



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

Workstream 3: Vulnerable Groups of Inmates

COUNTRY REPORT – GERMANY

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1) Introduction

Vulnerable groups of prisoners have not received a high degree of attention in the German legal literature yet. An overall definition or common understanding of vulnerable inmates is, therefore, still awaited.

In 2013, however, an expert conference of the Centre for Criminology (Kriminologische Zentralstelle e.V.) casted some light on the focus of German criminologists in terms of prisoners with special needs. Under the title 'offenders with special needs'¹, legal experts and practitioners primarily reckoned women, psychopathic as well as older and sick prisoners among this group.²

In regard to the question which prisoners belong to the group of vulnerable inmates, Feest (2013) rightly argues that the Center for Criminology has ignored the existence of further vulnerable inmate groups – that is to say persons with disabilities, trans- and intersexual prisoners as well as prisoners who deny their crime – that should be considered as well. Besides, many ordinary prisoners developed special needs due to the conditions of imprisonment (ibid.).

The following report is based on the classifications provided by the UN Handbook on Prisoners with Special Needs³. However, it is not limited to those groups of inmates mentioned in the handbook. As suggested by the contributors of the above-mentioned conference, female prisoners are portrayed as an independent group of vulnerable prisoners as well. Moreover, the special situation of drug-addicted prisoners and those denying the committal of a crime (Tatleugner) requires a separate depiction, too. The description of the different groups of vulnerable inmates deals with the respective relevance in the German penitentiary system and both their theoretical legal situation and the prevailing practices.⁴

2) Prisoners with mental health care needs

The share of prisoners with mental health care needs in the general German prison population is extremely high and therefore, mentally ill prisoners represent a significant vulnerable group of inmates. A study conducted in the prison of Bielefeld Brackwede in North-Rhine-Westphalia, the largest German federal state, showed that 53.2 per cent of its inmates had suffered from a personality disorder in need of treatment within the previous six months and 27.3 per cent of an anxiety disorder (prisoners can belong to both groups, von Schönfeld et al 2006, pp. 834, 836). The study also revealed that most of the prisoners, both male and female, exhibited a high degree of comorbidity and that a remarkable percentage of prisoners suffered from substance-use disorders, that is to say 59.2 per cent of the male and 69.8 per cent of the female participants (ibid., p. 836)⁵. Other studies refer to 26.2 to 80 per cent of prisoners with personality disorders (Ukere 2012, pp. 6-7; Kopp 2012).

¹ German title: 'Straffällige mit besonderen Bedürfnissen'.

² See the conference flyer, retrieved from: http://www.krimz.de/fileadmin/dateiablage/download/FlyerTagung_2013.pdf (last viewed 5 July 2014).

³ See: http://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf (last viewed 24 July 2014).

⁴ Since both women and crime-denying prisoners have not been treated as vulnerable inmates yet, the authors have dispensed with the report structure (general introduction / legal provisions / practice) and limited the description to a general overview.

⁵ Other studies speak about 25-50 per cent of problematic drug users, see below no. "11".

a) Legal provisions

The central legal regulation for the treatment of mentally ill prisoners is Section 56 Federal Prison Act or the respective provision in the different State Prison Acts⁶. The federal regulation clearly stipulates that the prison administration is responsible for taking care of the prisoners' physical and mental health. In this context, the state's obligation to facilitate proper medical treatment in the penitentiaries corresponds to a legally enforceable right on the prisoner's part (Lesting & Stöver 2012, § 56, marg. no. 1). As to medical care in the prison, German penitentiary law provides for the application of the so-called principle of equivalence, basing on the presumption that "[l]ife in penal institutions should be approximated as far as possible to general living conditions" (Section 3 para. 1 Federal Prison Act). Hence, medical care in prison has to be oriented at the established standards and guidelines of extramural medical care.

As the German legislator never enabled the – originally designated – involvement of prisoners in the public health insurance scheme, mentally ill prisoners do not have the right to choose their own doctor (Laubenthal 2011, p. 387). Instead, a medical officer (Anstaltsarzt) is responsible for the medical care inside the penal institution and only he or she may decide to consult an external psychiatrist or psychotherapist. The medical prison staff has broad discretionary powers, the use of which may be examined by courts in a very limited manner.⁷ Oftentimes, the prisoners are, therefore, completely at the medical officer's mercy if they suffer from psychological or physical problems. If the medical officer, however, recognises that a proper treatment is not possible in the prison facilities, Section 65 para. 2 Federal Prison Act⁸ provides for the prisoner's transfer to a suitable institution. Nevertheless, such transfers frequently fail because of reservations by psychiatric facilities which fear a loss of reputation or of the prison administration because of safety doubts (Stöver 2013, p. 281). In severe cases, the responsible prosecution service may also order the interruption of a prison sentence in order to facilitate the prisoner's transfer to a specialised hospital according to Section 455 Code of Criminal Procedure (Lesting & Stöver 2012, § 65, marg. nos. 19, 20).

With reference to the form and extent of medical care in prison, the treatment of psychological disorders appears especially problematic in Germany. On the one hand, the federal provision on medical treatment, that is Section 58 Federal Prison Act, does not explicitly mention psychiatric or psychotherapeutic measures and, indeed, there have been cases in which courts denied the right to a state-funded psychotherapy, arguing that the definition of illness in Section 58 did not cover psychological disorders.⁹ This phenomenon, however, may soon be history as the Federal Prison Act

⁶ See Art. 58 BayStVollzG (Bavaria); Section 56 NJVollzG (Lower Saxony); all other State Prison Acts do not explicitly mention the prison administration's responsibility for the health of the prisoners but guarantee the latter a right to necessary medical treatment: Section 74 para. 1 BbgJVollzG (Brandenburg); Section 62 para. 1 StVollzG M-V (Mecklenburg-West Pomerania); Section 72 para. 1 LJVollzG (Rhineland-Palatinate); Section 62 para. 1 SLStVollzG (Saarland); Section 63 para. 1 SächsStVollzG (Saxony); Section 73 para. 1 ThürJVollzGB (Thuringia); Section 32 para. 1 JVollzGB-3 (Baden-Württemberg); Section 24 para. 1 HStVollzG (Hesse).

⁷ The medical officer's discretion is, however, limited to measures that are conducted *lege artis*.

⁸ For the State Prison Acts see: Art. 67 BayStVollzG (Bavaria); Section 63 paras. 1 and 2 HmbStVollzG (Hamburg); Section 24 para. 4 HStVollzG (Hesse); Section 63 NJVollzG (Lower Saxony); Section 34 paras. 1 and 2 s. 1 JVollzGB-3 (Baden-Württemberg); Section 75 para. 1 BbgJVollzG (Brandenburg); Section 63 para. 1 StVollzG M-V (Mecklenburg-West Pomerania); Section 73 para. 1 LJVollzG (Rhineland-Palatinate); Section 63 para. 1 SLStVollzG (Saarland); Section 64 para. 1 SächsStVollzG (Saxony); Section 74 para. 1 ThürJVollzGB (Thuringia).

⁹ See e.g. Higher Regional Court of Karlsruhe, decision of 19 February 1997, 2 Ws 221/95, 2 Ws 222/95.

is being gradually replaced by State Prison Acts, eleven of which already mention psychotherapy or other forms of psychological aid as part of the catalogue of medical measures in the prison. On the other hand, psychiatric or psychotherapeutic treatment does – in practice – oftentimes not take place as many special psychological needs are either not recognised or not considered appropriately by the medical prison staff (Stöver 2013, p. 281). This may be particularly due to the fact that ordinary prisoners have not been diagnosed with a guilt-diminishing mental disorder and the court did not order the transfer to a forensic psychiatry (ibid.).

b) Practices

Although various studies have indicated an ever-increasing need for psychiatric and psychotherapeutic treatment in German prisons, there is no overall conception for a prison psychiatry (Nedopil, Müller & Dittmann 2012, p. 401).

On the contrary, only seven federal states – Baden-Württemberg, Bavaria, Berlin, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate and Saxony – have independent psychiatric departments in their penitentiaries. The other states intend to guarantee psychological treatment via cooperation agreements with forensic or general psychiatric institutions or by offering ambulant psychiatric services. In those states where penal institutions offer in-patient treatment, however, there is a lack of complementary measures (Konrad 2009, p. 211). In Berlin, for example, an aftercare department that offered partial in-patient treatment and which was integrated into the ordinary prison section was closed down after two decades (ibid., pp. 211-212).

