Research project EUPRETRIALRIGHTS

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

ANALYSIS OF NATIONAL LAW

National norms as regard to access of detained persons to the law and to court

Report on GERMANY

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21 November 2018

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This report is part of the research project EUPRETRIALRIGHTS from the consortium of partners :

Centre National de la Recherche Scientifique
Laboratoire SAGE, Université de Strasbourg
CESDIP, Université de Saint Quentin en Yvelines/Ministère de la Justice
European Prison Litigation Network
University of Utrecht, Montaigne Centre for Rule of Law and Administration of Justice
Helsinki Foundation for Human Rights, Poland
Dortmund University of Applied Sciences and Arts
University of Florence, L'Altro diritto - Inter-university Centre
Bulgarian Helsinki Committee
Ghent University, Institute for International Research on Criminal Policy
General Council of Spanish Bars
Pontifical University of Comillas

This project was funded by the European Union's Justice Programme (2014-2020).

INTRODUCTORY PART: CONTEXTUALIZATION

The number of people in pre-trial detention was highly volatile during the past years. The peak was reached in 1993, counting 20,440 detainees. The lowest numbers were observed in 2010 counting 10,781 persons. While the number of people in pre-trial detention was almost stable between 1998 and 2010, it continuously rises since then[1] reaching 13,443 in August 2017.[2] There is no systematic evaluation of the reasons available. Due to the overly high percentage of foreign nationals in pre-trial-detention (as compared not only to their share of the population but also compared to their share in prison rates), one plausible explanation is the connection to migration policy and refugee figures.[3] Statistics show that in 2013 in 92.7 % of the cases in which pre-trial detention was ordered, the grounds for arrest was the risk of flight. Only half of these cases finally led to a prison sentence without suspension. As the risk of flight in the reasoning of the courts is regularly related to the length of the expected sentence, this statistic shows that pre-trial detention is used too extensively.[4] A "risk of flight" is in the practice of courts usually also related to aspects that are more likely with foreign nationals such as social connections abroad, language skills etc.

After being arrested, the accused person *shall, without delay, at the latest on the day after his apprehension, be brought before the court that is to examine him and decide on his further detention (Section 114b CCP).* The right to have a deprivation of liberty exclusively ordered by a judge and, in case of arrest without a prior judicial decision to be brought before a judge without delay, is also guaranteed by the Constitution (Art. 104, para. 2 Basic Law). These judges are so-called "investigating judges" who are usually different from the judge that will later deal with the case in a criminal proceeding. In accordance with the wording, the arrested person shall have access to the judge immediately, but at the end of the day after apprehension at the latest. In practice, the maximum limit is still often exhausted. The duty to be brought before the court until the end of the day after the apprehension is still used as an excuse for a duration of police detention up to 48h. This happens despite settled case-law of the Constitutional Court which in 2002 in a seminal decision and afterwards at numerous occasions clearly stated that "without delay" has to be understood as immediately and that emergency services have to be established at courts[5].

The judge orders the arrested to be held in pre-trial-detention, if *he is strongly suspected of the offence and if there is a ground for arrest (Section 112 CCP).* Both criteria must be backed up by facts, which need to be obtained by the police. An order of pre-trial detention will regularly be perceived as an indicator for successful police work. Thus, the police may be

1 Schlothauer/, marginal no. 6.

2 Statistisches Bundesamt, Bestand der Gefangenen und Verwahrten, Stand 2017, page 7. https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/BestandGefangeneVerwahrtePDF_5243201.pdf?__blob=publicationFile

3 Graebsch, Ausländische Gefangene, marginal no. . 5; Dünkel/Geng/Morgenstern: Rechtstatsächliche Analysen, aktuelle Entwicklungen und Problemlagen des Strafvollzugs in Deutschland, in: Aus Politik und Zeitgeschichte Vol. 7, 2010 http://www.bpb.de/system/files/pdf/5P6XI7.pdf.

4 Schlothauer, marginal no. 7.

5 BVerfG, Beschluss v. 15.05.2002, 2 BvR 2292/00, juris.

tempted to use as much time as possible to collect these facts especially by interrogating the suspect while arrested by the police.

The judge is also responsible for decisions about restrictions during pre-trial detention that are related to the grounds for detention (flight or risk of flight, danger of suppression of evidence, danger of repetition) such as demanding for a special permission to have visits or phone calls or to hand over items during visits, the monitoring of phone calls, letters and parcels, the separation of the detainee from other detainees and the restriction of or exclusion from his placement and presence in premises shared with other detainees (Sect. 119 CCP). The court may transfer the implementation of orders to the public prosecution office (revocable at anytime), which may avail itself of the services of the officials assisting it and the remand detention center in effecting such implementation (Sect. 119 para. 2, second sentence CCP). This responsibility is in practice regularly transferred to the public prosecution office.

Also in cases in which a transferral has not (yet) taken place, the judge's order cannot be obtained in time, the public prosecution office or the penal institution is allowed to make a provisional order. This order shall be submitted to the court for approval within three working days unless it has meanwhile ceased to be in operation.

Additionally, the remand detention centers are exclusively responsible for decisions with respect to the safety and order of the institution and the detainee has the right to complain against them under Sect. 119 a CCP.[6] For their decisions the remand detention centers have to respect the federal acts with their detailed regulations of the rights of pre-trial-detainees, which exist in all federal states.[7]

In sum, considerung the possibility of transferring decisions that are related to the grounds of detention to the prosecution service in cooperation with the remand detention center combined with the original responsibility of the latter for decisions about safety and order, the remand detention center possesses a dominating role when it comes to restrictions.

Formal complaints against these decisions are further discussed under 2. 1.

6 The competent court is defined by Sect. 125 CCP. Prior to the preferment of public charges, the court that issued the warrant of arrest shall be competent in respect of further court decisions and measures relating to remand detention, suspension of its execution (Section 116), its execution (Section 116b) and applications pursuant to Section 119a. After public charges have been preferred, the court seized of the case shall have jurisdiction. See also https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1048

7 Schlothauer, marginal no. 1051.

1. LEGAL SUPPORT (i.e. access to legal information (information on rights and duties))

1.1 Obligations with regard to legal support

a) at the police station

Section 114b CCP is giving a list of rights the arrested accused is to be informed about. It is mandatory for the police to give this information. Because of the different scope of the regulations in this provision, the consequences of a violation are also different.[8] The instruction is to be given by the police right after the arrest. As Section 136 CCP holds an additional duty to give information to the accused prior to the first examination, there is no general inducement to presume the inadmissibility of evidence in case of a violation of Section 114 b CCP.[9]

Parts in bold print are made by the report authors to underline the main aspects of the instruction.

Section 114b
[Instruction of Arrested Accused; Rights]

*(1) The arrested accused shall be **instructed as to his rights without delay** and in writing in a language he understands. If written instruction is clearly insufficient, oral instruction shall also be given. The same procedure shall apply mutatis mutandis if it is not possible to give instruction in writing; written instruction shall, however, be given subsequently insofar as this can reasonably be done. The accused shall confirm in writing that he was given instruction; if he refuses, this shall be documented.*

(2) In the instruction pursuant to subsection (1) the accused shall be advised that he

*1. shall, **without delay**, at the latest on the day after his apprehension, be **brought before the court** that is to examine him and decide on his further detention;*

*2. has the right to reply to the accusation or **to remain silent**;*

*3. may request that **evidence** be taken in his **defence**;*

*4. may at any time, also before his examination, **consult with defence counsel** of his choice;*

4a. may, in the cases referred to in Section 140 subsections (1) and (2), request the appointment of defence counsel in accordance with Section 141 subsections (1) and (3);

*5. has the right to demand an **examination by a female or male physician** of his choice;*

*6. may **notify a relative** or a person trusted by him, provided the purpose of the investigation is not endangered thereby.*

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8 Schmitt, Section 114b, marginal no. 9.

9 Schmitt, Section 114b, marginal no. 10.

*7. may, in accordance with Section 147 subsection (7), apply to be **given information and copies from the files**, insofar as he has no defence counsel; and*

8. may, if remand detention is continued after he is brought before the competent judge,

a) lodge a complaint against the warrant of arrest or apply for a review of detention (Section 117 subsections (1) and (2)) and an oral hearing (Section 118 subsections (1) and (2)),

b) in the event of inadmissibility of the complaint, make an application for a court decision pursuant to Section 119 subsection (5), and

c) make an application for a court decision pursuant to §119a subsection (1) against official decisions and measures in the execution of remand detention.

