myself struggling to run after and that people are getting laid off and that I'm meeting them outside the door instead of in police custody.*
>
> *That's a whole clear hold-up tactic. The time you sit in the entrance area, waiting for a officer to come and talk to you, is often left sitting three quarters of an hour. Then perhaps a officer comes "oh, he is just for the identification service treatment, I'm sorry, I just do not find him, now he is just for hearing" and I say "yes, that's why I'm here to prevent that," but "yes, I'm sorry, I cannot disturb my colleague". Really so often that I cannot prevent it anymore*" (Lawyer, Int. 14)

Overall, there is a systemic problem in German police custody where legal protection and access of lawyers to their clients is not guaranteed. This was also shown above by using the example of the G20 protests.

2.3.2 Access to lawyers in prison

From empirical research and literature analysis, it seems that lawyers encounter difficulties to access their clients in pretrial detention.

> "*Here it has become much better*" (Lawyer, Int. 5)

> "*I cannot complain about prisons, so I have no problem, but I've been here for so long that they know me. There are more problems with new staff at the prison entrance, who say "who are you?" That's a grown trust*" (Lawyer, Int. 2)

> "*No problem at all. As long they don't have access to the telephone system, they can ask to use the staffs phone. In a moderate way. Or the social workers phone. But usually they have seen their lawyer during the hearing at court and know when to expect his visit*" (Prison director, Int. 21)

3. LEGAL PRACTITIONERS - NGOs (e.g. NGOs / Human Rights organisations / Legal Clinics/ Universities / monitoring bodies that provide legal advice and/or may start litigation)

1. Description of dedicated networks

3.1.1. Association for legal advice in the prisons of the Bremen Region (*Verein für Rechtshilfe im Justizvollzug des Landes Bremen e.V.*)

The Association was originally born out of a project within the framework of the University's Priority Program. After the end of the project, some participants decided to continue working as a non-profit organization. The members of the association now come without exception as students for legal advice; however, some remain associated with the association for many years, often as lawyers, and still offer legal advice. As part of the Bremen lawyers training, courses are regularly offered on the topic of introduction to legal advice in prison.

Unlike attorneys who can let their clients come to the office, legal advice takes place in the middle of the facilities, and thus directly with prisoners: in an office or common room or in an empty cell. It is important that the prisoners can freely come to the legal advice and also do not have the feeling that the officials "book" or register who can be consulted and when. The legal advice accordingly takes place at times when the cell doors are usually open. Thus, nobody has to be locked in by uniformed officer for getting advice.

The subjects of legal advice are varied. Often it is about conflicts with the outside world (with creditors, landlords, immigration offices, etc.), with criminal justice (new procedures, probation, total sentences, etc.) or in the penal system itself (prison leaves, questions related to work, disciplinary measures, etc.) as well as questions of early release.

In recent years, because of the considerable increase of the proportion of foreigners in the Bremen prison, questions relating to asylum applications, imminent deportation etc. have been added. Problems from social assistance and family law are also increasing.

In many cases, the legal advisers are also confronted with general problems that only marginally or not at all affect the law, but with which the prisoners feel left alone in prison. Often it helps in this situation that an outsider from outside takes the time to listen to these problems.

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As guidelines, the Bremen NGO has drafted "The 10 Commandments of Legal Advice" with following rules and explanations for their members and third parties:

1. Independence (from detention)

◦ The legal advice, as well as the legal-political association activity of the association are independent despite the official order.

2. Volunteering (free)

◦ We offer our consulting services honorary and therefore free of charge. This objective is anchored in § 2 of the statute of the association and fixed principle of our association for now more than 30 years.

3. Self-determination (We are not bound by instructions of our clients)

◦ We act self-determined and are not bound by instructions of those seeking advice.

4. Uninhibitedness (towards prisoners)

Unprejudiced prisoners are an integral part of our advice.

◦ The approach supported is that stories of prisoners are always heard impartially from the point of view of law enforcement situation, and then the knowledge of legal decision criteria involve to find a solution to the problem below.

