

To detain or not to detain – judicial decision-making in the pre-trial phase: The case of Germany*

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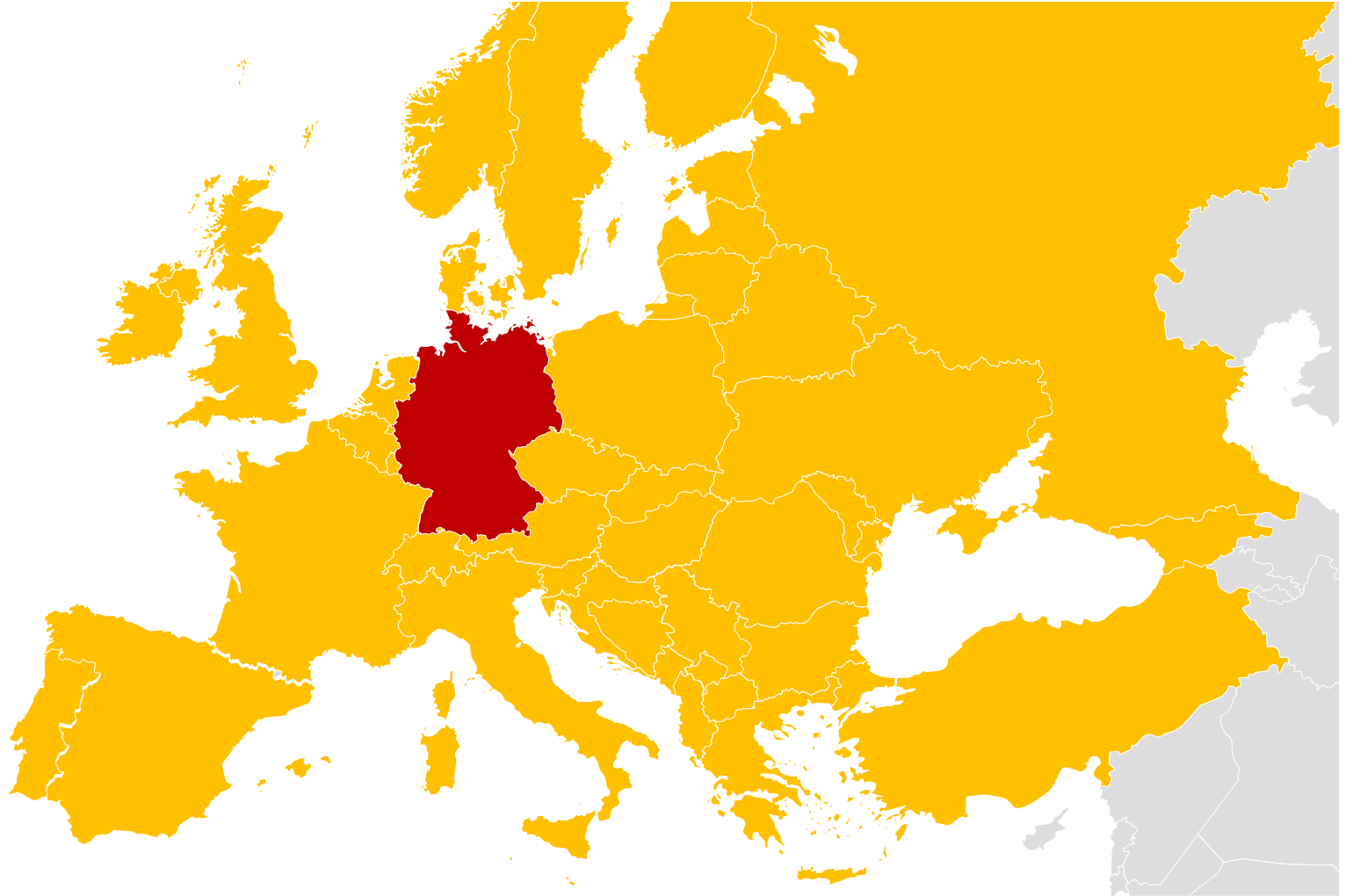
* DETOUR (PRE-TRIAL DETENTION AS ULTIMA RATIO) – WWW.IRKS:AT/DETOUR
WITH THE FINANCIAL SUPPORT OF THE EUROPEAN COMMISSION, JUSTICE PROGRAMME 2014

Research Projects: The German DETOUR study

(Pre-Trial **DETentiOn** as **Ultima Ratio**)

Mixed methods:

- Desk-top research (legislation, policy, jurisprudence, **statistics**, literature review)
- Exploratory empirical research by studying (a few) files and by observing PTD hearings
- **31 semi-structured interviews**, incl. a „case vignette“ with judges (11), public prosecutors (8) and defense lawyers (9) and prison officials (3) in different German regions