*The accused is to be advised of defence counsel's right to inspect the files pursuant to Section 147. An accused who does not have a sufficient command of the German language or who is hearing impaired or speech impaired shall be advised in a **language he understands** that he may, in accordance with section 187 subsections (1) to (3) of the Courts Constitution Act, demand that an **interpreter or a translator** be called in for the entire criminal proceedings **free of charge**. A foreign national shall be advised that he may demand notification of the consular representation of his native country and have messages communicated to the same.* [10]

"A language he understands" is not defined by written law. The benchmarks for the definition of that characteristic need to be defined by the jurisprudence.[11] Simple language skills will not meet requirements. The language skills need to be at a level allowing the person to follow the proceedings, which means that even legal terms need to be understood after being transformed to colloquial phrases.[12] Only combined active and passive language skills can lead to the conclusion, that an interpreter is dispensable.[13]

Development

The duties Section 114b CPP carries have been extended through the past years in adaption of European specifications. To comply with the dircetives 2010/64/EU, 2012/13/EU and 2013/48/EU the law was changed extensively in 2013 and 2017. 4a, 7 and 8 and the second and third sentences were added.[14]

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10 http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0898

11 Meyberg, RiStBV Rn. 7.

12 Vgl. LG Dortmund NotBZ 2005, 342 für § 16 BeurkG.

13 Meyberg, RiStBV Rn. 7.

14 Bundesgesetzblatt Jahrgang 2017 Teil 1 Nr. 60, S. 3295, http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl117060.pdf ;

The report of CPT after its visit to Germany in 2005 reminds that the risk of intimidation and ill-treatment is at its highest directly after being arrested. In relation to this, the report cautioned the expectations towards the formerly new obligation to instruct arrested persons immediately.[15] As a conclusion Section 114b was replaced by an extended and more detailed version effective since 01.01.2010.[16]

b) before the first examination

Section 136 CPP contains the information to be given prior to the first examination.

Section 136
[First Examination]

(1) At the commencement of the first examination, the accused shall be informed of the offence with which he is charged and of the applicable criminal law provisions. He shall be advised that the law grants him the right to respond to the charges, or not to make any statement on the charges, and the right, at any stage, even prior to his examination, to consult with defence counsel of his choice. He shall further be advised that he may request evidence to be taken in his defence and, under the conditions set out in Section 140 subsections (1) and (2), request the appointment of defence counsel in accordance with Section 141 subsections (1) and (3). In appropriate cases the accused shall also be informed that he may make a written statement, and of the possibility of perpetrator-victim mediation.

(2) The examination shall give the accused an opportunity to dispel the grounds for suspecting him and to assert the facts which speak in his favour.

(3) At the first examination of the accused, consideration shall also be given to ascertaining his personal situation.[17]

Any arrested person needs to be informed about the right to contact a lawyer at any time prior to any hearing. Usually at this point there is neither a decision about the pre-trial detention nor a decision made by the court about assigning a mandatory lawyer . There are discussions on whether the detention centre or the court is practically responsible for assigning a lawyer. For better legal protection for the arrested person the right to contact a lawyer needs to be extended to the right to get information about whom to contact and how.[18]

Bundesgesetzblatt Jahrgang 2013 Teil I Nr. 34, S. 1938,
http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl113034.pdf

15 Bt. Drucks. 16/11644 S.1ff., http://dip21.bundestag.de/dip21/btd/16/116/1611644.pdf

16 Bt. Drucks. 16/11644 S.11., http://dip21.bundestag.de/dip21/btd/16/116/1611644.pdf

17 http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0898

18 Schlothauer, marginal no. 51 ff.

Following a decision of the Federal Court of Justice in 1996, it is not enough to hand out a phone list of the local bar or a publicly available phone directory to the detainee to find a lawyer. That might confuse the person even more. More efforts are necessary to support access to a lawyer. It is indispensable to give a clear hint on the emergency service provided by the local lawyer´s associations.[19] In a later decision, this duty was shortened to cases in which the detainee indicates to need and want to contact a lawyer but is unable to pay for it.[20]

Emergency services are provided almost nationwide with a focus on weekends and periods outside office operation hours. The actors are usually experienced and specialised lawyers. Their duty is to give legal advice or even avoid imprisonment.[21] This first contact is usually free of charge and done pro bono by the lawyer. Both parties may benefit when working further together in case of an ongoing investigation procedure.

As a consequence of the 1996 decision, an addition was made to Section 136 CPP in September 2017 (para. 1, sentences 3 and 4). Existing emergency services are to be mentioned. It states that in case the accused wants to see a defence counsel prior to the hearing, information about how to get in contact are to be given. This revised wording of the regulation now does not leave any more space for references to the solvency of the accused person.

Violating these duties leads to the inadmissibility of evidence in so far as it comes to the right to remain silent, the right to contact a lawyer or to insufficient information about how to do so (phone list, emergency service), no matter if there is any measurable influence or not.[22] However, an accused person who is represented by a lawyer can agree to the admission of evidence which would be deemed inadmissible. This is not possible for someone without a defence lawyer.[23] Inadmissibility of evidence is also excluded to be the consequence in cases of a guaranteed awareness that the person who hasn´t be informed already knew about these rights in advance.[24]

19 BGHSt 42, 15 ff.

20 BGH NStZ 2006, 236; BGH StV 2006, 567.

21 Schlothauer, marginal no. 262.

22 Schmitt, Section 136, marginal no. 21.

23 Schmitt, Section 136, marginal no. 20.

24 Schmitt, Section 136, marginal no. 20f.

A strong suspicion is the necessary condition for pre-trial detention. Section 112 Chapter 1 I CCP stipulates:

Remand detention may be ordered against the accused if he is strongly suspected of the offence and if there is a ground for arrest. 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.[25]

For that reason, the inadmissibility of evidence can be of relevant influence on the decision whether remand detention may be ordered against the accused person.

As opposed to infringements as mentioned above, violating the obligation to inform about the possibility to request evidence, to inform about the opportunity to make a written statement or about the possibility of perpetrator-victim mediation does not in itself result in inadmissibility of evidence.[26]

Development

The duties Section 136 CPP carries have been extended through the past years in adaption of European specifications. To fit the 2010/64/EU, 2012/13/EU and 2013/48/EU in 2013 and 2017 the law was changed extensively. 4a, 7 and 8 and the second and third sentences were added.[27]

c) when arriving at the pre-trial detention center

The obligation to provide legal information in pre-trial detention resides with the detention centre according to the laws of the federal states, e.g. Section 6, para. 2 Act on Conditions of Pre-trial-detention in North Rhine-Westphalia. Each federal state issued a law between 2008 and 2012 after a change in the Constitution, shifting responsibility from the federal state towards the

25 http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0898

26 Schmitt, Section 136, marginal no. 21.

27 Bundesgesetzblatt Jahrgang 2017 Teil 1 Nr. 60, S. 3295, http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl117060.pdf ; Bundesgesetzblatt Jahrgang 2013 Teil I Nr. 34, S. 1938, http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl113034.pdf

federal states. These 16 laws differ in some points but not with respect to the obligation to give legal information. Each of them states that detainees must be informed about their rights as part of the interview on admission. The house rules are to be handed out and a copy of the federal act´s conditions of pre-trial detention is to be made available on request. None of the acts mentioned gives any details which rights the detainees are exactly to be informed about in the course of mandatory instructions.

At this point detainees will usually already have a defence lawyer. Only in very rare cases (when the detainee asked for more time to select a lawyer or to get in contact with one) the hiring of a lawyer will still be due.

Rules for convicted prisoners differ.

1.2 Legal support to non-native speakers

a) at the police station

Arrested persons are to be instructed about their rights in a language they understand. They are also to be informed about the fact, that an interpreter can be called in at any time free of charge.[28] This information is of very high importance. Firstly because such a rule will not be expected by the persons concerned.[29] Second because understanding the processes and information is a key for the further process.

Foreigners are also to be informed that they may demand notification to the consular representation of their native country and have messages communicated to them. Violating these duties never led to inadmissibility of evidence under the previous legal framework. Two chambers of the Federal Court of Justice, the 3rd and 5th Senate of the Federal Court of Justice had drawn the conclusion that there is no imaginable case in which an inadmissibility of evidence could be caused by this violation.[30] However, the decisions by the 5th Chamber were overturned by the Federal Constitutional Court.[31] Then the respective duty was implemented into written law. The unobserved contact with a consular representative, as now stipulated in Section 119 Abs. 4 Nr. 19, can be an effective way to get in contact with a competent lawyer with respect to language, matters of transfer to the home country for the execution of the sentence etc. The violation of this duty can be expected to constitute an accepted reason for inadmissibility of evidence in the future.