◦ The members of our association expressly declare their willingness to join the association.
◦ The prisoners are thus not defined by us according to the deeds you are accused of. Instead, prisoners in the counselling are seen by us as human beings and bearers of rights.
◦ After the convicted acts, you will only be asked by us if it is indispensable for further support.

5. Help for self-help (as a preference to do everything yourself)

Our only difference from purely legal counselling is that more time is usually available for a conversation, which is less restricted by the need to handle certain legal issues.

◦ Therefore, the conversation can usually take its starting point in the story of the prisoner or the prisoner. Legislation can be explained in its relevance as well as relativity. This is more help to help themselves, as the prisoners to take their conflicts out of hand.

6. Sustainability (not speed)

◦ One goal of legal advice is sustainability. Problems of the prisoners should be solved best in relation to the individual case.

◦ For this, our club members take sufficient time and offer regular office hours in the institutions.

◦ Basically, therefore, not the speed is in the foreground, but a lasting improvement or solution of the situation or the problem.

7. Continuity (preferably no permanent change of person)

The legal advice takes place biweekly or on a weekly basis. A note with the next consultation dates of the respective month is posted in the respective institutions.

◦ Thus, the prisoners have the opportunity to know when we come and if necessary you can write down your name on this note.

◦ However, a registration is basically not necessary! Spontaneous requests are always given attention and try to help.

8. Cooperation (with lawyer) ◦ We help to contact the lawyers of the counseling (cooperation).

9. Loyalty (opposite the project)

◦ By joining the association, our members declare their loyalty to the principles and objectives of our association.

10. Free access (the prisoner for legal advice)

◦ Our legal advice takes place directly in the respective institution. In order for the prisoners to have free access to legal advice, this takes place at times when the cell doors are usually open. The aim is thus to prevent the prisoners from contacting us only with the help of law enforcement officials.

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3.1.2 The NGO "Prison Archive" (*Strafvollzugsarchiv*)

This organisation has started in the 1970s at the University of Bremen (North of Germany) with the objective of documenting and explaining prisoners' rights and prison laws. Led by Professor Johannes Feest over the last decade, it is now also active in the legal field since 2011 at the University of Dortmund under the direction of Professor Christine Graebsch (who is also a lawyer). Beyond that, students go to the prisons in Bremen every week and give legal advice to prisoners. There are also between 600 and 800 prisoners who write every year to the Prison Archive. Professor Feest with his legal comments on prison law and Professor Graebsch with her articles on prison remedies - among others - have strongly influenced the perception and the knowledge about prison legal issues, and certainly contributed to a stronger protection of prisoners' rights than it would have been without their contribution to the NGO Prison Archive.

3.1.3 Some other legal assistance players

Besides both country-wide acknowledged NGO discussed above, one major association publishes a book on prison litigation. It costs only 1.65 € (postal charge) for prisoners, addresses all aspects of prison life and provides technical hints how to defend one-own rights. It is also free available online.[80] But this book "Wege durch den Knast" (ways through prison) is already forbidden in the majority of prisons.

Some other local organisations are involved to a different extent into providing legal counselling - only in exceptional cases to prisoners. Although it was not possible to analyse each of them in the framework of this project, they shall be mentioned to illustrate the potential diversity of this field in Germany:

- European Network of Clinical Legal Education[81]

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http://www.wegedurchdenknast.de/ unfortunately, no interview was managed for the project purpose.

81

- Union of student legal counsellors[82]

- Another student organisation[83]

2. How is litigation work financed?

Although it´s not directly litigation, the Bremen Association for legal advice receives sometime contribution from the Justice administration, for example when a court decision sentences to a one-time penalty of 20,000 € to close a criminal case instead of continuing the procedure. The Bremen association has been registered on the list for such "donation" since the obliged payer might choose whom will benefit his/her penalty money. Another way is illustrated by a current proceeding within which 25 € per month from a criminal case are transferred to the Association. Otherwise, the Bremen NGO has no costs, only occasionally for interpreters, and its own contribution is made through an active participation in legal advice.