Research Background

Legal-theoretical: Human Rights

- European Convention on Human Rights; jurisprudence of the ECtHR
- Germany: Constitutional Fundamental Rights, statutory legislation, jurisprudence of the Federal Constitutional Court
- Presumption for liberty before and during trial; PTD detention as ultima ratio
- What ratio (= purpose)? secure an orderly procedure with a fair result; prevention of further offences
- Proportionate measures
- No anticipation of punishment (presumption of innocence; respect for the Rule of Law / Rechtsstaatsprinzip)

ARTICLE 3
Prohibition of torture
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 6
Right to a fair trial

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

ARTICLE 5
Right to liberty and security
1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Grundgesetz für die Bundesrepublik Deutschland
Art 104

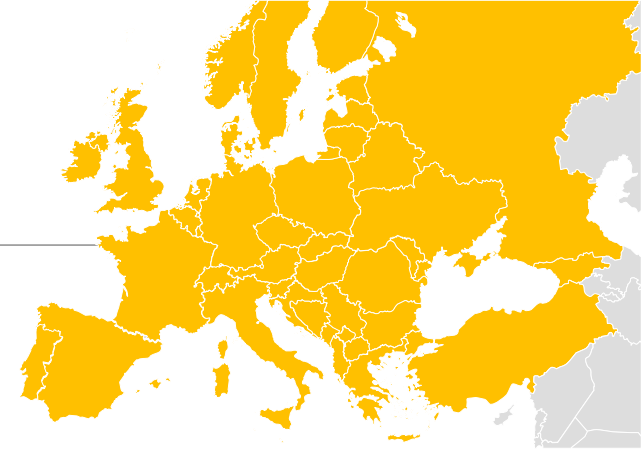
(1) Die Freiheit der Person kann nur auf Grund eines förmlichen Gesetzes und nur unter Beachtung der darin vorgeschriebenen Formen beschränkt werden. Festgehaltene Personen dürfen weder seelisch noch körperlich mißhandelt werden.

(2) Über die Zulässigkeit und Fortdauer einer Freiheitsentziehung hat nur der Richter zu entscheiden. Bei jeder nicht auf richterlicher Anordnung beruhenden Freiheitsentziehung ist unverzüglich eine richterliche Entscheidung herbeizuführen. Die Polizei darf aus eigener Machtvollkommenheit niemanden länger als bis zum Ende des Tages nach dem Ergreifen in eigenem Gewahrsam halten. Das Nähere ist gesetzlich zu regeln.

(3) Jeder wegen des Verdachtes einer strafbaren Handlung vorläufig Festgenommene ist spätestens am Tage nach der Festnahme dem Richter vorzuführen, der ihm die Gründe der Festnahme mitzuteilen, ihn zu vernehmen und ihm Gelegenheit zu Einwendungen zu geben hat. Der Richter hat unverzüglich entweder einen mit Gründen versehenen schriftlichen Haftbefehl zu erlassen oder die Freilassung anzuordnen.

(4) Von jeder richterlichen Entscheidung über die Anordnung oder Fortdauer einer Freiheitsentziehung ist unverzüglich ein Angehöriger des Festgehaltenen oder eine Person seines Vertrauens zu benachrichtigen.

Research Background

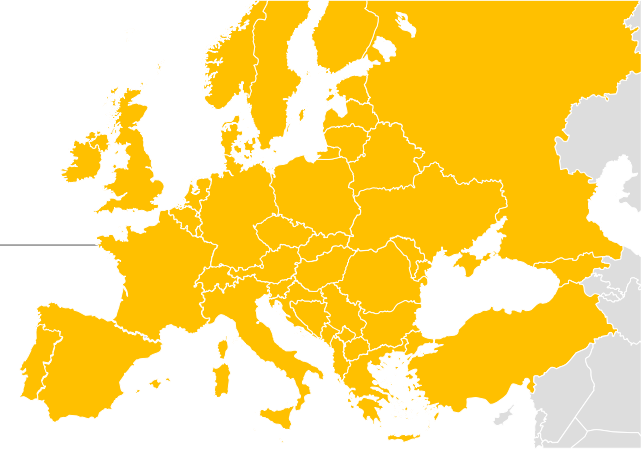


Socio-legal, socio-psychological, criminological: Legitimacy and (Procedural) Fairness