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28 Section 114b CCP, http://www.gesetze-im-internet.de/englisch_stpo/index.html

29 Schmitt, Section 114b, marginal no. 8a.

30 BGHSt 52, 110; BGHSt 52, 48; BGH StV 2003, 57.

31 BVerfG NJW 2011, 207; BVerfG NJW 2007, 499.

b) before the first examination

see above

c) pre-trial detention center

About the situation in pre-trial detention is to be mentioned that the costs of an interpreter or translator will be reimbursed by the State.[32] There are two conceivable constellations. One is the contact with the defence counsel. From the obligation to call a translator whenever needed during the criminal procedure follows the consequence to get the costs compensated. In case an interpreter/translator is necessary to guarantee an appropriate handling, the defence counsel can hire one and get refunded by the court. Such a need is assumed in any case the language skills of the accused person do not meet the conditions mentioned above.[33] Limited is this claim to the necessary amount.[34] The hourly rate is limited to the amount a court-hired interpreter may request according to the statutory regulations of the law on remuneration of lawyers (RVG). Section 46 para. 2 RVG refers to the rules of JVEG (German Law on Payment and Compensation by Judiciary Authorities) which defines a limit of 70 to 75 € per hour.[35] The claim is based on the mentioned right to call in an interpreter or translator at any stage of the criminal procedure.[36]

The second is Beratungshilfe (Out-of-Court Counselling Aid) where the costs of an interpreter are to be repaid based on Section 675 in conjunction with Section 670 German Civil Code (BGB).[37] Details are subject to the conditions mentioned above.

1.3 Actors providing legal information

All actors providing legal information are part of the custody system. They are public or civil servants. An ethical framework apart from their duties as public or civil servants doesn't exist.

Any possible involvement of a lawyer at a later point is associated with the obligations and general duties of a lawyer and professional responsibility.

1.4 Practical arrangements

32 Lissner/Dietrich/Eilzer/Germann/Kessel, marginal no. 338.

33 Fölsch/Schnapp, Section 46, marginal no. 36f.

34 Lissner/Dietrich/Eilzer/Germann/Kessel, marginal no. 338.

35 Lissner/Dietrich/Eilzer/Germann/Kessel, marginal no. 338.

36 Section 114b CCP, http://www.gesetze-im-internet.de/englisch_stpo/index.html

37 Dörndorfer, marginal no. 111.

See 1.5 and 4.1

1.5 Legal information tools

There are no other rules about which legal information are to be made available for detainees apart from those mentioned above under 1.1 c). Online legal information portals are not available at all. There are a few pilot programmes running for internet access in prisons.[38] But none of these include pre-trial detention. As a matter of fact, it seems to be the unanimous opinion that this area needs to be excluded.[39]

As will be further explained below, there are different projects, trying to offer access to legal information to people in pre-trial detention.

See also 4.1

Due to written law, the development of pro bono legal aid institutions in Germany is at its very beginning. Up to 2006 legal advice was supposed to be given as a general rule by no one else than an admitted attorney. Even since legal clinic projects are permitted today, the correctional institutions have no clear legal obligation to allow them access to detainees. This may be one of the reasons why during more than a decade no other (except for the few mentioned in what follows) legal clinic project in the field of prisons has been developed.[40]

At this point there are two NGOs nationwide dealing with prisoners' rights and providing legal advice. One is the "Verein für Rechtshilfe im Justizvollzug des Landes Bremen e.V." which is the name of an organization giving legal advice to people in all places of detention in the federal state of Bremen. This includes people in pretrial detention. This project is running since almost 40 years. There was only a weak legal argument which could be considered in support of an exceptional regulation being in force in Bremen as opposed to the rest of Germany. The possibility to establish and continue this project despite of the prohibition was mainly based on its general acceptance in the small federal state of Bremen. The consensus included the then governor of the prison. As a result of this broad consensus nobody contested this weak argument. The access to people in detention in Bremen is a long-standing tradition which needs to be defended from time to time. An anchoring in written law though does not exist.

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38 http://www.spiegel.de/netzwelt/web/internet-im-gefaengnis-berlin-will-pilotprojekt-starten-a-1081110.html , https://www.stuttgarter-nachrichten.de/inhalt.internet-im-gefaengnis-mehr-netz-im-knast.323e81be-0761-40eb-8a07-6e1c623dfb49.html.

39 http://www.news.de/panorama/855657230/internet-fuer-knackis-internet-im-gefaengnis-als-menschenrecht/2/

40 Those legal clinic projects also suffer from a missing legal framework. Confidentiality and the right to remain silent before court are much more clear for admitted attorneys.

The other one is called “Strafvollzugsarchiv” (The Prisons Archive) and was constituted at the University of Bremen as well. It provides written legal advice for people in detention nationwide who write their requests to “Strafvollzugsarchiv”. There are no special rules for those letters, which means they have to go through the same procedure of control as any other letter, and as a result may be read by the prison administration.

Despite a growing interest in legal clinics in Germany during the last decade, no other legal clinic project with respect to prisons or pretrial-detention can be identified. That might be caused by the missing legal obligation to allow legal clinics access to detainees and by the fact, that penitentiary law is not an important part of the law curriculum at universities.

Three other projects shall be mentioned in this context. One is the NGO “Komitee für Grundrechte und Demokratie” (Committee for Fundamental Rights and Democracy) with its “commissioner for prisoners” which has been established more than thirty years ago (http://www.grundrechtekomitee.de/node/20). Despite this formally sounding name, this commissioner has no formal legal status in any respect. He also answers letters of prisoners dealing with questions of prison and law although he is not a lawyer. Whether he is allowed to visit prisons or not depends on the decision made by the prison administration on an individual basis.[41]
It is not possible to draw conclusions about the situation of NGOs in general relying on information with respect to these few projects. There are no other NGOs, legal clinics or National Monitoring Bodies involved in legal advice for prisoners up to this point.

Another project is rather new but builds on similar efforts in the 1980ies. It is a book written by legal professionals in cooperation with prisoners and former prisoners on ways through imprisonment (“Wege durch den Knast” http://www.wegedurchdenknast.de/). It gives advice to prisoners on how to survive their prison term including legal as well as e.g. medical advice. The book has been released in May 2016 and has been sent to prisoners free of cost all over Germany. Soon afterwards the book has been banned from the majority of prisons due to allegedly posing a threat to the security of the institution which has also been confirmed as being in accordance with the law by some courts (e.g. Berlin Court of Appeal, decision http://www.burhoff.de/asp_weitere_beschluesse/inhalte/4318.htm , https://www.facebook.com/Strafvollzugsarchiv).

1.6 Reporting on legal information

see 1.3

41 Source: Personal communication with the commissioner Christian Herrgesell by Christine Graebsch on January 31st, 2018.

2. LEGAL AID (i.e. legal costs and legal representation fees)

2.1 Fees and mandatory (or non-mandatory) character of legal representation

I. Legal remedies

According to the law different actors carry responsibility for the conditions of detention and other circumstances relevant for the detainees' everyday life. Correspondingly, the legal remedies differ.

a) Decision made by the court

Any decision, e.g. about conditions of detention made by the lower or higher local court, may be subject to a complaint under Section 304 CCP.

Section 304
[Admissibility]

(1) A complaint shall be admissible against all orders made by the courts at first instance or in appellate proceedings on fact and law and against directions given by the presiding judge, the judge in preliminary proceedings, and by a commissioned or a requested judge, unless such orders are expressly exempted from appellate remedy by law.

Representation by a lawyer is not mandatory during the procedure. Access to the court is not subjected to the payment of a fee.

The court of the next higher level is responsible for the decision about the complaint. Legal remedies are then exhausted.[42]

b) Decisions made by the prosecution

Many decisions about detention conditions (in the scope of Section 119 para. 1 CCP) are made by the prosecution, especially because the courts usually transfer responsibility to the prosecution (Section 119 para. 2). If the conditions of detention are in the responsibility of the prosecution, a review can be demanded by applying for a judicial decision under Section 119 para. 5 CCP.[43]

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42 See also Sect. 304 and 305 CCP. https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1048

43 For competent court see Sect. 126 CCP. https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1048

Section 119
[Decisions and Measures in Execution of Detention]

(1) Insofar as necessary to avert the risk of flight, tampering with evidence or repetition (Sections 112, 112a), restrictions may be imposed upon a detained accused. In particular, it may be ordered that

1. *visitation and telecommunication shall be subject to permission;*
2. *visitation, telecommunication, correspondence and packages shall be monitored;*
3. *handing over of items during visitation shall be subject to permission;*
4. *the accused shall be separated from individual or all other detainees;*
5. *his placement and presence in premises shared with other detainees shall be restricted or excluded.*

The orders shall be made by the court. If its order cannot be obtained in time, the public prosecution office or the penal institution may make a provisional order. The order shall be submitted to the court for approval within three working days unless it has meanwhile ceased to be operative. The accused shall be informed of orders. The order pursuant to the second sentence, number 2, shall include the authorization to terminate visitation and telecommunication as well as to hold correspondence and packages.

(2) Implementation of the order shall be incumbent upon the authority making the order. The court may revocable transfer the implementation of orders to the public prosecution office, which may avail itself of the services of the officials assisting it and the penal institution in effecting such implementation. The transfer shall be incontestable.