One form of psychiatric in-patient treatment for prisoners takes place in the prison of Straubing (Bavaria) which has its own psychiatric department. 25 Bavarian penal institutions fall within the responsibility of the latter and its purpose is to assess the condition of prisoners who face psychological problems and to quickly stabilise and heal them in order to refer them back to the responsible penitentiaries (Ellinger et al. 2013, p. 295). In total, the psychiatric department offers treatment for 36 prisoners which is implemented by three specialised doctors, 14 nurses and one social pedagogue (ibid.). Additional to the in-patient treatment, the medical staff of the department also provides ambulant psychiatric assistance for prisoners from Straubing. In view of the psychiatric treatment in Straubing, it needs to be added that, obviously, the development of a relationship of trust between the treating psychiatrist and the patient is highly difficult. This phenomenon, though, is not limited to this specific facility as the function of medical and psychiatrist officers in penitentiaries – that is to say the maintenance of the prisoners' bodily functions in order to guarantee the continuation of imprisonment – generally hinders an open and trusting relation.

Another example of psychiatric treatment in German prisons is the cooperation agreement between the prison of Brandenburg and the local psychiatry (Menn 2013). Correspondent to the agreement, the prison hospital makes six beds available to prisoners with psychiatric needs who get treated by doctors, occupational and physical therapists as well as psychotherapists of the local psychiatry (Menn 2013, p. 307). The psychiatric station of the Brandenburg prison has an average occupancy rate of 90 per cent (ibid., p. 308).

With reference to ambulant psychiatric and psychotherapeutic care for prisoners, the treatment mostly relies on the sensitivity and interest of the medical prison staff. The consultation of external doctors generally happens quite rarely and even if the medical officer decides to pass on responsibility, this oftentimes rather results in a psychiatric diagnosis and psychopharmacological recommendations rather than continuous psychotherapeutic measures (Konrad 2009, p. 212). Following the low capacities for in-patient psychiatric treatment in German prisons, the psychiatric consultation-liaison services (Psychiatrischer Konsiliardienst) are confronted with a considerable number of highly mentally-ill prisoners whose needs go far beyond the possibilities of externally consulted psychologists (Witzel 2009, pp. 223 et seq.).

On the premise that a high percentage of inmates have increased psychiatric and psychotherapeutic needs, the psychiatric capacities of German prisons are extremely low and it can be assumed that many psychological problems are not adequately diagnosed and treated.

3) Prisoners with disabilities

Hitherto, prisoners with disabilities have received very little attention in Germany. In the annual publication of the Federal Statistical Office on demographic and criminological characteristics of prisoners, the sole statistical overview of German prison populations, persons with disabilities are not mentioned at all. What is more, German legal literature does – with few exceptions – not deal with prisoners with disabilities either. While mental disabilities in ordinary prisons are not grappled with at all, the prison administration of the different federal states provide, by their own account, specially equipped cells for physically handicapped prisoners.

The little attention to this subject is even more surprising since Art. 13 para. 2 of the United Nations Convention on the Rights of Persons with Disabilities provides that state “Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.” Overall the attention the convention gained in Germany is not appropriate, e.g. the Convention’s emphasis on “mainstreaming disability” (Preamble (g)) was even translated with “the topic of disability” (“Behinderungsthematik”).¹⁰

a) Legal regulations

While the UN Handbook on Prisoners with special needs defines persons with disabilities as those “who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”, German social law – more specifically – considers individuals as disabled when their bodily functions, their intellectual capacities or their mental health deviate, for more than six months, from the condition typical for a given age so that their participation in society is impaired (Section 2 of Book IX of the Social Code).

As far as German penal and penitentiary law is concerned, a disability does not automatically exclude the offender’s fitness for a custodial sentence. Severe disabilities may, however, lead to an incompatibility with the facilities of the penal institutions according to Section 455 para. 3 Code of Criminal Procedure. In such a case, the prosecution can order the suspension of the prison term’s execution (prior to imprisonment has started). As there are no special penal institutions for persons with disabilities, convicted offenders are transferred to the responsible penitentiary in accordance with the regional scheme of execution (Vollstreckungsplan).

Since the regulations on the execution of a prison sentence apply to persons with disabilities in the same way as to prisoners without diagnosed disabilities, disabled inmates enjoy all rights guaranteed by the Federal Prison Act or the respective State Prison Act (Feest 2009). Apart from these, they benefit from the Act on Equal Opportunities of Disabled People which includes a ban on discrimination for public authorities, the state duty to create barrier-free environments in the areas of construction and transportation, the right to use sign language and other communication aids in

¹⁰ The official German translation omitted the participation of relevant NGOs to a large extent, and a separate version was produced as well, see <http://www.institut-fuer-menschenrechte.de/menschenrechtsinstrumente/vereinte-nationen/menschenrechtsabkommen/behindertenrechtskonvention-crpd.html#c1911>.

administrative matters as well as the public authorities' obligation to consider the disability in their correspondence and written decisions and forms.

German penitentiary law contains a few specific regulations that are especially relevant for prisoners with disabilities.¹¹ First of all, Section 5 para. 3 Federal Prison Act provides that prisoners shall undergo a medical examination and be introduced to the head of the prison promptly after his admission to the prison. In case of disabled prisoners, one of the responsible officers is obliged to advise him or her on appropriate rehabilitative measures according to the degree and gravity of the disability.

As far as working inside or outside the prison is concerned, a diagnosed disability of a prisoner has to be considered as well. In view of Art. 5 of Directive 2000/78/EC¹² as well as the German implementation act (Allgemeines Gleichbehandlungsgesetz) – two legal instruments which need to be regarded when applying the Federal Prison Act – a disabled prisoner has the right to an occupation if he or she would have got the job unless the disability hindered him or her. In this case, the workplace has to be changed – to an (economically) reasonable extent – in order to enable the disabled prisoner to do the work (Däubler & Galli 2012, § 37, marg. no. 14). If the disabled prisoner is transferred to an open prison, he or she may receive help from the locally responsible Integration Office. If disabled prisoners are not capable of performing economically productive work, Section 37 para. 5 Federal Prison Act provides for the assignment of occupation of a therapeutic nature. A complete exemption from the duty to work is applicable to those prisoners who receive disability pension.¹³ For anti-discriminatory reasons, these prisoners shall be allowed to use an appropriate amount of their own personal money (Eigengeld) for purchases.¹⁴ In terms of the right to leave from custody, disabled prisoners do – in spite of their increased need for rest and recovery – not enjoy any privileges so that the maximum of 21 days of regular leave applies to them as well.¹⁵

Another regulation that specifically addresses disabled prisoners is Section 59 Federal Prison Act. According to that provision, prisoners are entitled to be supplied with visual and hearing aids, prosthetic appliances, orthopaedic and other aids which are necessary in a particular case to ensure the effectiveness of therapeutic treatment or to compensate for a disability. For aids and therapeutic measures, the costs of which are not born by the prison administration, disabled prisoners are, moreover, entitled to ask for supplementary welfare benefits (Kamann 2008, p. 495).

Last but not least, prisoners with disabilities shall – like prisoners with mental health issues – be transferred to prison hospitals or other penal institutions that are more suitable for their needs according to Section 65 para. 1 and 2 Federal Prison Act.

¹¹ As mentioning every respective state regulation would go far beyond the scope of this report, the following remarks will be limited to the relevant provisions of the Federal Prison Act.

¹² Wording of Art. 5: “In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.”

¹³ Higher Regional Court of Frankfurt, decision of 26 March 1985 - 3 Ws 807/84.

¹⁴ Federal Court of Justice, decision of 24 November 1987 - 5 AR Vollz 4/87.

¹⁵ Higher Regional Court of Bremen, decision of 12 April 1985 - Ws 219/84.

b) Practices

As indicated above, both German legal literature and the public debate has rarely dealt with disabled prisoners. However, a consultation of the sixteen different State Ministries of Justice revealed that either their prisons or prison hospitals contained special facilities for physically handicapped prisoners, the number of barrier-free cells ranging between three and ten rooms per federal state (Oberfeld 2009, p. 234). Special departments for physically disabled prisoners, though, only exist in Hövelhof and Bochum (both North Rhine-Westphalia), offering space for 72 prisoners in total (ibid.).