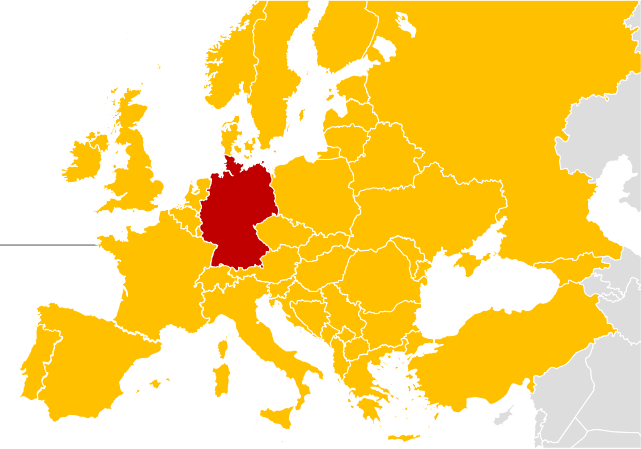
- Procedural Justice Theory (Tyler 1990/2006)
- Legitimacy /trust of the CJS
- „The process is the punishment“ (Feeley 1979), „Court Room Work Group“ (Eisenstein/Jacob 1977)
- „Conflicts as property“ (Christie 1977)

Research Questions

- PTD must be a means of last resort – is it?
- How does the law seek to implement this principle?
- (How) Do legal practitioners implement this principle?
- What is the role of ‘alternatives’ to PTD?
- European and comparative aspects (cross-border co-operation etc.)

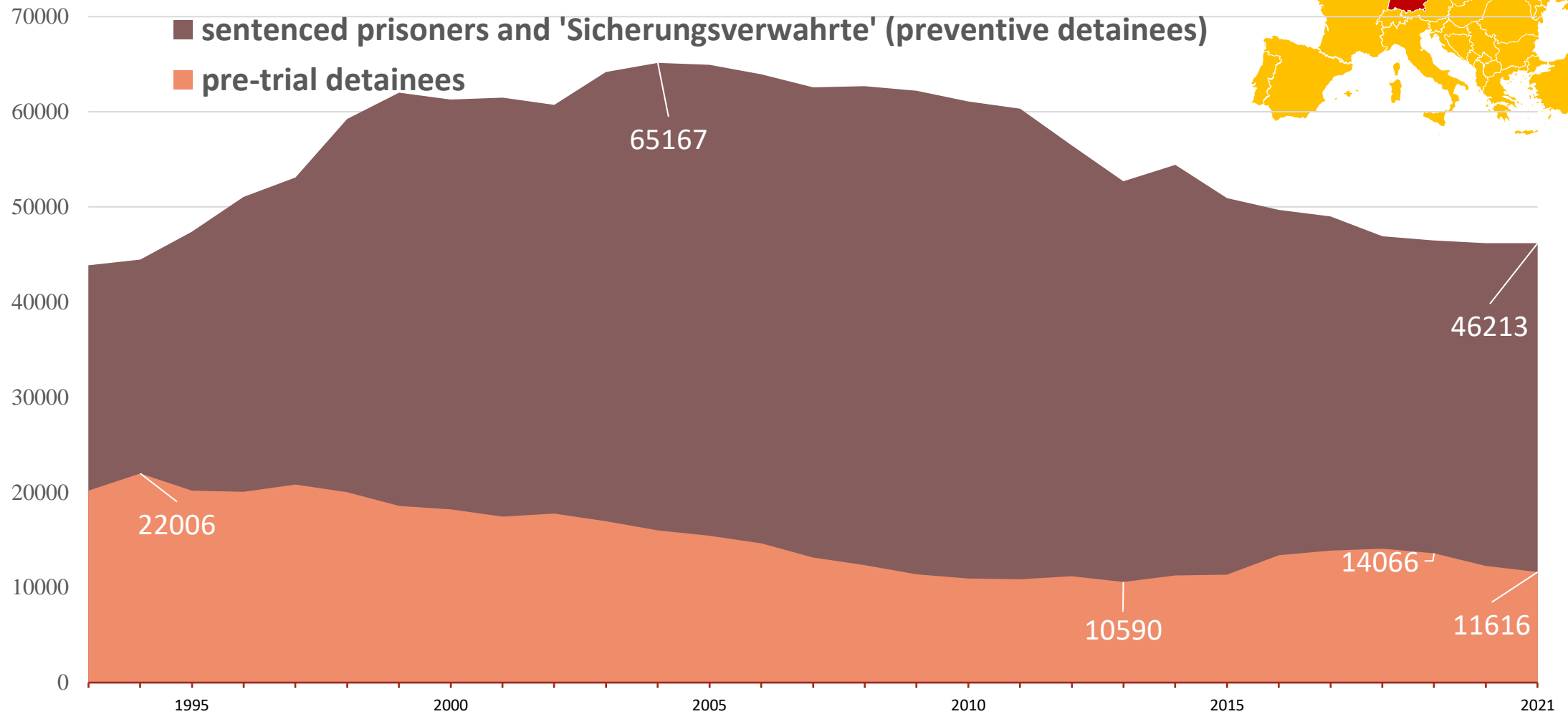
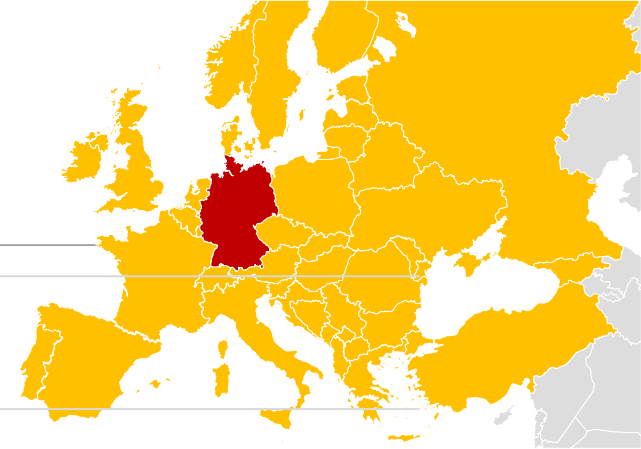