(3) Where the monitoring of telecommunication has been ordered pursuant to subsection (1), second sentence, number 2, the persons with whom the accused is communicating shall be informed of the intended monitoring immediately after the connection has been established. The information may be given by the accused himself. The accused shall be advised in good time prior to the commencement of telecommunication of the duty to so inform.

(4) Sections 148 and 148a shall remain unaffected. They shall apply mutatis mutandis to communication of the accused with

1. *the probation office competent for his case;*
2. *the supervisory agency competent for his case;*
3. *the court assistance agency competent for his case;*
4. *the parliaments of the Federation and the Länder;*
5. *the Federal Constitutional Court and the Land constitutional court competent for his case;*
6. *the Land ombudsman competent for his case;*

7. the Federal Commissioner for Data Protection and Freedom of Information, the agencies of the Länder competent for the monitoring of compliance with data protection provisions in the Länder, and the supervisory authorities pursuant to section 38 of the Federal Data Protection Act;

8. the European Parliament;

9. the European Court of Human Rights;

10. the European Court of Justice;

11. the European Data Protection Supervisor;

12. the European Ombudsman;

13. the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;

14. the European Commission against Racism and Intolerance;

15. the United Nations Human Rights Committee;

16. the United Nations Committee on the Elimination of Racial Discrimination and the United Nations Committee on the Elimination of Discrimination against Women;

17. the United Nations Committee against Torture, its Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the corresponding national preventive mechanisms;

18. the persons mentioned in Section 53 subsection (1), first sentence, numbers 1 and 4, in regard to the content specified therein;

19. unless the court orders otherwise,

a) the prison advisory boards and

b) the consular representation of his native country.

The measures necessary to determine the existence of the conditions set out in the first and second sentences shall be taken by the authority competent pursuant to subsection (2).

(5) An application for a court decision may be made against decisions or other measures taken pursuant to this provision, unless the legal remedy of complaint is admissible. The application shall not have suspensive effect. The court may, however, make provisional orders.

(6) Subsections (1) to (5) shall also apply where another custodial measure (Section 116b) is executed against an accused in respect of whom remand detention has been ordered. In this case as well, the competence of the court shall be determined by Section 126.

Representation by a lawyer is not mandatory during the procedure. Access to the court is not subjected to the payment of a fee.

The decision of the court can be reviewed as described under a)

c) Decisions made by the prison

If the conditions of detention are subject to a decision of the detention centre's administration itself or if the administration delays the decision about an application for a period of more than three weeks, a judicial decision can be obtained. Section 119 a CCP provides the legislative framework.[44]

Section 119a
[Applications in Respect of Decisions and Measures]

(1) An application for a court decision may be made against an official decision or measure in the execution of remand detention. An application for a court decision may also be made if an official decision applied for in the execution of remand detention is not given within three weeks.

(2) The application for a court decision shall not have suspensive effect. The court may, however, make provisional orders.

(3) The authority competent for the decision or measure relating to execution may also file a complaint against the decision of the court.

Representation by a lawyer is not mandatory during the procedure. Access to the court is not subjected to the payment of a fee.

The decision of the court can be reviewed as described under a).

After a change in written law (federal acts on remand detention), one additional option to apply for a judicial decision became less important. Section 23 para. 1 EGGVG (Introductory Act to the Courts Constitution Act) was stating the right to appeal against general orders by the prison (e.g. visiting hours for lawyers in general, duration of outdoor exercise, weight limit for postal parcels or the order to search all visitors).[45] The exploratory memorandum for Section 119a StPO[46] is giving an indication Section 23 EGGVG shall be replaced by that new Section 119a StPO. Legal commentaries come to the conclusion that a complete leverage of Section 23 EGGVG was

44 For competent court see Sect. 126 CCP. https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1048

45 Schmitt, Anh EGGVG, Section 23, marginal no. 18.

46 http://dip21.bundestag.de/dip21/btd/16/116/1611644.pdf

intended by legislation[47] and all possible cases are now to be subsumed under Section 119 a StPO.[48]

A final legal decision on that issue is still pending. That shows the minor importance of that rule in practice, since federal Acts on Remand Detention came into force between 2008 and 2012.[49] Following the relevant literature this rule is only mentioned for completeness and will not be developed in this report.

II. Extraordinary remedy

All procedures mentioned lead at one point to a final decision by the court. When remedies are exhausted, extraordinary remedies can be considered.

The extraordinary remedy of a constitutional complaint (Verfassungsbeschwerde) is designed to monitor possible infringements of fundamental rights. The previous decision is only examined with respect to a possible violation of basic rights or some other constitutional rights considered to equate them. Any other procedural irregularity or other legal mistake by the preceding courts is only regarded as relevant if it results in an infringement of these fundamental rights as laid down in the German Constitution.[50]

Even though Constitutional Law is a challenging and complicated field of law, being represented by a lawyer is not mandatory for a constitutional complaint. Access to the court is not subjected to the payment of a fee.

Legal aid for court proceedings (Prozesskostenhilfe) may be granted in this procedure as well. But due to the jurisprudence of the Federal Constitutional Court, the hurdles are high.[51] Because of the fact that the procedure is free of charge and being represented by a lawyer is not mandatory[52], only good prospects for the case and a good reason for the client needing assistance will lead to approval.[53]

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47 There are dissenting court decisions as for instance OLG in Hamm, decision from 04.10.2011 – 1 VAs 42/11 in which an application of the 23 EGGVG in these cases is also comprised.

48 Köhnlein, Section 23 EGGVG, marginal no. 106.

49 http://www.dvjj.de/themenschwerpunkte/untersuchungshaft/untersuchungshaftvollzugsgesetze

50 http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/merkblatt.html

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

52 Federal Constitutional Court is providing a leaflet for this Constitutional Complaint to make it easier tosuceed even if lawyer is not hired. But since the violation of a fundamental right must be proven and the deadlines are not extendable, such a case is hardly to handle by any legal layman.

53 Beschluss vom 09.07.2010 2 BvR 2258/09.

2.2 Legal aid scheme

a) Out-of-Court Counselling Aid (Beratungshilfe)

In general, there is an advice assistance system (Beratungshilfe) for out-of-court assistance. The main emphasis of this instrument is on counselling and giving an initial assessment of the situation. The assistance of a lawyer can be claimed for in a procedure in which the income and the need of being advised by a lawyer are checked.[54] Beratungshilfe is in principle also possible in cases of criminal law. Since it covers only initial advice but not the costs for inspection of the files, this instrument is rather useless in criminal law cases where inspecting the files is an essential prerequisite to giving even initial advice.

An initial advice and representation out of court for detainees in pre-trial detention about their rights with respect to the conditions of their detention could well be granted under the scope of the Beratungshilfe-system, because it is open to any kind of legal procedure that is not (yet) related to a court proceeding. But, even though the literature on prisoner's rights after a conviction at least punctually mentions this option[55], there is not one hint on a according possibility for pre-trial detention in neither the literature nor the jurisprudence.

The conditions are matter of national law, according to the Out-of-Court Counselling Aid Act (Beratungshilfegesetz).

b) Legal proceedings in court

Legal proceedings in court can be funded by a system of legal aid for court proceedings (Prozesskostenhilfe (PKH)). The financial resources of the applicant[56] need to be set out using a standard form. Further criteria are the chances of success in that very case and the necessity to

54 Section 1 Beratungshilfegesetz (Law on Out-of-Court Counselling Aid), http://www.gesetze-im-internet.de/englisch_berathig/index.html

55 Spaniol, Section 120, marginal no. 21.

56 The following amounts are to be deduced from the income: € 492 for the applicant and € 492 more for his or her partner, € 224 additional is the person is working, € 393/ € 373/ € 350/ €284 for every person older than 18/14/6/0 years the applicant is supporting. In addition, a reasonable amount for the apartment will be deduced. Remaining amounts must be used for the procedure. If necessary in up to 48 installments. See also https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*[@attr_id=%27bgbl119s0161.pdf%27]#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl119s0161.pdf%27%5D__1554175746179

get the assistance of a lawyer with a view to the legal difficulties of the case.[57] These conditions constitute a high threshold in practice. In simple cases PKH will be denied for the reason that they are simple. In more difficult or extensive cases the person affected will need a lawyer - already for the legal aid application procedure - who is willing to do this extensive work without knowing if ever getting paid for it. The requirement of a comprehensive reasoning arises from the fact that the decision on PKH is to be made by the court of the principal proceedings. Thus, the court decides about its own likeliness of later deciding in favour of the applicant. Obviously, it is much easier for the court to predict the outcome than for the applicant.

Additionally, in practice courts often delay the decision on legal aid until the final stage of the proceeding and grant legal aid only in case of a upcoming success for the applicant – in which case the applicant will no more need legal aid because the costs will have to be compensated by the opposing party anyway.