4. PRISONERS AS LITIGANTS

There is no available information on this issue. Since a legal reform guaranteed a lawyer to all pretrial prisoners (mandatory or private one), cases of prisoners as litigants might have strongly decreased. From the current findings of the present research – litigation against conditions of detention is seldom in pretrial detention, and since many practitioners mainly focus on, deal with and remember of criminal trials and sentenced prisoners, and from the current practice toward prisoners' complaints in Germany, pretrial prisoners as litigants may not be numerous.

> "*There are prisoners who write themselves, there are prisoners - these are the most - who complain to their lawyer, some things can also be clarified, and in some things I say "turn to the court, I´m happy to write an opinion, then the court should decide ... "- but so far as I said, we have really little complaints here, and I can spontaneously remember no decision*" (Prison manager, Int. 9)

1. Access to legal information

The German legal system is very formalized in terms of procedure and comprehensive with respect to legal information at disposal. One major obstacle to legal information is that contemporary access to

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82 www.encle.org

83 http://b-s-r-b.de/

https://lawandlegal.de/

most documents is digital (versus paper-based) and requires technology devices and knowledge as internet use.[84]

Internet-supporting devices are currently not authorised in detention places, and research and observations show that paper-based legal information is deficient in many detention places.

> "*We are obliged to provide law texts to prisoners, but do not hand them over, because the demand is not there*" (Prison manager, Int. 9)

> "*We have a leaflet on the rights and obligations of remand prisoners, in all possible languages, but is outdated - needs updating and is not yet finalized, so no copy is now available. And that's difficult, because when you think you're done, then something changes, and that's also stuff you do by the way*" (Prison manager, Int. 9)

It is thus no surprising to hear from concerned persons, i.e. prisoners themselves, that (legal) information is deficient in detention.

> "*I was in pretrial detention in X. That was heavy. For different reasons. People in pretrial detention usually are not well informed. But I was. I have been in prison before and I have been in X before. I tried to enforce my rights through written applications, like you are supposed to do. I didn´t get access to laundry in the way it was supposed to be, received newspapers one week delayed, didn´t get a new soap bar when needed. All these issues were in my written applications. But nothing changed. Asking for an answer lead to the information that my request was nowhere to be found. I started sending my requests to my lawyer which send them via fax. The result was the same*" (Prisoner, Int. 26)

In this precise case, the prison management had said that they never received any application by this prisoner. The prison management continued to claim not having received the application, although the prisoner´s lawyer was able to prove it since she had sent the applications by fax. This situation seems to be a typical case, which explains why only few applications are made since it takes time and energy to proceed them through the prison administration.

Legal information on some socio-economical aspects as HIV-issues, i.e. medical rights, is broadly available for prisoners.[85] Although these brochures are not primarily addressing litigation at such, they enable a better understanding of prisoners´ rights and thus enhance their agency to speak for their rights.

4.3 Organisational and practical issues related to legal aid

84 See on the MoJ website https://broschueren.justiz.nrw/

85 E.g. https://www.aidshilfe.de/shop/substitution-haft-2018

Formalities for filing a claim for legal aid

Formalities to access to rights in criminal proceedings are complex and usually not manageable for citizens without legal education background. Interviewees point out that in the first form addressed to arrested persons – a list of their rights -, vocabulary and syntax are not accessible for common people.[86]

> "[With respect to] *counselling aid [Beratungshilfe] the effort to get paid consultation assistance is twice as much as the cost for the consultants themselves. I have to fill in forms, the client must fill in the form, I have to file an application and finally get 30 euros for the whole application*" (Lawyer, Int. 11)

Furthermore, legal forms are usually complicated to understand for anyone. Public authorities are willing to use plain language ("*einfache Sprache*" in Germany),[87] but it is rarely implemented.

> "*The administrative language is quite interesting. You need to explain with simple words again "watch out, that's in there, you may have a lawyer, you may use the telephone, this and that," that helps. But you can tell that: if you hand over the note and he looks a bit ... then it's just like that, you have to talk to him*" (Head of police detention, Int. 3)

> "*The power of such a form is questionable because people are very upset, in bad shape, sometimes cognitively not the brightest people, a few cannot read or write properly. So the whole kaleidoscope of society, of course, at the bottom of society. Therefore, the next question is if they always understand what is in there. Sometimes I get the impression that they do not really understand that*" (Judge, Int. 6)

In general, prisoners are often left alone with forms, even by their own lawyers.