Research Questions



- **PTD must be a means of last resort – is it? For all?**
- How does the law seek to implement this principle?
- (How) Do legal practitioners implement this principle?
- What is the role of ‘alternatives’ to PTD?
- European and comparative aspects (cross-border co-operation etc.)

German context: Statistics I



Source: Federal Statistical Office, Bestand der Gefangenen und Verwahrten (Prison Statistics) stock data, 31.3. of each year

German context

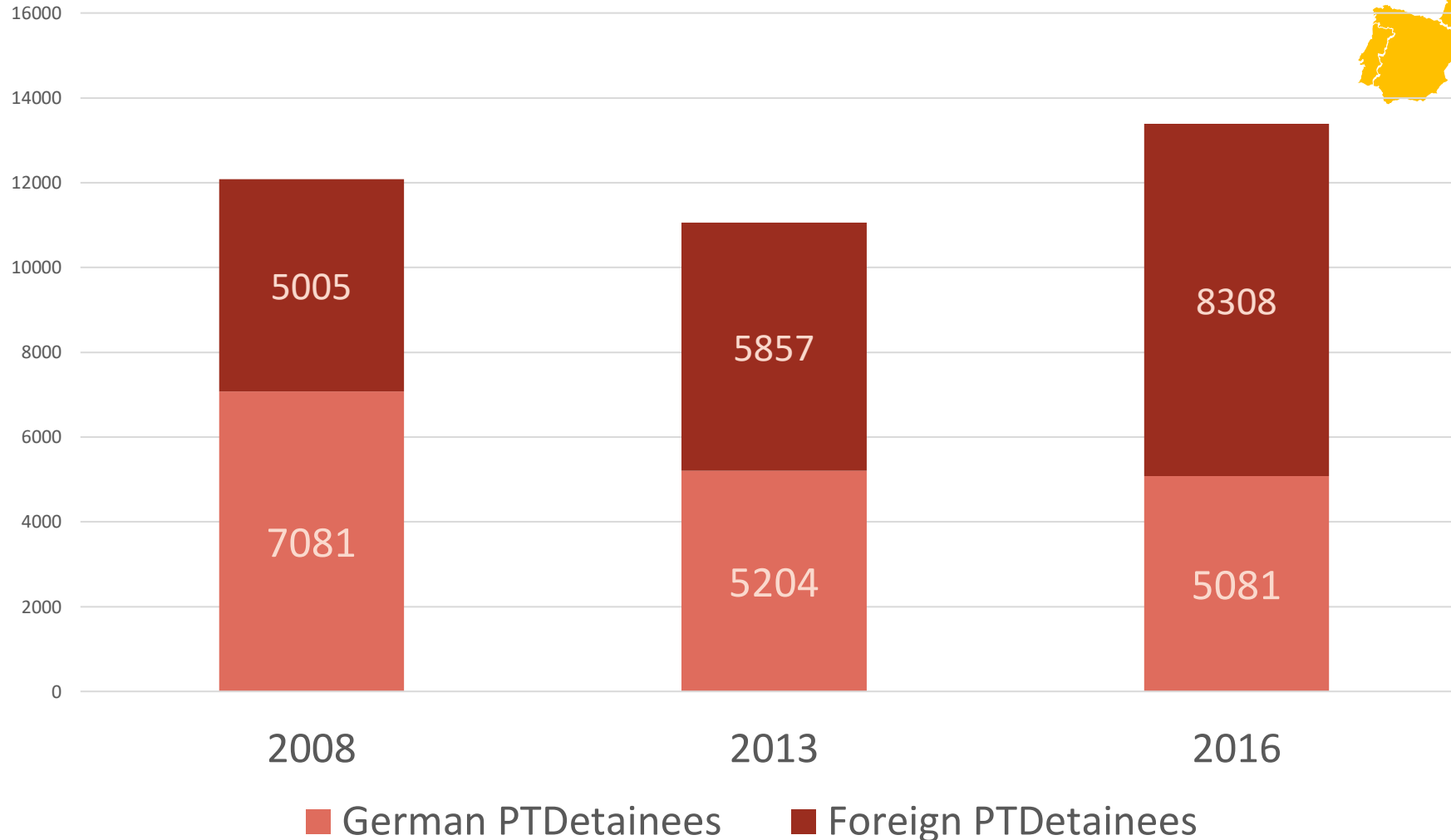
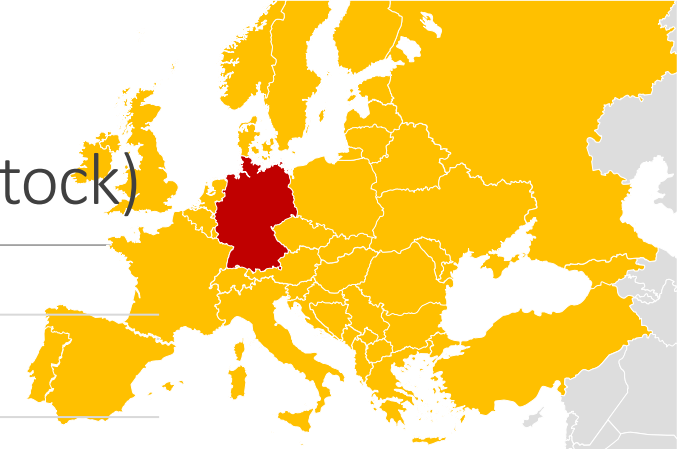
- European comparison: relatively low rate per 100.000 inhabitants (2016: 16; 2019: 17; 2021: [14])
- Percentage of all persons with a final court decision in criminal cases (conviction and acquittals) who had been in PTD: 3,3% in 2019 (,PTD ratio'), depending strongly on the offence