PKH is the legal aid scheme in place for convicted prisoners in proceedings about their rights against the prison administration according to the Prison Acts of the Federal States (Section 120 para. 2 Federal Prison Act). When it comes to pre-trail detention, the situation is different. Section 119 Code of Criminal Procedure grants the right to complain against the decision of a court or – as usually in practice – the decision of the prosecution in accordance with the administration of the detention centre – with respect to circumstances somehow related to the criminal proceedings such as restrictions for visits and communication. Section 119a Code of Criminal Procedure grants the right to complain against any other restrictions or omissions by the administration of the detention centre based on the Federal Codes on the Execution of Pre-Trial Detention.[58] There is no regulation in any of these laws on access for detainees in pre-trial detention to legal aid for litigation in connection with the execution of pre-trial detention. 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 pre-trial 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 pre-trial detention by supplementary interpretation. Rather, it must be said, there is no discussion at all in jurisprudence about possibilities for accessing legal aid with respect to pre-trial detention´s conditions at all.

The respective act is the Code of Civil Procedure (Zivilprozessordnung).

57 Section 114 para.1 ZPO (Code of Civil Procedure), http://www.gesetze-im-internet.de/englisch_zpo/index.html

58 Untersuchungshaftvollzugsgesetze der Länder, http://www.dvjj.de/themenschwerpunkte/untersuchungshaft/untersuchungshaftvollzugsgesetze

c) Court-assigned lawyer

A third system exists exclusively for cases of criminal law and it differs in many respects from the system of PKH, with the latter being not applicable in criminal law cases. If a custodial sentence of more than one year is to be expected, if the trial is situated at the higher court in the first instance, if the legal or factual situation is difficult or if the suspect is taken into pre-trial detention, the involvement of a lawyer is deemed to be necessary.[59] In this case, Section 140 Code of Criminal Procedure (CCP) obliges the court to hire a lawyer of the defendant's choice. The lawyer may claim for payment against the state. The expenses will later be imposed on the defendant in case of a conviction. This system is supposed to only make sure, the defendant can reach a lawyer unless he or she is unable to pay for the defence at that very moment.[60]

The Lawyer's Remuneration Act (Rechtsanwaltsvergütungsgesetz) is setting special rules for the payment of these lawyers. The compensation is up to 60%, on average about 20% lower than regular.[61] Possible problems out of that fact are difficulties in finding a willing, competent and available lawyer. Apart from that, the role and the rights of this court-assigned lawyer are in agreement with any other defence counsel.[62]

Due to that rule, each person in pre-trial detention has a lawyer. The competence of that lawyer also extends to any matter connected to detention.[63] On that basis a good supply should be ensured. In practice this is restricted by the question of financing. Any proceedings concerning the conditions and circumstances of detention are covered by the standing charge[64] related to the criminal law case. Additional charges can only arise in case of court hearings[65] or very few other matters causing a schedule fee.[66] 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

59 Section 140 para. 1 StPO, http://www.gesetze-im-internet.de/englisch_stpo/index.html

60 Schmitt, Section 140, marginal no. 26f.

61 Burhoff, RVGreport 2015, 406. See also 2.8 c) for the different rates.

62 Burhoff, RVGreport 2015, 406.

63 Burhoff, RVGreport 2011, 242.

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

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

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

court-assigned lawyer any payment received by the client will shrink the claim that can be made to the state according to the law. Legal protection thus needs a lawyer ready to give a lot for little money.

2.3 Emergence of a right to legal aid in penal facilities

There are no special rules for legal aid in penal facilities. The decisions about legal aid are subject to the same regulations inside and outside prison. None of the key decisions is to be made by prison administration or detention facilities.

2.4 Perimeter of the legal aid regarding prison litigation

As the rules for legal aid are similar in- and outside prison, there are no aspects excluded.

Legal aid granted for a criminal case provides limited additional fees for proceedings linked to the defendants' rights in detention. As mentioned under 2.8 the remuneration of the lawyer is augmented if the client is in pre-trial detention. The disadvantages following from detention shall be compensated by this extra-fee. Whether in reality any extra effort (apart from e.g. having to visit the client in detention instead of seeing him or her in the lawyer's office) was caused by this is of no interest.[67] Any additional proceedings are perceived as being compensated by that extra-money, like proceedings on conditions of detention or about release.[68] The extra-fee is between 31 and 93 €.[69]

Only a hearing fee can arise (additionally) in case of a hearing taking place in one of the proceedings mentioned.

2.5 Scope of the compensation

None of the acts are to be done by a lawyer. In cases in which a lawyer is mandatory for the crime law case, all efforts regarding pre-trial detention are included.[70]

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67 KG RVGreport 2007, 149; StraFo 2007, 483 = RVGreport 2007, 462 = StRR 2007, 359 = JurBüro 2007, 644; AGS 2008, 32; OLG Celle StraFo 2008, 443 = AGS 2008, 490 = StRR 2009, 38 = NStZ-RR 08, 392; OLG Hamm RVGreport 2009, 149 = StRR 2009, 39.

68 Burhoff, RVGreport 2011, 242.

69 Nr. 4109, 4115, 4121 VV Lawyer´s Remuneration Act, http://www.gesetze-im-internet.de/englisch_rvg/index.html

70 Burhoff RVGreport 2011, 242.

2.6 Choice of the lawyer

In case of PKH or Beratungshilfe a recipient not only has to choose the lawyer but also has to find one that is willing to take over the mandate.

BRAO § 49a The duty to give legal advice

(1)

A Rechtsanwalt has a duty to give legal advice as provided for under the Act pertaining to the provision of legal aid for legal advice (Beratungshilfegesetz). The Rechtsanwalt may decline to give legal advice in the individual case if there are important grounds for doing so.

(2)

A Rechtsanwalt has a duty to co-operate in services offered by the Bar for giving legal advice to persons with a low income who seek access to justice. The Rechtsanwalt may decline to co-operate in the individual case if there are important grounds for doing so.

Although the lawyer is in principle required to take over cases according to the law, it might be difficult to find one that will take over any prison-connected case. Outcome of these cases is low (35 – 85 €). The administrative outlay is big. Many lawyers will for that reason try hard to find an "important ground" to decline taking over. That effect will be even stronger if the client got the special and more sapping needs of a detainee.

Some federal states organize Out-of-Court Counselling Aid in a local service as para. 2 specifies. Obviously a consultation service, mostly taking place at the bar's office, is not to be reached by pre-trial detainees.

Prozesskostenhilfe is only available in cases of an extraordinary remedy. These cases are complicated and call for large input. At the same time the legally prescribed fees are lowered.[71] There is no law requiring to take over Prozesskostenhilfe cases. So the challenge in cases of Prozesskostenhilfe is to find a capable lawyer, willing to invest much for a little outcome.

The obligation to take over the case arises with the assignment by the court. Due to Section 121 Code of Civil Procedure the party shall be assigned an attorney as counsel who is willing to represent the party and whom the party has selected. Only in exceptional cases (*Should the party not find an attorney willing to represent it, the presiding judge shall assign an attorney as counsel upon the party having filed the corresponding application, Section 121 para. 5 Code of Civil Procedure*) an attorney can be forced to cooperate.[72]

71 See also 2.8 b) for comparing the fees.

72 BGH 27,166; 30, 226.

2.6 Application for legal aid

Out-of-Court Counselling Aid and legal aid for court proceedings both depend on the financial situation of the person.

Applications for Out-of-Court Counselling Aid can be done in writing or orally. Information about income, assets, marital status and financial burdens have to follow the application.

Section 4

(1) The local court in the district of which the litigant has his general place of jurisdiction shall decide on applications for advisory assistance. If the litigant does not have a general place of jurisdiction in Germany, the local court in the district in which the need for advisory assistance occurs shall have jurisdiction.

(2) The application may be made orally or in writing. The situation for which the application for advisory assistance is being made shall be indicated.

(3) The following documents shall be included with the application:

1. a statement by the litigant concerning his personal and economic circumstances, especially information concerning his marital status, profession, assets, income and expenditures, as well as the relevant documents and

2. an assurance by the litigant that he has not previously been granted advisory assistance concerning the same matter or been refused it by a court, and that no court proceedings are or were pending concerning the same matter.[73]

Legal aid for court proceedings needs a written application. There are forms available to give the needed information about income, assets and personal situation. Using these forms is obligatory.[74]

Section 170 Code of Civil Procedure
Service on representatives

73 http://www.gesetze-im-internet.de/englisch_berathig/englisch_berathig.html#p0031

74 Section 117 para. 4 Code of Civil Procedure, http://www.gesetze-im-internet.de/englisch_zpo/index.html Prozesskostenhilfeverordnung (Rules of Legal Aid Procedure), https://www.gesetze-im-internet.de/pkhfv/BJNR003400014.html

(1) In the event a person does not have the capacity to conduct proceedings, service is to be made on his legal representative. Any service made on the person incapable of conducting proceedings shall not be valid.