Feest (2010) has formulated several demands that shall facilitate a disabled prisoner-friendly accommodation in ordinary prisons:

- Barrier-free prison facilities
- Cell equipment according to the disability
- Consideration of the disability in the treatment programme (individual aid and treatment)
- Assignment of occupations that correspond to the disability
- Lower working hours
- Therapeutic occupation offers (if economically productive work is impossible)
- Increase of exemptions from the obligation to work
- Disabled-prisoners-friendly leisure facilities
- Special diets, supply with individual medical aids
- Consultation of specialised doctors by the medical officer
- Introduction of an ombudsman for disabled prisoners
- Cooperation with the local Integration Office (in the course of preparations for release)

In conclusion, it has to be noted that disabled prisoners are an important vulnerable group of inmates that has been broadly ignored by legal practitioners and theorists (Andreßen-Klose 2005).

4) Ethnic and racial minorities and indigenous peoples

Contrary to foreign nationals in the German penitentiary system, ethnic and racial minorities play a comparably marginal role among legal theorists and practitioners. There are various present ethnic minorities in German prisons, in particular black people, Sinti and Roma as well as the so-called group of (late) repatriates¹⁶ and their descendants.

However, only the latter were subject to a controversial criminological debate when imprisonment rates rapidly grew among (late) repatriates (Feest & Graebisch 2012, Anh § 175, marg. no. 13). Especially young dependents of repatriates were regarded as increasingly criminal by several authors as well as in the public debate (Kawamura-Reindl 2002, pp. 47 et seq.). Some authors even reported of

¹⁶ Since 1988, about three million (late) repatriates came to Germany from middle-eastern Europe (approximately 800,000) and the former Soviet Countries (about 2.2 Million), retrieved from: http://www.aussiedlerbeauftragter.de/AUSB/DE/Themen/spaetaussiedler/spaetaussiedler_node.html;jsessionid=7C12483A25BA1FA6A530E966F0DCD8BA.2_cid287 (last viewed: 24 July 2014). According to the Federal Displaced Persons Act (Bundesvertriebenengesetz), (late) repatriates are Germans who (or whose parents) had fled (or had been displaced from) Germany after 8 May 1945 or 31 May 1952, had lived in resettlement areas since then. As German nationals, these former emigrants enjoy all civil and participation rights.

an emerging subculture of repatriates in German prisons (Zdun 2007, p. 246). The assumption, however, that (late) repatriates became a particularly significant and overrepresented group of inmates could never be verified as repatriates are not covered by the statistical offices and the figures from explorative studies vary considerably (ibid., pp. 247 et seq.).

a) Legal regulations

The German penitentiary law does not contain any special regulations with respect to ethnic minorities.

Nonetheless, the prison administration has to consider the General Equal Treatment Act which aims, amongst others, at the prevention and abolition of disadvantages due to race or ethnic origin. Apart from access to social welfare benefits, healthcare and education, the scope of the General Equal Treatment Act particularly addresses the access to jobs, equal working conditions and all forms of vocational training (Section 2). Although prisoners are not explicitly mentioned by the General Equal Treatment Act, the anti-discrimination law is applicable to them as well (Däubler & Galli 2012, Vor § 37, marg. no. 40). Thus, any indirect or direct discrimination is unlawful and the disadvantaged prisoner may demand damages. This is especially relevant when it comes to the assignment of an occupation inside the prison or free employment outside the penal institution.

b) Practices

With reference to those prisoners who belong to an ethnic minority but do not belong to the group of foreign nationals, practical experiences and programmes are very rare.

One project from Rhineland-Palatinate, however, received considerable attention and is worth-mentioning at this point. In order to counter the development of an isolating subculture among young ethnic German repatriates from Russia in the prison, employees of the juvenile prison of Schifferstadt (Rhineland-Palatinate) designed a project that aimed at the strengthening of personal responsibility, future perspectives, and educational as well as vocational integration (Michelitsch-Traeger 2008, pp. 171 et seq.). Furthermore, the project intended to deal with the young offenders' cultural background and identity.

In frequent group meetings, the young repatriates ate Russian specialties, watched Russian movies and debated about specific problems they faced in the prison. In the course of the discussions, the young prisoners mostly complained about the prohibition to talk in Russian in front of the prison staff, a strict application of disciplinary measures in comparison with other inmates and the little stock of Russian literature and films in the prison library (ibid., pp. 172 et seq.). Furthermore, the project tackled issues like mutual prejudices, values and norms (pp. 173 et seq.). In addition to the group meetings, the project staff held one-on-one conversations and made use of the systemic therapeutic approach (ibid., pp. 175 et seq.).

The project leaders drew a very positive conclusion and regarded the project as successful. From their point of view, the serious and intensive communication on equal terms resulted in a change of the young prisoners' collective structures and a higher degree of integration and mutual comprehension (ibid., pp. 176 et seq.).

5) Foreign nationals

When it comes to foreign prisoners, it needs to be clarified at first which prisoners fall under this category. Following the legal definition provided by Section 2 para. 1 of the German Residence Act (Aufenthaltsgesetz), foreign nationals are individuals who do not have the German nationality.

Therefore, the term ‘foreign national’ does not reveal anything about the prisoner’s ethnic, cultural or social affiliation (Feest & Graebisch 2012, Anh § 175, marg. no. 1).

As to the prevalence of non-German prisoners, the annual publication of the Federal Statistical Office provides a clear insight: On 31 March 2013, there were 13,216 adult and adolescent foreign nationals in German prisons, 574 of which were female (Federal Statistical Office 2014, p. 15). In this context, adult foreign prisoners make up 23.7 per cent of the general adult prison population and young foreigners make up 22 per cent of the general adolescent prison population. More than half of the foreign prisoners (7,085) were at the age between 25 and 40. In view of pre-trial detainees, the share of foreign nationals has been even higher in the past, amounting to 41.4 per cent in 2008 (Düinkel, Geng & Morgenstern 2010, p. 27). Although the number of foreign prisoners have stopped rising significantly after 1998, it has not decreased alongside the slight diminishing of the general prison population (Feest & Graebisch 2012, Anh § 175, marg. no. 2). Compared to the share of foreign nationals in the German society, foreign prisoners are a highly overrepresented group in German penitentiaries. However, diverse studies have shown that this overrepresentation does not correlate with an increased criminality among foreign nationals (e.g. Walter 2010) as factors like the disposition to report foreign nationals rather than Germans, a different quality of criminal prosecution and a stricter sentencing policy lead to such a numerical asymmetry (Feest & Graebisch 2012, Anh § 175, marg. no. 2). What is more, foreign nationals receive longer prison sentences than German offenders and many foreign prisoners are threatened with an expulsion after release from prison (ibid., marg. nos. 3 and 4).

With reference to the significant share of foreign nationals in the German prison population and their – oftentimes – uncertain residence status, foreign prisoners represent a highly significant vulnerable group of inmates which has occupied legal theorists and practitioners in Germany for a long time.

a) Legal regulations

The Federal Prison Act, or the relevant State Prison Act respectively, is applicable to all prisoners – without exceptions and independent from the individual person and his or her legal status (Bammann 2002, p. 100). Hence, neither the Federal Prison Act nor the different existing State Prison Acts know the term ‘foreign national’ and there is no differentiation between German and non-German prisoners in theory. Notwithstanding, several general regulations and certain administrative provisions address or influence the situation of foreign nationals in the German penitentiary system.

First of all, it needs to be noticed that – in accordance with the general applicability of German penitentiary law – the overall objective of a prison sentence, that is to say the prisoner’s reintegration into society, has to be pursued in case of a foreign prisoner in the same way as with German inmates (ECtHR, R. v. Germany, no. 5123/07, 22 March 2012). In view of this goal, however, various administrative provisions disadvantage foreign prisoners in an extensive manner.

One substantial form of discrimination takes place with respect to the initial question whether a prisoner shall be imprisoned in a closed prison facility or transferred to an open prison. In this connection, administrative regulation No. 1 on Section 10 Federal Prison Act¹⁷ generally excludes

¹⁷ Wording of Section 10 Federal Prison Act:

“(1) A prisoner shall, with his consent, be committed to an open institution or unit if he meets the special requirements for such treatment and, in particular, if it is not to be feared that he might evade serving his prison sentence or abuse the opportunities offered by an open institution to commit criminal offences.