> "*I explain my clients [families of prisoners] that they can apply for legal aid regarding civil proceedings.*[88] *I sometimes have clients who have been with the lawyer but have not*

86 See (on the MoJ website) these forms listing rights of arrested and suspected persons in different languages: http://www.bmjv.de/SiteGlobals/Forms/Suche/Belehrungsformularesuche_Formular.html?gtp=6697702_list%253D2&resultsPerPage=25

87 https://en.wikipedia.org/wiki/Plain_language

88 See a leaflet (on the MoJ website) on legal assistance (BUT not legal defense) and legal aid regarding civil proceedings https://www.bmjv.de/SharedDocs/Publikationen/DE/Beratungs_PKH.html

> *completed the application with him. Then they come to me and say, "How do I fill out this application?". Actually, the lawyer can do that as well, but I do it and then they go back to the lawyer with the completed application. And to complete such a form is not easy. I have had three such cases in the last year. Here you can advise the client to change the lawyer. It's actually a five-minute business for the lawyer, but our clients cannot do it. And many clients were with the lawyer and were not advised that they are eligible for legal aid regarding civil proceedings*" (NGO, Int. 10)

This leads to the conclusion that existing formalities for filling a claim for legal aid are not practically feasible for pretrial prisoners.

Organisation of financial aid for litigation and its concrete implementation

4.4 Prisoners belonging to various minorities, under-represented or isolated groups within prisons or Prisoners facing special security measures, particular disciplinary sanctions, restrictions or isolation

There is not available information on these issues.

4.5 Organisation of remedies inside prison facilities among prisoners

Prisoners are not allowed to go to court in the name of another prisoner. Thus 'jailhouse lawyers' are not an official institution. Prisoners are also not allowed to represent a collective in court. Recently, a self-organized 'trade union' of prisoners (not acknowledged as a trade union by authorities and courts) was denied access to the courts for the purpose of representing a collective complaint.

5. ACCESS TO THE INTERNET/DIGITAL TOOLS FOR PRISONERS

There is no available information on this issue concerning remand prisoners. Digital devices and access to internet are almost impossible to get in pretrial detention, refused either by the detention judge or the prison authorities.

6. CONCLUSION

There is a common narrative within our interviewees pointing out the pragmatic tendency of engaging negotiation versus processing litigation.

> "*But in principle I have little to do with such complaints where I have to file applications because I always try to clarify things differently. Of course I can sit down and write a letter but that does not help*" (Lawyer, Int. 2)

> "*It's totally rare, and I think because someone in custody does not pretend to stay there longer. First of all, you have the hope to get out of it very quickly, and that's the goal, where everything is focused. And someone who has this goal is interested in all these little quotes. He thinks it's bad anyway - and it's bad, and these things do not play a big role, unlike when they're in custody*" (Lawyer, Int. 7)

It seems to be that at the beginning of pretrial detention, pretrial prisoners think (and hope) that they will be soon released, and later they think that they will be soon sentenced prisoners, so that pretrial detention is rarely considered to last long. But probably this refers even more to the thinking of the lawyers themselves, as described above.

> "*For educative reasons we could set a fee scale where it says that everything that happens during the execution of the detention is paid. There is not only a recognition amount, but it is under 500 euros nothing to do. However, it assumes in advance that the legislature wants to discipline the prison, so that it adheres to the rules. It would lead, which would be welcome, that less detention would be ordered*" (Lawyer, Int. 4)

There are contrary opinions fearing that systemic legal aid will explode justice budget without being very effective:

> "*But if every claim is taken up by a lawyer ... if he works for it, it is his right to get paid for it, without question. However, is this my concern, that the whole thing will be lucrative ... if it's a justified complaint, of course, yes. But when I see how many complaints you get when you're new to the job, because prisoners try everything out, "what can I achieve, what kind of governor is that," you get tested. When there is a legal case in which you think "it's exciting, it's not very clear, I interpret it that way but you can also interpret it differently" ok. But there are many things [that are not relevant]*" (Prison manager, Int. 9)