(2) Should the party on whom documents are to be served not be an individual, service on the entity's head shall suffice.

(3) In the event of an entity having more than one legal representative or head, it shall suffice to serve the documents on one of them.[75]

2.7 Evaluation and granting of applications for legal aid

The decisions about Out-of-Court Counselling Aid are to be made by a judicial officer at the local court. Legal knowledge is unnecessary because legal examination is not required. Out-of-Court Counselling Aid is to be granted regardless of chances of success.

Appealing against the decision of the judicial officer leads to a final decision by the judge. This decision is definitive. After this decision legal remedies are exhausted.

Section 7 Act on Advisory Assistance and Representation for Citizens with a Low Income

Only reminders serving as a legal remedy are permitted against a decision rejecting an application for the approval of advisory assistance or repealing approval ex officio or upon the application of a consultant.

Appeals are to be made in writing or at the legal application office. Due to the fact, that pre-trial detainees will not be able to show off at this office, written form is the only practicable way.

For PKH please also see 2.2 c).

2.8 Remuneration of legal aid lawyers

a) Out-of-Court Counselling Aid

Outcome of Out-of-Court Counselling Aid is regulated by the Lawyer´s Remuneration Act (Rechtsanwaltsvergütungsgesetz). The remuneration schedule is giving these details:

75 http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0699

2500	Fee for advisory assistance	€15.00
2501	No expenses shall be charged in addition to the fee,. The fee may be waived. Advisory fee	€35.00
	(1) The fee shall be incurred for advisory assistance if such assistance is unconnected with another activity that is subject to a fee. (2) The fee shall be set off against a fee for another activity connected with the advisory assistance.	
2502	Advisory activity with the objective of reaching an out-of-court agreement with creditors concerning debt settlement on the basis of a plan (section 305 (1) (1) of the Insolvency Statute): Fee 2501 shall be	€70.00
2503	General fee.....	€85.00
	(1) The fee shall be incurred for carrying out a transaction including providing information or assistance with drawing up a contract. (2) Half of this fee shall be set off against the fees for subsequent court or official proceedings. A quarter of this fee shall be set off against the fees for proceedings for a declaration of enforceability of a settlement pursuant to sections 796a, 796b and 796c (2), second sentence of the Code of Civil Procedure.	

The Fees for legal advice outside of advice assistance are calculated in a very different way.

An initial consulting can lead to a remuneration of up to 190 €. If the prospects of a legal remedy are about to be verified, due to Nr. 2100 remuneration schedule the amount (to be found in the list below) is to be multiplied by 0.5 to 1.0. Extrajudicial representation leads to a multiplication by 0.5 up to 2.5. A factor higher than 1.3 is only possible in difficult cases.

Annex 2 (corresponding to Section 13 (1), third sentence)

Value of the claim up to … €	Fee … €		Value of the claim up to … €	Fee … €
500	45.00		**50,000**	1,163.00
1,000	80.00		**65,000**	1,248.00
1,500	115.00		**80,000**	1,333.00
2,000	150.00		**95,000**	1,418.00
3,000	201.00		**110,000**	1,503.00
4,000	252,00		**125,000**	1,588.00
5,000	303.00		**140,000**	1,673.00
6,000	354.00		**155,000**	1,758.00
7,000	405.00		**170,000**	1,843.00
8,000	456.00		**185,000**	1,928.00
9,000	507.00		**200,000**	2,013.00
10,000	558.00		**230,000**	2,133.00
13,000	604.00		**260,000**	2,253.00
16,000	650.00		**290,000**	2,373.00
19,000	696.00		**320,000**	2,493.00
22,000	742.00		**350,000**	2,613.00

25,000	788.00		**380,000**	2,733.00
30,000	863.00		**410,000**	2,853.00
35,000	938.00		**440,000**	2,973.00
40,000	1,013.00		**470,000**	3,093.00
45,000	1,088.00		**500,000**	3,213.00

It appears, that the calculation can only be done if the value of the claim is known. As not any countable amount of money is object to the operation, the value needs to be defined by using the rules of Section 23 para. 3, 2. sentence Lawyer´s Remuneration Act. To construct an example a value of 4,000 € will be presumed.

That leads to the following outcomes (excluding taxes, expenses and fees):

Advisory Assistance:

Out-of-Court Counselling Aid:	15 € (to be born by the client) + 35 €	=	50 €
Initial Consulting:		up to	190 €

Prospects of a legal remedy:

Out-of-Court Counselling Aid:	15 € (to be born by the client) + 35 €	=	50 €
Standard rate outside legal aid =	252 € x 0.5-1.0	=	126-252 €

Extrajudicial Presentation:

Out-of-Court Counselling Aid:	15 € (to be born by the client) + 35 € + 85 €	=	135 €
Standard rate outside legal aid=	252 € x 0.5 -2.5	=	126-630 €

In practice fees for lawyers are generally very low in the area of prison law. The value of a prisoner's claim will as rule never be defined with 4,000 Euro but usually with 300 to 500 Euro, sometimes 1,000 Euro by the court. The reasoning given for this is the low income of the prisoners. It though also affects the lawyer who will only receive very small fees (like may be around 60 Euro) from the state if s/he wins the case.

For advisory assistance (*Beratung*) or extrajudicial representation (*außergerichtliche Vertretung*), the standard rates are 2.52 to 4.66 times higher when they are set outside the system of advice assistance aid (see example above).

b) Legal aid for court proceedings

As to legal aid for court proceedings, calculation is similar to other calculation systems. Differences are to be found with respect to the following table:

Section 49
Ad valorem fees from the state treasury

If fees are determined according to the value of the claim, the following fees shall be remunerated instead of the fee pursuant to section 13 (1) if the value of the claim exceeds €4,000:

Value of the matter in dispute up to the amount in euro indicated below	Fee in euro	Value of the matter in dispute up to the amount indicated in euro below	Fee in euro
5,000	257	16,000	335
6,000	267	19,000	349
7,000	277	22,000	363
8,000	287	25,000	377
9,000	297	30,000	412
10	307	more than	
13,000	321	30,000	447

As mentioned above, legal aid for court proceedings is only available for an extraordinary remedy in pre-trial detention cases. The relevant amount in these cases is 5.000 € or higher. Comparing the fees for an amount of 5,000 €, 10,000 € and 15,000 € (257/303 €, 307/585 €, 321/604 €) shows, that the remuneration in cases of legal aid for court procedures are between 15 and 47 % lower than in regular cases.

c) court-assigned lawyer

Lawyers in crime cases are paid following to the list below. The 3rd column gives the spectrum in which the defence-council can charge fees. An average case leads to an average fee, which means (highest + lowest) : 2 = average fee. If the case is difficult or extensive, fees can be increased to the highest quoted sum.

The 4th column gives the fee a court-assigned lawyer can charge. Increasing the fee is not possible.

A surcharge is given in pre-trial-detention cases.

Subdivision 3 *Court proceedings*			
First instance			
4106	Procedural fee for the first instance before a local court	€40.00 to €290.00	€132.00
4107	Fee 4106 with surcharge	€40.00 to €362.50	€161.00
4108	Hearing fee for each day of the main hearing in proceedings specified in no. 4106.....	€70.00 to €480.00	€220.00
4109	Fee 4108 with surcharge	€70.00 to €600.00	€268.00
4110	An attorney appointed or assigned as counsel by a court takes part in the main proceedings for more than five and up to eight hours: additional fee as well as fee 4108 or 4109		€110.00
4111	An attorney appointed or assigned as counsel by a court takes part in the main proceedings for more than eight hours: additional fee as well as fee 4108 or 4109		€220.00 €
4112	Procedural fee for the first instance before a criminal division	€50.00 to €320.00	€148.00
	The fee shall also be incurred for proceedings 1. before a juvenile division unless the fee is determined pursuant		

	to no. 4118, 2. in rehabilitation proceedings pursuant to part 2 of the Criminal Rehabilitation Act.		
4113	Fee 4112 with surcharge	€50.00 to €400.00	€180.00
4114	Hearing fee per day of main proceedings in proceedings specified in no. 4112.....	€80.00 to €560.00	€256.00
4115	Fee 4114 with surcharge	€80.00 to €700.00	€312.00
4116	An attorney appointed or assigned as counsel by a court takes part in the main proceedings for more than five and up to eight hours: Additional fee as well as fee 4114 or 4115		€128.00
4117	An attorney appointed or assigned as counsel by a court takes part in the main proceedings for more than eight hours: Additional fee as well as fee 4114 or 4115		€256.00
4118	Procedural fee for the first instance before a higher regional court, a criminal division with lay judges (*Schwurgericht*) or a criminal division pursuant to sections 74a and 74c of the [German] Courts Constitution Act (*Gerichtsverfassungsgesetz* - GVG)	€100.00 to €690.00	€316.00
	The fee shall also be incurred for proceedings before a juvenile division if it decides on cases governed by the general provisions on the competence of a criminal division with lay judges.		
4119	Fee 4118 with surcharge	€100.00 to €862.50	€385.00
4120	Hearing fee per day of main proceedings in proceedings specified in no. 4118.....	€130.00 to €930.00	€424.00

4121	Fee 4120 with surcharge	€130.00 to €1,162.50	€517.00

A procedural fee for the first instance before a local court with surcharge would be up to 362.50 € for a defence council hired by the client. The fee for the court-assigned lawyer is 161 € which is 56 % lower. The proportions are the same for the other fees.