(2) Prisoners shall otherwise be committed to closed institutions. Moreover, a prisoner may be committed to a closed institution or be re-transferred to it if this is necessary for his treatment.”

those prisoners from the transfer to an open institution who are subject to an extradition or immigration detention order or an expulsion decision. As far as the latter is concerned, an exception is only possible if the Migration Office agrees. Administrative regulation No. 2 on the same section further regards even those foreign prisoners as generally unfit for the transfer to an open prison in whose cases an expulsion or extradition procedure has been merely initiated. Although the prison administration has wide discretion with regard to the decision on such a transfer, but German courts have clearly expressed that it has to consider all individual circumstances and cannot simply deny the prisoner's wish to be transferred because of a possible expulsion or extradition.¹⁸

Similar to the provisions on a transfer to an open prison facility, prisoners with an extradition or immigration detention order as well as those with an expulsion decision are generally excluded from work outside the prison (Außenbeschäftigung), work release (Freigang) and short leaves (Ausgang).¹⁹ Again, even prisoners who are subject to a pending extradition or expulsion procedure are – as a rule – considered as unsuitable for such relaxations (Lockerungen).²⁰ Contrary to these non-binding administrative provisions, a number of court decisions have illustrated that foreign prisoners have every right to apply for such relaxations and the prison administration has to consider the prisoner's and his or her relatives' living conditions and all relevant factors (Köhne & Lesting 2012, § 11 StVollzG, marg. no. 41). Furthermore, the prison administration is not bound to the decision of the responsible Migration Office (ibid., marg no. 70). The above-mentioned restrictions and principles also apply to the general leave from custody which may be granted till a maximum duration of 21 days per year.

As it comes to the right to have visitors, which is included in both the Federal Prison Acts and all existing State Prison Acts, the prison administration is meant to assist the foreign prisoner to find contact persons and to enable him or her to get in touch. Moreover, the Directives for International Co-operation in Criminal Matters – and in particular its nos. 133-137 on the contact to foreign diplomatic and consular representations – are applicable to non-German prisoners. Since the Federal Prison Act – as well as all State Prison Acts – allows the optical and acoustical supervision of visits, foreign prisoners may be monitored, too. According to the case-law of the Federal Constitutional Court, however, they do not have to bear the costs for an interpreter who is commissioned to facilitate the supervision (Federal Constitutional Court, decision of 07 October 2003, 2 BvR 2118/01).

As far as written correspondence is concerned, the Federal Prison Act provides for an interception of letters in case they are written in a foreign language without any compelling reason. In the State Prison Acts of Bavaria and Baden-Württemberg, it is even specified that there is no such compelling reason if the prisoner writes to a German prisoner or a third person who has the German nationality or whose centre of life is located in Germany²¹. *Joester & Wegner* doubt, though, that such regulations come up to the constitutionally guaranteed principle of equality (2012, § 31 StVollzG, marg. no. 22).

Since the possibilities to contact persons outside the prison may be limited in the case of many foreign prisoners, the prison administration is – under certain circumstances – justified to give preference to

¹⁸ See e.g. the penal execution chamber of the Regional Court of Darmstadt, decision of 20 January 2004 - StVK 1649/04; Regional Court of Hamburg, decision of 30 June 2000 - 613 Vollz 57/00.

¹⁹ Administrative regulation no. 7 (1) b) and c) on Section 11 Federal Prison Act.

²⁰ Administrative regulation no. 7 (1) d) on Section 11 Federal Prison Act.

²¹ This also affects "(late) repatriates" (see above), e.g. whose mother language is Russian but the citizenship is German.

them with regard to the right to do phone calls to relatives (Higher Regional Court of Koblenz, decision of 28 April 1993 - 3 Ws 141/93).

With reference to the assignment of work as well as educational and vocational training, the above-mentioned principles of anti-discrimination are applicable to foreign prisoners as well.

Further theoretical legal entitlements of foreign prisoners that still await implementation in penitentiary practice are the right to legal counseling in residence law matters (Calliess & Müller-Dietz, § 73 StVollzG, marg. no. 5), the possibility to write complaints and petitions in their own language (Schuler & Laubenthal 2013, § 108 StVollzG, marg. no. 16), the principle of equality with regard to effective legal remedies (Kamann & Spaniol 2012, § 112 StVollzG, marg. no. 8)

Last but not least, there is one central regulation that clearly distinguishes foreign prisoners from the German prison population: Section 456a Code of Criminal Procedure²². According to that procedural provision, the responsible prosecution service may decide to enable the removal of a foreign inmate from the prison before the termination of his or her prison sentence. Primarily designed to financially and organisationally relieve the German penitentiary system, the norm is also meant to protect the personal interests of the convicted foreigners (Schmidt 2012, p. 209).

As a precondition, the foreign prisoner must be subject to a legally enforceable expulsion or removal order, the execution of which is actually planned and feasible (Appl 2013, § 456a StPO, marg. no. 3). The decision to suspend the execution of the prison sentence is at the discretion of the prosecution service and does not depend on the prisoner's agreement. In view of the time and general indication of an application of Section 456a Code of Criminal Procedure, the federal states have issued various, considerably varying guidelines and administrative provisions.²³

Since Section 456a Code of Criminal Procedure does not provide for a remission of the sentence but rather for its interruption, the execution of the prison term may be continued if the removed foreign national returns to the Federal Republic of Germany. However, the continuation is only lawful if the foreign prisoner had been properly informed about the consequences of his or her early removal.²⁴ What is more, the prosecution service can decide not to order the continuation of the prison term's execution if there are significant reasons that would render the imprisonment inappropriate (Schmidt 2012, p. 214).

Alternative to the interruption of a prison term, the prosecution service may also request the foreign national's country of origin to carry out the prison sentence of a German penal court according to Art. 71 Act on International Cooperation in Criminal Matters.

Additionally, in cases of a legally enforceable expulsion or removal order, the execution of which is actually planned and feasible, foreigners subjected to a forcible addiction treatment next to a prison sentence should serve the prison sentence first (Section 67, para. 2, Sentence 4 Federal Criminal

²² Wording of Section 456a Code of Criminal Procedure:

(1) The executing authority may dispense with execution of a prison sentence [...] if the convicted person is to be extradited [...] or if he is expelled from the territorial scope of this Federal statute.

(2) Execution may take place subsequently if the extradited or expelled person returns. [...] On dispensing with execution the executing authority may, at the same time, order subsequent execution in the event of the extradited or expelled person's return [...]. The convicted person shall be so informed."

²³ For a current overview see Schmidt 2012, pp. 233 et seqq.

²⁴ Higher Regional Court of Stuttgart, decision of 16 December 1980 - 3 Ws 311/80; Higher Regional Court of Karlsruhe, decision of 04 February 1999 - 2 Ws 188/98.

Code), thus, there are less opportunities for rehabilitation or shorten the actual served time for these prisoners.

b) Practices

Despite the considerable number of foreign nationals in German prisons and their specific problems and challenges – due to language barriers, cultural issues or their legal status in Germany – there are no projects or approaches with reference to these prisoners which have received much attention in German legal literature or the public debate. In view of legal counselling, specific offers for foreign prisoners only exist where detention pending deportation (Abschiebungshaft) is implemented in ordinary prisons instead of special detention facilities (which constitutes a breach of Directive 2008/115/EC (EU Returns Directive)).

6) Lesbian, gay, bisexual and transgender (LGBT) prisoners

LGBT prisoners have received very little attention in Germany so far. In general, sexuality in prisons is perceived as a societal taboo and scientific research on that topic is almost inexistent (Bammann 2008, p. 248). In view of official statistics, LGBT prisoners are not mentioned either, quantitative estimates are, therefore, very difficult. Nevertheless, homo- and transsexuality have been relevant issues throughout the history of the German prison system as LGBT prisoners have constantly been subjected to discrimination.

a) Legal regulations

There are no specific provisions that mention or directly address LGBT prisoners in German penitentiary law. Albeit, there are several regulations courts have dealt with in the context of LGBT issues.

First of all, LGBT prisoners enjoy full protection from the General Equal Treatment Act, Section 1 of which not only prohibits discrimination on grounds of racial or ethnic origin, gender, religion, worldview, disability or age but also on the basis of sexual identity. Any form of discrimination by the prison administration, especially with respect to the assignment of work, education or vocational training because of the prisoner's sexual orientation is illegitimate and unlawful (Däubler & Galli, Vor § 37 StVollzG, marg. no. 42).

Moreover, transsexual prisoners may assert a right to medical treatment according to Section 56 Federal Prison Act and the respective provisions of the State Prison Acts (Higher Regional Court of Karlsruhe, decision of 30 November 2000 - 3 Ws 173/99). In certain cases, transsexual prisoners may even demand a treatment in the form of an extensive psychotherapy (ibid.).