One finding from the empirical research – both, based on literature, jurisprudence and based on interviews - is that almost no case of judicial protection from prisoners in pretrial detention has been found. The research question was thus extended by this finding to the reasons for the non-existence of these criminal cases:

Several regulatory hindrance strategies that reduce access to legal support

1. A major problem with legal protection is that there is no / late presentation of the case to the detention judge
2. Intoxicated arrested persons are not brought before the detention judge
3. Detention judges are the same as the court in principal proceedings starting from the point in time when charges are pressed – this could possibly lead to a deterrence aspect with respect to the fear of detainees that complaints about conditions
4. Award of funds
6. Fragmentation of the legal protection under §119 and §119a code of criminal procedure

7. Delegation of decisions to public prosecutors and prison directors
8. Police detention apparently unimportant, but grasping for criminal charges
9. Remand detention also seemingly unimportant, but in practice a high threshold for legal protection

As Professor Feest already pointed out in 2009 before the Saxony Regional Parliament within public hearings related to the draft Law on Remand prison,[89] there is still a need for a remand prison Ombudsman in order to compensate the current weakness regarding the rights of remand prisoners. There is unfortunately only one Ombudsman dedicated to prisons in general, which was installed on the 1st of January 2011 in the Region of North Rhine-Westphalia.[90] Unfortunately, although the work of the Ombudsman was considered unanimously as important and necessary, the regional Ministry of Justice has decided that yearly activity reports are not public and published online anymore.[91] This political decision obviously does not contribute to an improved, strengthened public protection of prisoners by society.

> "*So a total balance sheet from a distance - because I have not been confronted with the problem so far ... I know that I do not know much ... I have no evidence that the detention would be characterized by a dramaturgical design and a tougher disciplinary system and disciplinary measures ... so that the pretrial prison, whether as to legal or as to practical issues, would be more unpleasant, I cannot say. One shall rather ask the practitioners*" (Public authority, Int. 13)

> "*Sometimes I realize that the lawyers are not very active in this area. One aspect is time. And if so, then they say "ok, I'll give up the next client if you give me 3000 €, so I'll take care of it"... The money*" (Judge, Int. 6)

89

27th of April 2009, Protokoll der 51. Sitzung des Verfassungs-, Rechts- und Europaausschusses des Sächsischen Landtages.

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http://www.justizvollzugsbeauftragter.nrw.de/index.php

91

This by-law modification has been made in 2017 (which is not indicated on the Ombudsman website): http://www.justizvollzugsbeauftragter.nrw.de/infos/Rechtliche_Grundlagen/AV_vom_13_12_2010/index.php

❖ Recommendations / proposals

The following recommendations are issued from the empirical research and are supported by practitioners.

Recommendation 1:

Create the status and/or the function and/or the activity of a detention lawyer

> "*Ideally, it would be like having a colleague on the side who is, as it were, attached to the design of the conditions of detention, who could alone take care for this point. Because the more extensive the procedures become, and when these problems are added to detention, this detracts from the actual activity*" (Lawyer, Int. 5)

Recommendation 2:

Enable clients to choose their own mandatory lawyer shortly after having received one designated by the detention judge

> "*There would be the possibility to limit the assignment [of a designated mandatory lawyer] only to the time of the arrest warrant, and this does not automatically mean that you will never get rid of him*" (Lawyer, Int. 7)
>
> "*What could be changed is that you tell people how to get rid of a mandatory lawyer, or that they cannot get rid of him by saying "I do not want him anymore." Few people know that is the case. I admit that such an instruction would not be so easy to formulate*" (Lawyer, Int.16)

Recommendation 3:

Integrate pretrial detention into the broader legal procedure system of prison litigation

> "*You could easily include the remand prison in the rules for the judicial decisions under article 109 Prison Act, I do not really see why that would not be possible, why that would not fit structurally. That would be a help, you would have established procedures in established courts that deal with it, and not such an exceptional right. Because I do not want to know what a judge at the district court says about a complaint to remand prison, he probably does not know what to do with it*" (Lawyer, Int. 14)

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