But...

- Serious lack of statistical data !
- Strong regional differences within Germany, rate (2018) per 100.000 between 8 and 28
- Length: about 50% of all prisoners stay three months or less, but about 6% stay more than 1 year in 2018 (this share has risen, probably due to the Corona backlog - 2020: 8%)
- Outcomes: of all defendants with PTD, only about 55% receive an immediate prison sentence; about 34% receive a suspended sentence, about 9% a fine, 1,5% are acquitted
- ,Alternatives' (= Suspension of the arrest warrant under conditions) play a minor role
- Strong overrepresentation of PTDetainees without German passport

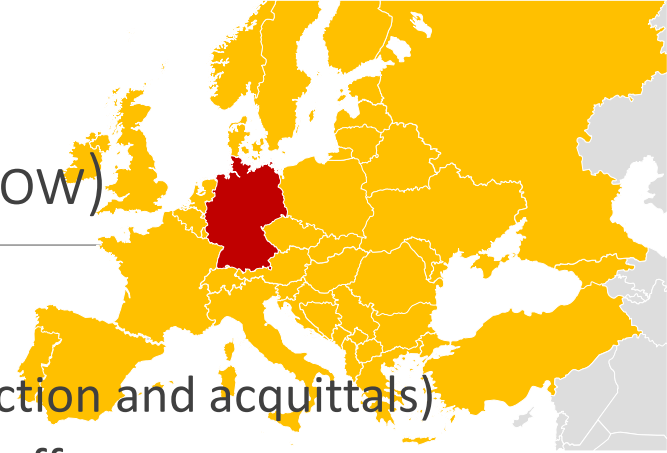
More context: <http://www.irks.at/detour/publications.html> (Germany, National reports)

Law and practice of ordering PTD: Foreign PTDetainees (stock)



Source: Morgenstern 2018, Council of Europe, SPACE I for 2016

Law and practice of ordering PTD: Foreign PTDetainees (flow)



- Percentage of all persons with a final court decision in criminal cases (conviction and acquittals) who had been in PTD: 3,3% in 2019 (,PTD ratio') , depending strongly on the offence
- PTD ratio for Germans: 2,0%
- PTD ratio for Foreign Suspects: **6,5%**

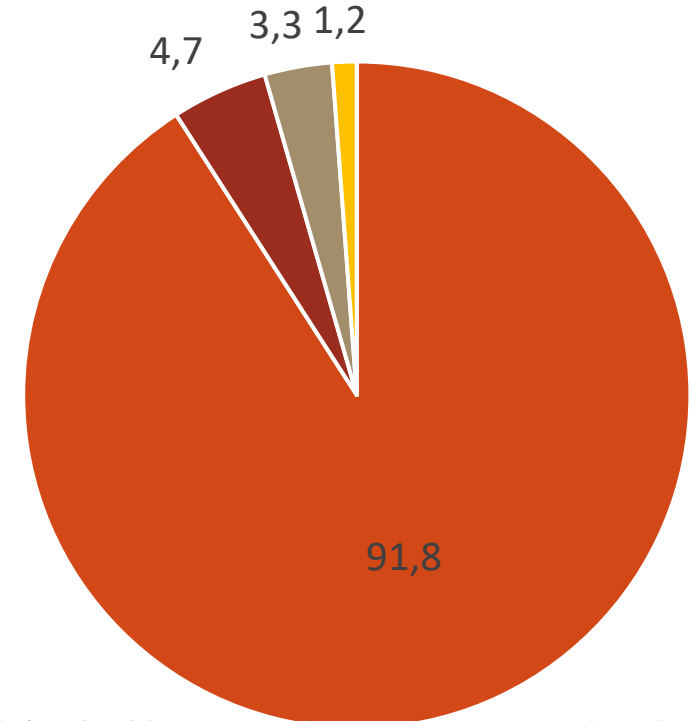
(Source: Heinzle/Spanner under the Freedom of Information Act, for the year 2017)