In the case of a transsexual prisoner, the Higher Regional Court of Celle quashed the court decision of the responsible Penal Execution Chamber which allowed the local prison administration to prevent the prisoner from buying and wearing women's clothing (decision of 9 February 2011 - 1 Ws 29/11 StrVollz). The judges in Celle rejected such a prohibition as it was based on old-fashioned role expectations and because a mere reference to the threat of violent reactions by other inmates was not sufficient to justify such an interference.

The legal complaint of another transsexual prisoner who tried to avoid such reactions from other male inmates, and – unsuccessfully – applied for the transfer to a women's prison, failed, however, as the court did not consider the prison administration's rejection as a violation of his human dignity (Constitutional Court of Berlin, decision of 31 October 2002 – 66/02, 66 A/02).

The Federal Constitutional Court, on the other hand, strengthened the rights of transsexual prisoners when it decided that the prison staff was obliged to call the transsexual applicant by her new, court-

confirmed name and justified its decision with the principle of human dignity and personal freedom guaranteed by the German Basic Law (Federal Constitutional Court, decision of 15 August 1996, 2 BvR 1833/95).

In view of homosexual prisoners, both German legal literature and courts have been more restrictive and regarded homosexuality as mainly harmful. Hence, the purchase and possession of graphic homosexual literature may be forbidden by the prison administration (Higher Regional Court of Nuremberg, decision of 15 August 1983 - Ws 552/83)²⁵. Reasoning their decision, the Nuremberg judges argued that due to the exceptional sexual situation in a closed group of male prisoners, such magazines were likely to artificially charge an atmosphere which is characterised by unwanted abstinence anyhow. Thereby, prisoners were enticed to react to that situation in a manner that led to relationships of dependence among the inmates.

Extramurally, Art. 3 Basic Law (Equal Rights) was used as a basis to rule out regulations that discriminated on grounds of sexual orientation²⁶.

Due to the strict separation of women and men in the German prison system, homosexuality remains the sole opportunity of sexual contact for prisoners – developments like the introduction of the possibility of longer visits of several hours' duration in special apartments (Langzeitbesuch)²⁷ put aside. In spite of that fact and a high risk of sexually transmitted diseases without the possibility of safer sex, German prison case-law does not recognise the right to a steady supply with (cost-free) condoms (Higher Regional Court of Koblenz, decision of 07 February 1997 - 2 Ws 837/96).

Acknowledging the problems a closed one-gender orientated environment poses, the principle of separation of prisoners according to their presumed (biological) sex may be questioned. When thinking about abolishing this separation, one though would also have to take into account not to create a new vulnerability, i.e. subjecting a low number of women prisoners to a male structured environment.²⁸

b) Practices

Owing to a strong predominance of heteronormative attitudes among prisoners, LGBT prisoners remain an almost invisible, highly vulnerable group of inmates and there seems to be no overall conception how to increase tolerance towards them in the general prison population. Professed LGBT prisoners, however, depend on open-minded social workers, pastors and prison officers.

With reference to the problematic topic of condom supply, there are both positive and negative examples. In Bavaria, the HIV prevalence in the prisons is 30 times higher than among the general German prison population since it is quite difficult to get contraceptives (Lohmann 2014). Between the years 2005 and 2007, only 43 condoms were handed over to Bavarian inmates while 13,000 men were imprisoned in Bavarian penitentiaries during that time (ibid.). In surroundings where homosexuality is considered off-limits, the duty to lodge an official application for condoms with the medical or psychological prison staff obviously prevented many prisoners from asking for them.

²⁵ See also Higher Regional Court of Munich, decision of 16 April 1973 -1 V As 13/73; Higher Regional Court of Hamm, decision of 27 February 1981- 4 Ws 58/81.

²⁶ E.g. Federal Constitutional Court, decision of 19 June 2012, 2 BvR 1397/09.

²⁷ For examples see Eder, U. (2008).

²⁸ Cf. the discussion on giving up the prison for women and integrate it into a men's prison as a unit of its own: <http://www.taz.de/!113641/> (last viewed: 24 July 2014).

In contrast to the Bavarian prison policy, penal institutions in North Rhine-Westphalia have adopted a more progressive approach. The prison of Hövelhof, for example, not only offers a machine with different sorts of cost-free condoms, it also enables all newly admitted prisoners to get vaccinated against hepatitis A and B (Deutsche AIDS-Hilfe 2013, pp. 23 et seqq.). In the prison of Duisburg, cost-free condoms are available in an information centre which additionally offers information material from the German AIDS Service Organisation (Deutsche Aids-Hilfe), the local credit counselling centre and other relevant organisations (ibid., p. 32). In this way, prisoners can get hold of the contraceptives unnoticed.

7) Older prisoners

The demographic change, or the aging of the German society, has not left the German prison population unaffected. While prisoners of an age of 60 or higher made up only one per cent of all prisoners in the year 1980, more than 2 per cent of the overall prison population were 60 years old or older in 2000 (Dünkel, Geng & Morgenstern 2010, p. 24).²⁹ Following that trend, 3.8 per cent of the German prison population, i.e. 2,118 prisoners, were of the age of 60 or older on 31 March 2013 (Federal Statistical Office 2014, pp. 16, 18). Among men, the share of prisoners above 60 among male prisoners was even 4.8 per cent at that time (ibid., p. 18).

When speaking about old prisoners, it needs to be established which age limit is to be used as a reference. While the age of 60 is predominantly used as a demarcation, the age of 50 has been suggested as well (Schollbach & Krüger 2009, p. 131). Taking the latter as a basis for the quantitative evaluation of older prisoners, this group appears even more relevant. On 31 March 2013, 13.3 per cent of all prisoners were aged 50 or above, among female prisoners this share even amounted to 16.4 per cent (Federal Statistical Office 2014, p. 18). Looking at the number of older prisoners among those serving a life sentence, the proportion of prisoners above 50 even comes to 41 per cent (ibid., p. 19). In this connection, *Görgen* rightly argues that a lower age limit was justified due to the comparably low percentage of prisoners of a very advanced age³⁰ as well as an accelerated aging process in prisons (Görgen 2007, p. 5, fn. 1).

As demographic changes progress, it may be expected that the German prison population ages parallel to the general societal development. Furthermore, recent tendencies in the penal sanctioning practice, i.e. longer prison sentences, a more restrictive approach towards the suspension of sentences on probation and the more extensive use of legal instruments for the prolongation of prison sentences (e.g. preventive detention), will most likely lead to a higher proportion of old prisoners in German penitentiaries (Oberfeld 2009, p. 236). As a consequence, the group of older prisoners appears as a highly relevant vulnerable group of inmates.

a) Legal regulations

There are almost none special legal provisions for older prisoners in German penitentiary law. The only existing legal regulation deals with the duty to work according to Section 41 of the Federal Prison Law, which does not apply for prisoners aged 65 and above. However, the principle of anti-discrimination, according to the General Equal Treatment Act, also applies to old prisoners as age is, next to the above-mentioned aspects like disabilities or ethnic origin, a legally defined criterion in anti-discrimination law.

²⁹ These figures include both ordinary prisoners and preventive detainees (Sicherungsverwahrte).

³⁰ Only 0.7 per cent of all prisoners were above 70 on 31 March 2013 (Federal Statistical Office 2014, p. 18).

b) Practices

As the age structure of the German prison population has not started changing in the last couple of years but has been subject to a gradual alteration for quite some time, the prison administrations reacted to the increased number of older prisoners, and the legal literature discussed different forms of their accommodation³¹. Nevertheless, many federal states have not designed an overall conception for the placement of older prisoners yet, thus, senior inmates are treated as ordinary prisoners in most German penitentiaries.

A pioneer in dealing with the aging prison population is the state of Baden-Württemberg. As early as 1970, Baden-Württemberg started to imprison senior inmates separate from other prisoners (Rennhak 2007, p. 19). In Singen, a branch of the prison of Konstanz, 48 prisoners above 62 can be accommodated. In the only German ‘prison for the elderly’, the convicts’ average age is 70 and all prisoners serve prison terms of at least 15 months (German Press Agency 2014). While the equipment of the penitentiary does not significantly differ from ordinary prisons, the everyday life of the prisoners does.

The Singen prison – designed as a closed facility – is oriented at the open prison regime, with a daily routine that is less determined than in ordinary closed prison facilities. Between 7 am and 10 pm, all prison cells are open, in case of multi-occupancy cells without a toilet even around the clock (Rennhak 2007, p. 20). Tendencies like loneliness and isolation are meant to be counteracted by common shopping trips and hikes, health support is offered in the form of age-appropriate sport programmes, discussion groups, music and cooking classes (Schollbach & Krüger 2009, p. 136). Extended visiting possibilities and suitable occupations for those prisoners who are still bound to work³² are further notable differences.