An average fee would be 201.25 €. Comparing to 161 € which is 20% lower.

2.9 Support to non-native speakers

a) at the police station

As mentioned above under 1.2 a)

Arrested persons are to be instructed about their rights in a language they understand. They must be informed about the fact that an interpreter can be called in at any time free of charge.[76] This information is of very high importance. Firstly, because such a rule will not be expected by the persons concerned.[77] Second because understanding the processes and information is a key for the further process.

Foreigners are also to be informed that they may demand notification to the consular representation of their native country and have messages communicated to them. Violating these duties never led to inadmissibility of evidence under the previous legal framework. Two chambers of the Federal Court of Justice, the 3rd and 5th Senate of the Federal Court of Justice had drawn the conclusion that there is no imaginable case in which an inadmissibility of evidence could be caused by this violation.[78] However, the decisions by the 5th Chamber were overturned by the Federal Constitutional Court.[79] Then the respective duty was implemented into written law. The unobserved contact with a consular representative, as now stipulated in Section 119 Abs. 4 Nr. 19, can be an effective way to get in contact with a competent lawyer with respect to language, matters of transfer to the home country for the execution of the sentence etc. The violation of this duty can be expected to constitute an accepted reason for inadmissibility of evidence in the future.

76 Section 114b CCP, http://www.gesetze-im-internet.de/englisch_stpo/index.html

77 Schmitt, Section 114b, marginal no. 8a.

78 BGHSt 52, 110; BGHSt 52, 48; BGH StV 2003, 57.

79 BVerfG NJW 2011, 207; BVerfG NJW 2007, 499.

b) before the first examination

See above.

c) pre-trial detention center

About the situation in pre-trial detention is to be mentioned that the costs of an interpreter or translator will be reimbursed by the State.[80] There are two conceivable constellations. One is the contact with the defence council. Out of the claim to call a translator whenever needed in the crime procedure follows the opportunity to get the costs compensated. In cases a interpreter/translator is necessary to guarantee an appropriate handling, the defence council can hire one and get refunding of the court. That need is assumed in any case the language skills of the accused person do not meet the conditions mentioned below.[81] Limited is this claim to the necessary amount.[82] The hourly rate is limited to the amount a court hired interpreter may request according to the statutory regulations of the law on remuneration of lawyers (RVG). Section 46 para. 2 RVG refers to the rules of JVEG (German Law on Payment and Compensation by Judiciary Authorities) which defines a limit of 70 to 75 € per hour.[83] The claim is based on the mentioned right to call in a interpreter or translator at any state of the crime-procedure.[84]

The second is Beratungshilfe (Out-of-Court Counselling Aid) where the costs of a interpreter are to be repaid based on Section 675 in conjunction with Section 670 German Civil Code (BGB).[85] Details are subject to the points made above.

2.10 Exemption of costs for the legal aid beneficiary

see below

2.11 Financial consequences of the failure of the proceedings for the legal aid beneficiary

In case of Out-of-Court Counselling Aid no charges arise.

80 Lissner/Dietrich/Eilzer/Germann/Kessel, marginal no. 338.

81 Fölsch/Schnapp, RVG, Section 46, marginal no. 36f.

82 Lissner/Dietrich/Eilzer/Germann/Kessel, marginal no. 338.

83 Lissner/Dietrich/Eiler/Germann/Kessel, marginal no. 338.

84 Section 187 para. 1-3 German Code on Court Constitution (Gerichtsverfassungsgesetz) http://www.gesetze-im-internet.de/englisch_gvg/index.html

85 Dörndorfer, marginal no. 111.

The only thinkable case of Prozesskostenhilfe is the extraordinary remedy of a constitutional complaint. The procedures at the Federal Constitutional Court are free of charge. In case of failure no charges arise.

In cases in which a lawyer was assigned for the criminal law procedure, the decision about any costs is to be made at the end of the proceedings together with the final judgement, e.g. conviction or acquittal. Section 465 CCP directs the costs for the criminal proceedings as a whole towards the defendant in case of his or her conviction. In case of acquittal Section 467 excludes any taxing of costs as a rule. In case of any other finalization of the trial proceedings, e.g. discretionary diversion, the costs are usually with the defendant unless the court decides otherwise (Sect. 465 para. 2 CCP).

2.12 Opportunities in case the legal aid beneficiary is not satisfied with his counsel

Out-of-Court Counselling Aid can only by granted once in a specific case. If the beneficiary is not satisfied no exceptions are intended.[86]

Prozesskostenhilfe allows a change, but it doesn´t double the fees. The new lawyer can only charge fees that emerge after the change. All the fees resulting from the first lawyers work can not be remunerated and have to be carried by the beneficiary.[87]

Chance of the court-assigned lawyer can be done in cases of loss of confidence. As the change leads to doubling of the fees, there must be strong reasons and accomplished facts in order to justify the change.[88] The new lawyer will be fully paid.[89]

86 Lissner/Dietrich/Eilzer/Germann/Kessel, marginal no. 193.

87 Lissner/Dietrich/Eilzer/Germann/Kessel, marginal no. 642.

88 Schmitt, Section 143, marginal no. 5ff.

89 Fölsch/Schnapp, Section 48, marginal no. 86ff.

3. ORGANIZATION OF BARS AND LAWYERS' ACTION IN DETENTION

3.1 Regulations of bars' involvement in legal support to detainees

There is no legal support for detainees organized by the bars.

Most lawyers' associations provide an emergency service for arrested or accused persons.

As mentioned above, emergency services are provided almost nationwide with a focus on weekends and periods outside office operation hours. As can be concluded from the wording of the new phrase which was added to Section 136 CPP in September 2017, (existing emergency services are to be mentioned) it is not mandatory for lawyers' organisations to provide this kind of service.[90] Emergency services for arrested or accused persons are usually permanent institutions. Emergency services have also been established around political events like the G 20 summit 2017 in Hamburg or the G 8 summit 2007 in Heiligendamm.

Section 49a § 1BRAO (Legal Framework for the Profession of Lawyers) states a duty to give legal advice for lawyers within the framework of the Act on Advisory Assistance and Representation for Citizens with a Low Income. In the federal states of Hamburg and Bremen a special legal arrangement is in place, substituting the regulations on advisory assistance as mentioned above. The duty to offer this service is to be fulfilled by legal aid consultation hours. Neither in Bremen nor in Hamburg these consultation hours are provided in places of detention.

Section 49a § 2 also states a general duty for lawyers to participate in legal advice services provided by "the advocacy" (which will most likely mean the bar) for persons with low income. The mentioned "emergency services" are not part of this obligation. This regulation mirrors the duties set out in § 1 and primarily targets the mentioned federal states replacing the advisory assistance by legal aid consultation hours.[91]

3.2 Lawyers specialized in detention/penitentiary law

There is no statutory qualification for lawyers specialized in detention or penitentiary law. A lawyer can be designated *Fachanwalt für Strafrecht* (lawyer specialised in criminal law). Designation needs to be awarded by the bar.[92] A specialist lawyer in criminal law will provide

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90 Schlothauer, marginal no.262.

91 Römermann/Zimmermann BRAO § 49 Rn. 14-15.

92 Section 1 Specialist Lawyer Code of Conduct (Fachanwaltsordnung). http://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/fao_stand_01.01.2018.pdf

expert knowledge in criminal law including related constitutional rights, European law and human rights law.[93] Theoretical knowledge has to be proofed by advanced training courses with a minimal amount of 120 hours and a written thesis.[94] Practical experience can be approved by 60 finally processed criminal law cases with at least 40 actual trial periods at the court of lay assessors or higher court.[95] The knowledge needs to be proofed in a final expert discussion.[96] To obtain the status, advanced training courses in a minimal amount of 15 hours are to be completed every year.[97]

3.3. Practical arrangements for carrying out legal assistance missions

Access to accommodation facilities can only be allowed by the prison authorities. There is no written law guaranteeing any access.

Lawyers are supposed to see their clients in prison under conditions that allow personal and confident discussions. Any access to locations different from the consulting rooms do not follow up with this requirement. Exceptions are e.g. made if the client is isolated in a security cell and cannot be transferred to the consulting room. In these cases (according to practical experience) the lawyer can see his or her client there.