Law and practice of ordering PTD: Judicial decision-making – the case of Germany

Grounds and pre-requisites as required in statutory law (Code of Criminal Procedure, Strafprozessordnung, §§ 112, 112a StPO)

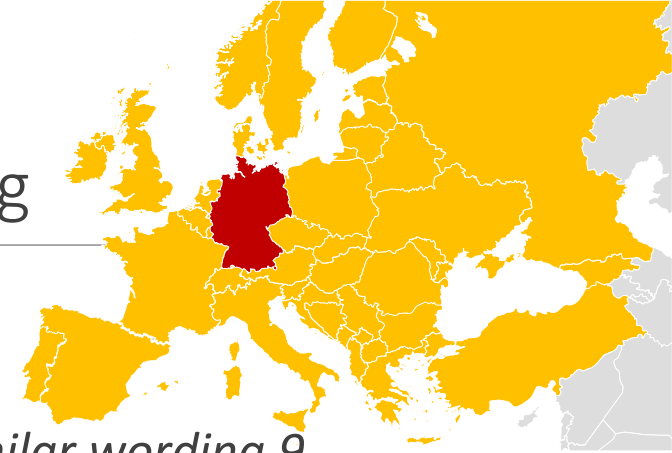
- Urgent suspicion (“dringender Tatverdacht”)
- Proportionality (... “It may not be ordered if it is disproportionate to the significance of the case or to the penalty or measure of reform and prevention likely to be imposed.”)
- 4 grounds for detention:
 - flight or the risk of absconding (Flucht, Fluchtgefahr),
 - risk of collusion / tampering with evidence (Verdunkelungsgefahr),
 - risk of repeating or continuing a listed offence of a (relatively) serious nature (Wiederholungsgefahr)
 - the gravity of the offence (Schwere der Tat), not a stand-alone ground 1965

- flight/risk of flight (Flucht/Fluchtgefahr)
- risk of collusion etc. (Verdunkelungsgefahr)
- risk of repetition (Wiederholungsgefahr)
- Gravity of alleged crime (Schwere der Tat)



Judicial application of grounds (Strafverfolgungsstatistik), more than one ground may be applied, 2019

Law and practice of ordering PTD: Judicial decision-making

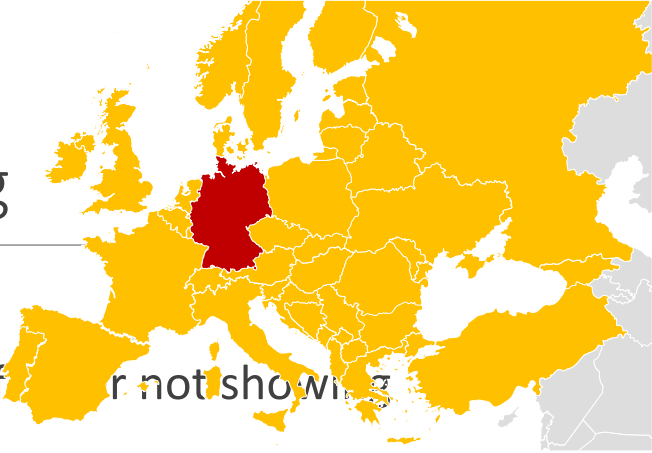


Construction and motives for ordering pre-trial detention:

“... in the end usually it then is the risk of absconding.” (4, judge; with a similar wording 9, lawyer, 47).