Another example for an age-specific treatment of older prisoners is the “Kornhaus”, a special department for older inmates in the prison of Schwalmstadt in Hesse. According to the Hessian scheme of execution, prisoners who have reached the age of 55 and exhibit a low degree of dangerousness and likeliness to abscond are transferred to this facility. The Kornhaus has room for 61 prisoners who are mostly accommodated in single-occupancy cells (Roos & Eicke 2008, p. 109). The cells are open all times and the facility offers medical, psychological, pedagogical, sports-pedagogical and religious services. Prisoners have comparably generous visiting regulations (six hours a week) and may take part in memory training, age-appropriate sport groups, discussion rounds and information events on age-specific topics like the old-age pension scheme (Schollbach & Krüger 2009, p. 135). The Kornhaus prison staff has undergone a special training programme that focusses on the special needs of older prisoners and the conception of the prison is subject to constant development (Roos & Eicke 2008, p. 113).

As it is the case with prisons in general, it has to be kept in mind that efforts to change conditions often result in only minor differences with respect to the daily life of a prisoner. For instance, entering the Kornhaus – a more than 400 years-old building – climbing a number of unavoidable stairs is the first thing to do. The wood works, prominently exhibited to visitors, are relicts of the prison’s past since a lack of personnel prevents current inmates from producing any further pieces. It also turns out that most of the elderly prisoners kept in the ‘Kornhaus’ serve shorter sentences for minor crimes, especially prison terms for default of paying an imposed fine. In such kind of cases it would be

³¹ See e.g. Fichte (2007); Legat 2009, pp. 70 et seqq.

³² The duty to work does not apply to prisoners above 65 years.

preferable to seriously think about alternatives to imprisonment and to question the meaningfulness of a prison term in general.

In Detmold³³, Bielefeld³⁴ (both North-Rhine-Westphalia), Waldheim (Saxony)³⁵ and Bayreuth (Bavaria)³⁶, the prison administrations installed special departments for older prisoners which also offer age-specific treatment and – in part – barrier-free facilities.

The prison of Berlin Tegel, the biggest German penal institution for male prisoners, has adopted a different, non-separating approach. Instead of creating a separate department for older prisoners, the prison administration places senior inmates in the general prison section and initiated special age-appropriate treatment programmes in 2011 (Kammerer & Spohr 2013, p. 318). The different offers for older prisoners, including occupational therapy, age-specific consultation hours and a computer class, are organised by private agencies like the city mission (ibid.). In the framework of a pilot project, the Institute for Gerontological Research investigated the situation of older prisoners and revealed that age-specific programmes generally enjoy considerable popularity among senior prisoners if they are properly informed about the offers (Kammerer & Spohr 2013, p. 321).

At last, an explorative study on the everyday life of older prisoners in Switzerland, conducted by *Baumeister & Keller* (2011), is worth mentioning. Wondering about the specific problems of older prisoners in everyday life and their coping efforts, the challenges for prison staff in working with senior inmates as well as the consideration of older prisoners in the Swiss prison system, the authors interviewed both prison officers and inmates in different – closed and open – prison facilities (Baumeister & Keller 2011, p. 5). Similar to Germany, Switzerland has experienced a significant increase of convicted persons above the age of 60. Between the years 1984 and 2008, the number of prisoners older than 60 almost doubled (ibid., p. 7). As common characteristics and needs of older inmates in Switzerland, Baumeister & Keller mention health issues, a tendency towards a biographical assessment (Bedürfnis zur Bilanzierung), the desire to have contact with emotionally important, familiar and reliable persons and a differential aging process (Baumeister & Keller 2013, pp. 6 et seq.). On the basis of their narrative interviews, the authors name four types of older prisoners:

1. The trying preserver (Bemühter Bewahrer): identifies himself with the status he had in his former life and tries to uphold it; distances himself from the other prisoners (Baumeister & Keller 2013, p. 8).
2. The conformist restarter (Angepasste Neubeginner): is ashamed of his former life and breaks off ties with the outside world; actively participates in the treatment programmes of the prison and tries to build new relationships with other inmates (ibid., p. 9).
3. The misunderstood outsider (Missverstandener Ausgeschlossene): feels misunderstood by laws and society; has few contacts within the prison and is mostly on hostile terms with the prison staff and other inmates; he actively justifies the crime he was convicted for (ibid.).
4. The unnoticeable lackadaisical (Unauffällig Resignierter): has been subjected to multiple problems for a long time; has few personal, social or financial resources to change his situation; acts very inconspicuously and is oftentimes overseen by other inmates and the prison staff (Baumeister & Keller 2013, p. 10).

³³ See Voogt 2013.

³⁴ See Neue Westfälische (2012).

³⁵ See Rieckmann (2012).

³⁶ Bayreuther Sonntag (2012).

With reference to the structural and individual challenges in working with older prisoners, Baumeister & Keller explicate that prison officers act in a permanent interrelation between institutional tasks and personal interpretations (Baumeister & Keller 2013, pp. 10 et seq.).

On the one hand, the interviewed prison staff criticised the institutional conditions in Switzerland since many older prisoners were not able to work despite the existing duty to do so. The interviewed prison officers also complained about missing concepts for older prisoners in view leisure activities and education, the age-inappropriate daily structure, infrastructural deficiencies like missing elevators and barrier-free cells, the missing night care, the lack of clearly defined tasks for the work with older prisoners and a missing differentiation between assistance and care services (ibid., p. 11). The interviewees of the prison administration draw an ambivalent picture of older prisoners, regarding them as both decent, friendly, reliable and stubborn, bossy and less productive (ibid., p. 12).

In conclusion, Baumeister & Keller (2013, pp. 14 et seq.) argue in favour of:

- Barrier-free surroundings
- an age-appropriate accommodation of older prisoners
- a modification of the prison term's objective, to be reached with specific conceptions
- a separated placement
- special training programmes for the prison staff with clear tasks
- a consideration of the individual needs of older prisoners, with the four different types of senior inmates as a basis.

In spite of the above-mentioned examples of special treatment for older prisoners, the reasonableness of such forms of differentiated imprisonment should be carefully questioned. Instead of continuously attempting to prolong the possibilities of imprisonment by introducing care facilities, barrier-free prison sections and special programmes for the elderly, the overall goal of penitentiary law, that is to say the possibility of resocialisation, should be the driving factor for both the courts and the legislator. If the high age of an offender and a long prison term are not compatible with that principle, imprisonment should not be ordered.

8) Prisoners with terminal illnesses

In this context, two groups of terminally-ill prisoners are of concern: the prisoner with a specific sentence who becomes terminally ill prior to release, and the prisoner with an unlimited sentence (lifelong imprisonment) or measure (forensic psychiatry or preventive detention).

a) Legal regulations

Growing numbers of older prisoners (see above) and spreading illnesses like cancer, aids and hepatitis C and a reluctance to release certain prisoners gave rise to the reflection upon dying prisoners. According to Section 455 of the Federal Criminal Code, the execution of a prison term can be interrupted (or delayed prior to its beginning) in cases of long-lasting severe illnesses which cannot be treated within a prison or a prison hospital, unless, inter alia, interest of public security stands against such interruption. Terminal illness is also a question for clemency law. Already in 1977, the Federal Constitutional Court ruled that human dignity demands that every prisoner with a sentence of lifelong imprisonment must have a concrete and realistic chance to regain freedom and re-enter society at some later point in time, thus not giving up hope (BVerfG, 1 BvL 14/76, 21-06-1977). The constitutional

court later ruled that this “principle of hope” (“Hoffnungsprinzip”) cannot be reduced to a remainder of life in mental or physical infirmity or closeness to death (BVerfG, 2 BvR 1146/85, 24-04-1986, para. 38).³⁷ However, according to the Federal Constitutional Court it is still possible that lifelong imprisonment can be imprisonment until the prisoner dies (e.g. BVerfG, 2 BvR 539/80 and 612/80, 28-06-1983, para. 111; BVerfG, 2 BvR 2259/04, 06-07-2005, para. 30). By now cases of terminal illnesses should offer the possibility of release, even if treatable in prison or a seen danger of reoffending (BVerfG, 2 BvR 3012/09; 09-03-2010).

b) Practices

There are no reliable statistics on the number of releases because of terminal illness or the number of deaths in prisons due to such illnesses. In the case of lifelong prison sentences practitioners estimate that 9 to 15 per cent of prisoners die in prison.³⁸ The number of persons released only a couple of hours or days before death is absolutely uncertain. According to Fiedeler (2003, p. 14), the Observatoire International des Prisons together with Aides-Provinces denounced Germany for its practice of releases just before death in 1996.