The only known example of access to almost all accommodation facilities in prison and pre-trial detention for actors of legal aid is the prison in Bremen. Members of the NGO providing legal advice are getting access to the facilities to see all detainees. That can even be extended to see the client in his or her room, if he or she invites one in. The direct contact reliably avoids the exclusion of access for inmates who are perceived as unwanted or inconvenient by the centre's administration. Even if sanctions are executed or seeing the NGO members is impossible for any other reason, a solution can be found.

Section 19 Federal Data Protection Act is giving the right of provision of information to the person who is subject of the date.

Section 19
Provision of information to the data subject

(1) The data subject shall, at his request, be provided with information on

1. stored data concerning him, including any reference in them to their origin,

93 Section 2 Specialist Lawyer Code of Conduct (Fachanwaltsordnung).

94 Section 4, 4a Specialist Lawyer Code of Conduct (Fachanwaltsordnung).

95 Section 5 Specialist Lawyer Code of Conduct (Fachanwaltsordnung).

96 Section 7 Specialist Lawyer Code of Conduct (Fachanwaltsordnung).

97 Section 15 Specialist Lawyer Code of Conduct (Fachanwaltsordnung).

2. the recipients or categories of recipients to whom the data are transmitted, and

3. the purpose of storage.

The request should specify the type of personal data on which information is to be provided. If the personal data are stored neither by automated procedures nor in non-automated filing systems, information shall be provided only in so far as the data subject supplies particulars making it possible to locate the data and the effort needed to provide the information is not out of proportion to the interest in such information expressed by the data subject. The controller shall exercise due discretion in determining the procedure for providing such information and, in particular, the form in which it is provided.

This regulation was implemented by the different federal remand custody acts. All of them determine that the access to the penitentiary file can be denied, if that would carry a risk for the upcoming criminal procedure or endanger the implementation of directives given with regard to it.[98]

This access to the penitentiary file can be carried out by the person concerned or by any representative.

98 e.g. Section 95 Federal Remand Custody Act Bremen (Bremisches Gesetz über den Vollzug der Untersuchungshaft).

4. ROLE OF NGOS, LEGAL CLINICS AND NATIONAL MONITORING BODIES OF PRISON CONDITIONS

4.1 Ability for these organizations to intervene in prison and to provide legal advice

There are no general rules about these organizations and their right to visit prisoners. This means in fact they need authorization prior to visiting prisons and see detainees on the basis of a single case. The reason might be that up to the year 2006, no legal advice was to be given by basically anybody else but an admitted attorney due to a law originating from National-Socialist times (Rechtsberatungsgesetz (Act on the Admission to Giving Legal Advice). That law was abrogated in 2006 and replaced by the Rechtsdienstleistungsgesetz (Act on the Service of Legal Advice) which initially gave the opportunity of legal advice from outside the advocacy.[99] For quality assurance and to protect the affected persons interests, the Rechtsdienstleistungsgesetz did open up five different options of advisory service to people or organizations outside the advocacy. One of them – and the only one that could be of interest in this context – is the pro bono work of legal advisers.[100] This statute only covers the extrajudicial fields and has to be supervised by a fully qualified[101] lawyer.[102]

At this point there are two NGOs nationwide dealing with prisoners' rights and providing legal advice. One is the "Verein für Rechtshilfe im Justizvollzug des Landes Bremen e.V.", the other one is the "Strafvollzugsarchiv" (The Prisons Archive), both of them mentioned above as well as the other projects with similarities: the NGO "Komitee für Grundrechte und Demokratie" (Committee for Fundamental Rights and Democracy), the book Wege durch den Knast" http://www.wegedurchdenknast.de/) and the user's organisation "Trade Union of Prisoners".

Since 1980 there are also mandatorily established advisory committees, which need to exist in any prison, including pretrial-detention centres.[103] If the court doesn't make a different ruling in an individual case, communication with this advisory committee may not be subjected to control

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99 Kilian/Sabel/vom Stein, marginal no. 1ff.

100 Kilian/Sabel/vom Stein, marginal no. 17f.

101 Qualified to hold the position of a judge; first and second state law examination.

102 Kilian/Sabel/vom Stein, marginal no. 19.

103 Graebsch, Section 103, marginal no. 18.

(Sect. 119 para. 4 sent. 2 No. 19 lit b CCP). These advisory committees are supposed to be a link between the institution and the public.[104] ne of their task is to control and monitor the correctional facility, but the main one is to assess if the objective of the institution as stipulated by law is reached. This implies access to all facilities at any time and the possibility to make extensive use of this right.[105] At the same time a mediatory function shall be met, but all of this without engaging in individual cases. This balancing act gives an indication of the challenges these committees meet. [106] Because of the unlimited access there is a factual high capability which on the other hand may be cut back by their official task. Another reason why these committees cannot be seen as giving legal advice is their composition of people which are supposed to represent an average of the population rather than professionals of imprisonment such as lawyers.

An ombudsman for prisons exists only in one federal state; North Rhine-Westphalia. Detainees have the right to make complaints to this institution (Sect. 41 sentence 2 Act on Remand Detention in North Rhine-Westphalia). While letters to this institution are not subjected to control of the prison administration, this institution is not part of the list of courts and institutions which are excluded from judicial control or control of the communication by the prosecution service or detention centre. The ombudsman may support the rights of inmates against the administration by mediating and reporting. The ombudsman though does not give legal advice. If the inmate has complained to a court as well, the ombudsman will not take over the case. Thus, detainees have to make a decision on whether to apply for a judicial review of a matter or to complain to the ombudsman.

4.2 Dissemination of legal documents

There are no rules about the dissemination of legal documents by NGOs or other organizations in general. In 2016 a manual for prisoners (*Wege durch den Knast*) was published by a group called "Assoziation A" located in Berlin that has been mentioned above. The book uses over 600 pages to inform and educate prisoners about their rights as well as to convey strategies to avoid the harms of imprisonment. Most of the prison administrations decline to accept this book as part of the property of any inmate or deny handing it over to the prisoner if sent by mail. Due to the statements given by the administration, motivating prisoners to exercise their rights is endangering the safety and order of the institution.[107] That example shows the sharpest sword of

104 Graebsch, Section 103, marginal no. 2.

105 Graebsch, Section 103, marginal no. 3f.

106 Graebsch, Section 103, marginal no. 32ff.

107 http://peter-nowak-journalist.de/2017/02/04/kein-weg-durch-den-knast/

prison administration. “Endangering safety and order of the prison” can and is pulled up as a reason for any kind of decision – even in case of obvious other motivations.

This practice takes place despite the decision of the Constitutional Court on behalf of ‘The Prisons Archive’ in 2004. It dealt with a leaflet[108] on advice for HIV/AIDS prisoners including a chapter on prisoners’ rights in general. This chapter had been written by the Prisons Archive. The administration of a Bavarian prison decided not to deliver it to the prisoner it was sent to. The administration stated it could induce prisoners to a hostile perception of prison and a misuse of the complaint system. While this decision was confirmed by the courts, the Federal Constitutional Court rescinded it with the reasoning: „If a prisoner is informed about his rights in an objective, thorough and, from a legal perspective, at least justifiable way by means of a brochure, […] this does not cause a danger, even if the legal information is posed critically against aspects of imprisonment.” [109]

4.3 Legal action in court

As mentioned above, the rules of the act on the service of legal advice (*Rechtsdienstleistungsgesetz*) only allow activities in the extrajudicial field. Representing or acting on behalf of any other person is only possible if permitted by the law in that field. In criminal law this is done by the Code of Criminal Procedure. Section 137 defines, that any accused person may contact or hire a lawyer at any state of the procedure. Except for representing somebody in court proceedings and hearings this role can be given to any individual person (e.g. a friend).[110] These persons can file a motion or appeal against decisions. Defending an accused person in court can only be done by a defence attorney or a fully educated lawyer or a law professor.[111] Other persons can be authorized by the court. In case of “mandatory defence” (see 2.2 c)) any other person can be authorized additionally but not solely.[112] For pretrial-detention cases this opens up the possibility of representing and acting on behalf of the prisoner. Because of the “mandatory defence” in detention, any action has to be coordinated with the defence attorney.

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108 „Positiv in Haft“, Deutsche AIDS-Hilfe, 8. Auflage 2011. https://www.aidshilfe.de/sites/default/files/documents/Brosch%C3%BCre_PIH-DE_2011.pdf

109 BVerfG 15.12.2004 - 2 BvR 2219/01.

110 Schmitt, Vor Section 137, marginal no. 12.

111 Meyer-Goßner, Einl., marginal no. 134.

112 Schmitt, Section 138, marginal no. 18f.

As the number of NGOs in this field is low there are only very limited instances. As a conclusion the opportunity of being represented by NGOs or any other organization members is technically given only to a very limited extend[113]. In practice it doesn´t play any role.

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113 A constitutional complaint can be ordered by an NGO, but only in cases relating to their own rights. Not in order to protect others rights.

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