*“So, it in first instance secures the trial and in second instance the execution of the sentence. **This means, when I have to fear that there will be no trial at all with whatever result, I principally have to keep him here”.** (interview 15, judge)*

Law and practice of ordering PTD: Judicial decision-making



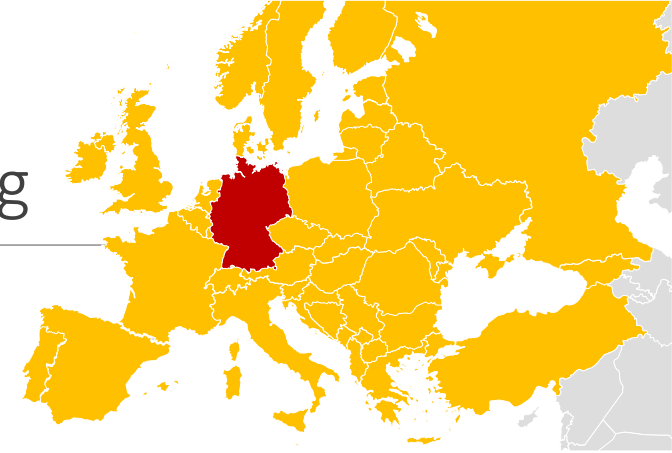
- Risk of absconding – the legal construct:
complicated of balance of incentives and obstacles for absconding; risk of the offender not showing up for trial does not suffice
- Some interview partner reflected the problems of prognosis

“With the risk of absconding it is a balance between the expected sentence and the personal circumstances. I have to predict and this prognosis in the end cannot be checked. If I leave him inside, we will never know if he [would have] absconded and if I let him out and he bunks off.... There are such cases, but not very often...” (10, judge; comparable 13, judge)

“But now, if he has one [job] and a family, you just have to imagine a little, would he now, if we release him, would he abscond? If you say he has children, family, a permanent job, why should he flee? If there is no really serious punishment imminent?” (11, PP)

“But most of the people do not go into hiding, because flight is an unbelievable stress. Financially, the fewest have the possibility really to go into hiding. ... simply not being at home. But also this is permanent anxiety, most people don’t stand this.” (5, lawyer, 116)
- Public Prosecutors: „detention means work“

Law and practice of ordering PTD: Judicial decision-making



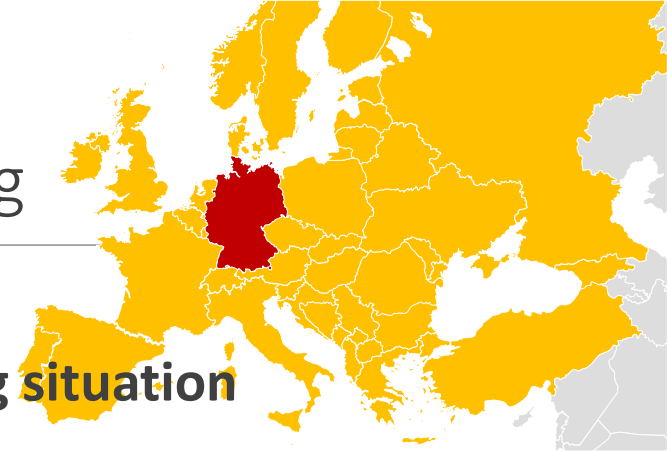
Dominating factors to justify detention (I): **Expected Sentence**

- Expected sentence does sometimes also play a role for proportionality considerations
- some did not request /grant PTD when a suspended sentence is possible or in cases of petty offences
- But...

*“For trivial offence it [the arrest warrant] is out of the question. **Except you have definite indications for flight or such a situation of neglect, that means no social bonds, that you have to say you can’t seriously conduct the proceedings at all [without arrest warrant].” (31, judge)***

- Securing the proceedings regardless of porportionality considerations?
- Particular problem for non-resident foreigners

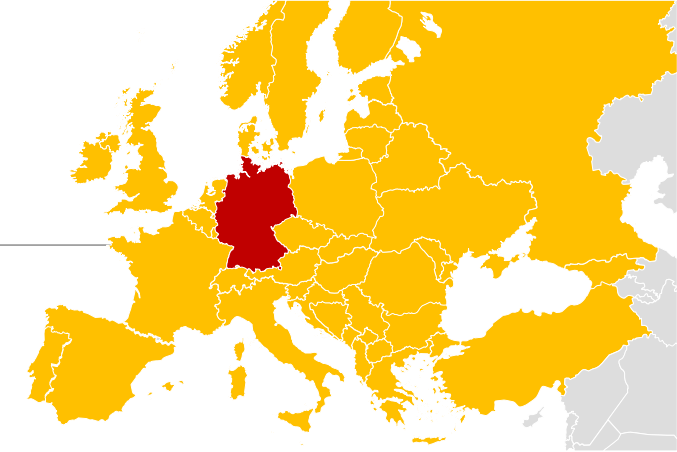
Law and practice of ordering PTD: Judicial decision-making



Dominating factors to justify detention (II): **fixed address and housing situation**

- for foreigners in Germany: settled legal status (residence permit etc.) additionally important (mixed answers for refugees)
- mixed result regarding defendants from other EU-countries
- For many the most important: Is there an address to summon s.o. or to send the police to?
- This means that foreigners without fixed abode in Germany, in particular when socially not integrated, can hardly avoid PTD, regardless of offence