In Berlin (Prison Hospital Plötzensee), a project on hospice and palliative medicine in prison was initiated since (prison) reality and dying prisoners asked for a way to die in prison in dignity.³⁹

Even though the topic is not a new one, discussions on it have not yet even started in Germany.

9) Prisoners under sentence of death

There are no prisoners under sentence of death in Germany.

10) Women

Considering female prisoners as a group of inmates whose needs are mostly disregarded due to the overrepresentation of men in German prisons, *Haverkamp*, contributor to the above-mentioned conference of the German Centre for Criminology, reported on the special situation of women in the German penitentiary system (Haverkamp 2013). In particular, she criticises the prison administrations’ concentration on the needs of male prisoners in view of treatment programmes and security issues, the placement far away from home, a lacking separation between remand and ordinary prisoners as well as adult and young prisoners and the oftentimes missing treatment differentiation of female prisoners with short and long sentences, of first and repeat offenders and of those with a drug dependence (Haverkamp 2013, pp. 135 et seq.).

In view of the individual treatment programme, *Haverkamp* sees various difficulties in German women’s prisons that lead to a special vulnerability of female inmates. First of all, a high fluctuation in the sector of short prison terms regularly entails the prison administration’s abstention from individual treatment measures (Haverkamp 2011, p. 125). Deficiencies in the quality of vocational training and occupations, excessive debts of female prisoners and a missing debt regulation as well as

³⁷ Cf. ECHR, *Vinter et al. v. UK*, 66069/09, 130/10 and 3896/10, 09-07-2013, pp. 26-7; Fiedeler (2003).

³⁸ Fiedeler (2005), p. 76, referring to the Federal General Prosecutor, respectively Fiedeler (2003), p. 18.

³⁹ *Ärzte Zeitung*, 04.10.2013.

inadequate aftercare – especially due to staff shortages and insufficient cooperation with ex-offender services (Straffälligenhilfe) – represent further specific problems in women’s prisons according to the author (Haverkamp 2013, pp. 136 et. seq.).

Moreover, *Haverkamp* grapples with the concept of gender mainstreaming in women’s prisons which is meant to counteract the discrimination of female prisoners and to create equal opportunities. As a practical example of gender mainstreaming in German penitentiaries, she mentions a special programme for the professional reintegration of former prisoners, in the course of which a network for qualification, employment and aftercare services was created (Haverkamp 2013, p. 143).

Although female prisoners’ needs have mainly been neglected due to the ‘male predominance’ in the German prison population, there is one area in which the legislator has made an attempt to counter the detrimental effect of imprisonment for women or, to be more precise, for mothers in prison. Therefore, both the Federal Prison Act (Sections 80 and 142) and the existing State Prison Acts provide for the creation of facilities for mothers with children.

In such facilities, mothers may be accommodated with their children if the latter are not bound to attend school and if the placement is to the best interest of the child. Prior to the placement, the Youth Welfare Office has to be consulted. The facilities for mothers with children are meant to offer a child-friendly living space different from the general prison atmosphere and shall assist the female prisoners in building and developing a proper relationship with their offspring as well as learning to properly raise their children in freedom without endangering them by committing crimes (Deutsche AIDS-Hilfe 2014, p. 177). At the moment, there are 10 such facilities in Germany (Weßels 2012, § 142, marg no. 3).

While those special facilities undoubtedly offer a less restrictive prison regime than the ordinary prison sectors, it is still questionable whether they could ever serve their purpose. Penal institutions do – by nature – not represent surroundings that enable the development of a healthy familial relationship, let alone give the prisoners a realistic chance to raise their children self-determinedly. Therefore, the approach of several federal states to give female prisoners the opportunity to care for their children at home in the framework of so-called ‘day-releases for housewives’ (Deutsche AIDS-Hilfe 2014, p. 177) are to be generally welcomed. However, the principle of anti-discrimination requires the extension of such measures to male prisoners as the child’s separation from his or her father is damaging as well.⁴⁰

The state of Brandenburg has recognised this phenomenon, and at least envisions the accommodation of children with either their mother or their father if the general preconditions are met in Section 21 of its State Prison Act.

11) Problematic drug users

In the literature, the prevalence of drug abuse among prisoners in Germany varies between 25 per cent (Stöver 2007, p. 81) - he seems to refer to opiate users only- and 50 per cent (Federal Ministry of the Interior & Federal Ministry of Justice, p. 612)⁴¹ of all prisoners.

In this connection, two forms of treatment are of particular importance within the German penitentiary system: Substitution treatment and syringe exchange programmes.

⁴⁰ One of the authors of this report, as a lawyer, had one male client in Bremen who qualified for day-releases to care for his child.

⁴¹ The report speaks of 30-40 per cent but with reference to a study finding 49.3 per cent of prisoners with at least former drug use.

a) Legal regulations

Neither the Federal Prison Act nor the State Prison Acts deal explicitly with harm-reducing measures. The central regulations of the prison laws are those on medical treatment in general (see above: prisoners with mental health care needs). Thus, the federal Narcotics Act (Betäubungsmittelgesetz) applies inside prison in the same way as outside prison. However, some federal states have specific administrative regulations on the treatment of drug-abusing prisoners, e.g. on the substitution with diamorphine (synthetic heroine) in Baden-Württemberg⁴². Also, the general principle of creating a prison regime that equals the extramural world as far as possible is very important with respect to prisoners with problematic use of drugs, because it demands that prisoners will leave prison in a status of health no worse than when entering prison. This should naturally include the continuation of medical programmes in which they have participated outside, such as maintenance programmes.

b) Practices

Inside German prisons the main substance to substitute heroine is methadone, but other substances are used as well (e.g. buprenorphine and codeine). The practice, however, varies, not only between the federal states, but from prison to prison, and sometimes even between the medical officers in one prison (Pollähne & Stöver 2005, p. 145). In about 75 per cent of all German prisons, substitution programmes are available (Keppler et al. p. 82). Some prisons offer substitution as a tool for drug withdrawal only, others as a real maintenance programme. While life in penal institutions should be approximated as far as possible to general living conditions, reality proves to be different with respect to maintenance programmes. In 70 per cent of cases in which convicted offenders have been treated in a maintenance programme before the prison sentence, the treatment ends after entering the penitentiary (Stöver 2011 p. 51). Even in prisons that offer a maintenance programme, the additional consumption of drugs different from the intramurally prescribed ones⁴³ will still happen to a certain amount. The reaction to the use of additional drugs varies in German prisons between simply terminating maintenance and a professional approach of re-evaluating the situation of the prisoner and possibly applying a higher dose, because the former amount might have proven to be insufficient. Another option would be to switch to the use of diamorphine instead of methadone, which in Germany is possible in the prison of Stuttgart-Stammheim only. While prisons in Switzerland and Austria offer a less ideological approach towards the use of different substances for maintenance programmes, there is still a strong resistance in Germany against the use of (synthetically produced) heroine. Despite of the clear positive results heroine has shown compared to methadone in a multi-side randomized clinical study⁴⁴ this also applies to the situation outside prison, even though extramurally some progress has been made during the last years.

Judgements of German courts on the topic of treatment for drug-addicted prisoners are rare and mostly deny a right to substitution treatment (ibid., pp. 1305, 1309-10), even though the ECtHR (McGlinchey et al. v. The UK, no. 50390/99, 29 April 2003) ruled that at least drug withdrawal without medical (including substance) support amounts to inhuman treatment (Art. 3 ECHR), and at the same time found the UK in breach of Art. 13 ECHR because of the lack of an effective remedy

⁴² See Ministry of Justice of Baden-Württemberg: Administrative Regulation on substitution in the prison, 15 July 2011 – Az.: 4550/0495, retrieved from: <http://www.aidshilfe.de/sites/default/files/VwV%20Substitution%20BaWue.pdf> (last viewed: 30 June 2014).

⁴³ Usually, the doses are generally lower in prison than outside.

⁴⁴ Cf. Study design, results, literature on the study etc. <http://www.heroinstudie.de>

against the prison's decision. The German courts denying substitution treatment find their unrealistic line of argumentation by counterfactually assuming prisons to be drug-free zones.