Law and practice of ordering PTD: Foreign Suspects



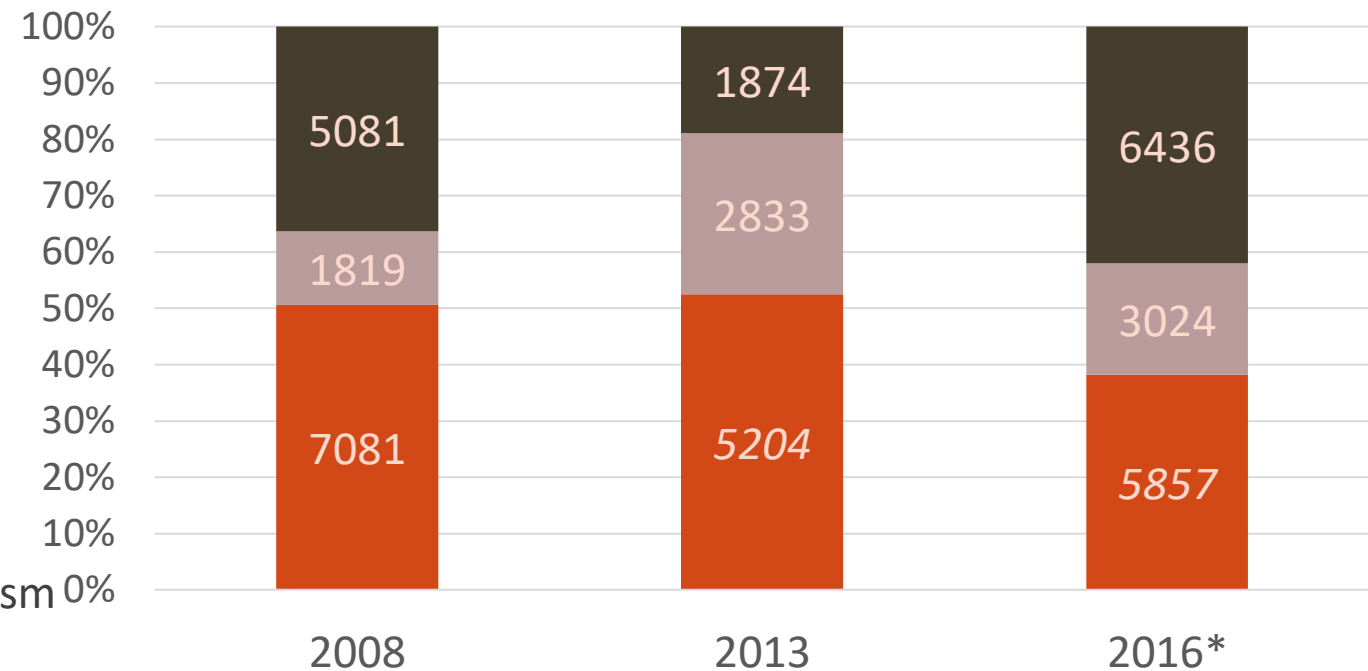
➤ Remedies?

■ PTDetainees from non-EU states

- growing number („refugee crisis“ 2015/2016)
- legal status?
- provision of housing / fixed address

■ PTDetainees from within the EU?

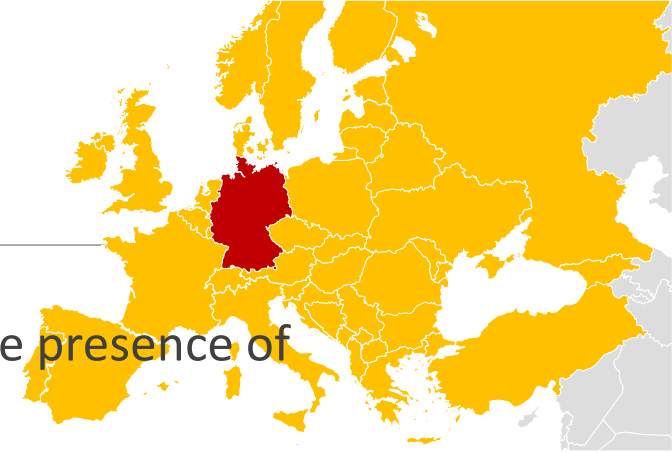
- European Supervision Order
- Numbers show potential für cross-border mechanism
- But: slow and tedious procedure



■ German PTDetainees ■ PTDetainees EU ■ PTDetainees Non-EU

*: data for 2016: estimates based on Council of Europe, SPACE I

Conclusion



- PTD in Germany, at least for adults, is a measure geared mainly to secure the presence of defendants at trial
- “risk of absconding” as dominant ground for detention is often (mis)understood as risk of not showing up for trial
- This disproportionately affects foreigners and those without fixed abode
- Proportionality considerations are overridden
- EU cross-border mechanisms may help in (some) cases of EU citizens / residents, but will not remedy the concerns for suspects not coming from EU states

Thank you for your attention!

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