Contrary to this line of argumentation, research has shown various benefits maintenance programmes have for the prisoner, such as:

- reductions in the use of heroine, intravenous drug use and sharing syringes
- less involvement in drug trafficking
- reduced risk of death after release
- increase of involvement in further treatment
- reduction of drug-related crime and crime in general.

In addition there are benefits on the side of the institution such as:

- withdrawal symptoms are more easy to be controlled
- reduction of consumption of drugs and drug trafficking
- increased ability to work and productivity
- better approachability and integration of prisoners under maintenance.

Methadone maintenance programmes are the agreed standard of evidence-based medicine (Mattick, Richard P. et al. 2009).

Syringe exchange programmes exist in one German prison only (Women's Prison in Berlin-Lichtenberg). All other pre-existing exchange programmes were terminated for political reasons, even though syringe exchange is a major risk concerning communicable diseases like HIV or hepatitis C. About 75 per cent of intravenous drug users in prison stated that they exchanged syringes, and about 25 per cent did this more than 50 times (Plaisier 2010, p. 21). The formerly existing syringe exchange programmes have been evaluated by researchers and all of them concluded with the recommendation to continue this kind of programme. There is also the example of the Champ-Dollon Prison in Geneva, Switzerland, with a practice of syringe exchange since 1996, showing the effectiveness of this kind of programme and how unnecessary fears about them are, like the one that prisoners will use syringes as a weapon (see for a summary Graebisch 2013, 1311 f.)

12) Prisoners denying the committal of the crime⁴⁵

A special group of vulnerable prisoners, not covered by the Handbook on Prisoners with special needs, are those who deny the committal of the crime(s) they are sentenced for.

The denial of the committal of a crime, for which one is sentenced, might have different reasons:

- one has actually not committed the crime;
- one does not want to concede the commission to others as this might shake the other person's trust in oneself;
- one is not willing to ascribe the crime to oneself, because one doesn't agree with the own actions.

Denial can be conscious or subconscious.

⁴⁵ The following is based upon an information sheet of the Strafvollzugsarchiv prepared by Sven-U. Burkhardt: http://www.strafvollzugsarchiv.de/index.php?action=archiv_beitrag&thema_id=6&beitrag_id=183&gelesen=183 (last viewed 11 July 2014).

a) Legal regulation

There is no legal definition or group of those denying the committal of the crime. However, the prison, and later experts giving advice on possible relaxations or the release from prison, are bound by the facts stated in the sentence to some extent. Additionally, there is a legal regulation, according to which not revealing the whereabouts of the loot of a crime may be taken into account when deciding upon (“early”) release from prison (section 57 para. 6 Criminal Code) – even if one denied the crime.

b) Practices

The vulnerability of this group of inmates derives especially from a different regime. The denial is often used as a major argument against granting relaxations, based upon the lack of trust and compliance from the perspective of the prison administration. This may likely be followed by the argument that, in the case of denial, dealing with the reasons for committing the crime is impossible, and thus, there is no room for a risk assessment in favour of relaxations or release etc. In many cases the prison administration attempts to condition the prisoner to acknowledge the commission of the crime and address its causes by psychological strain. This strain is often produced by the denial of various things like relaxations, additional visits, and many things one has to apply for, more control (missing trust) etc. Even though courts argue that the denial of a crime is only one point in evaluating the prisoner, and no one can be forced to make a confession, it will remain a major point in practice. Additionally, various assessment tools (e.g. HCR 20, PCL-R) refer to it as “failure to accept responsibility for one's actions” or “lack of insight” respectively, bringing about negative scores.

13) Prisoners at risk of committing suicide

Like in many other countries, the suicide rates in prison are higher than in the general population (Opitz-Welke et al., p. 386). Moreover, individuals awaiting imprisonment are at a greater risk of committing suicide as well (Opitz-Welke et al., p. 386). The oftentimes raised assumption of a clear relationship between personality disorder and a higher risk of suicide cannot be proven. Various studies, however, identified indictment for a serious crime and solitary confinement as factors which increase the risk of suicide in prison (Opitz-Welke et al., p. 386).

1. Legal regulations

a) Fundamentals

According to the European Prison Rules, medical service in prison is required to pay special attention to suicide prevention (European Prison Rules, Recommendation Rec(2006)2, 47.2).

Pursuant to section 3 of the Federal Prison Act, the penal system has to be adapted to the general extramural life conditions as far as possible and harmful consequences are to be prevented for the purpose of supporting re-socialisation. Relaxations which make the daily life in prison more bearable also provide for security in prison, insofar as more deprivation among inmates also disturbs the safety inside prison (Bennefeld-Kersten 2009, p. 76).

The state, as well as all prison officers, have a duty of care towards the prisoners (ibid., p. 78, 79). Nevertheless, an intervention is only constitutionally justified in case of a danger of suicide which bases on the prisoner's inability to consider the consequences of a suicide consciously (Feest/Köhne 2012, § 88 marginal no. 8; Walter 2012, § 102, marginal no. 34).

As well as members of the extramural society, prisoners may not be restricted in their freedom to decide upon their own life, not even in the decision to put an end to it. But the special situation in prison has to be taken into account which may challenge the free will of the detained person (Bennefeld-Kersten 2009, p. 78). This is even more the case where the fact of imprisonment at itself or the conditions of imprisonment lead to suicidal ideation. The unsuccessful waiting for any kind of improvement of the own situation like therapies, release or easing of the detention conditions is sometimes a reason why for some prisoners the own life may not seem to be worth living any more. A worst-case scenario would be that inmates see a - potentially by the state assisted – suicide as the only way to escape from their bad situation as it happened in a prison Belgium (Drewes 2014). The German law does not know a killing on request. But aiding to a suicide is allowed as long as the dying person takes the medicine by him- or herself. An increase of the possibilities to assisted suicide could be accompanied by the effect that prisoners who see suicide as their last option want to be helped doing this step. There is every reason to avoid that prisoners are confronted with situations like this.

b) Security measures

According to German prison law, there are “special security measures” that may be ordered in respect of a prisoner where, “in view of his behaviour or on account of his mental state, there is increased danger of his escaping or danger of violent attacks against persons or property or the danger of suicide or self-injury.” In this situation the following measures are permitted: deprivation or withholding of articles, observation at nighttime, segregation from other prisoners, deprivation or restriction of outdoor exercise, detention in a specially-secured cell containing no dangerous objects and shackles.

The measure of deprivation or restriction of outdoor exercise has been repeatedly criticised by the Committee for the Prevention of Torture of the European Council (CPT) since it violated No. 27.1 of the European Prison Rules. While the German legislator has abolished the possibility to deprive prisoners of their outdoor exercise or to restrict it with the purpose of disciplinary action, the provision with respect to security measures is still kept in the law and even the new State Prison Acts have recently implemented similar rules in ignorance of the CPT’s renewed recommendation without giving reasons for it, and despite the fact that experts pointed to this in parliamentary hearings (e.g. Graebisch 2013, p. 20). Recently, the CPT described it as “highly regrettable that, despite the specific recommendation repeatedly made by the committee for almost two decades, the special security measures of ‘prohibition of outdoor exercise’ has not only been maintained in the federal law [...], but has also been introduced in the newly-adopted regional laws governing preventive detention and the execution of sentences”.

To understand the persistence of the German legislation it is important to comprehend the typical practical approach that is made use of by prison administrations in Germany. Special security measures are used much more often than disciplinary measures, because the latter require to follow certain procedural safeguards and are thus more complicated and entail more preconditions to be fulfilled than security measures do. This may seem justifiable when keeping in the mind that the purpose of disciplinary measures is to keep up with security and order and to react to infringements retrospectively; security measures are there to protect the prisoner and/or others in an emergency. But there is a high risk of misusing this right to intervene for reasons other than protection. This is especially the case with the transfer of a prisoner to a “specially secured room without dangerous objects”, a kind of isolation cell that – apart from suicide prevention – can serve multiple purposes from the perspective of the prison administration.

c) Disciplinary measures

Another connection between suicide prevention and disciplinary measures can emerge if the latter are ordered as a consequence of attempting (or announcing the intent of) suicide. Because an attempt of

suicide does not constitute a breach of duty, it may not be used as a reason for disciplinary measures, even though this has been subject to debate in the German legal literature (Walter 2012, § 102, marginal no. 34 with reference) and has often been handled differently in practice. The latter perspective is based on a differentiation between “serious” and “non-serious” attempts – a differentiation that lacks foundation in the, p. 321 ff., 331.).

As one of the disciplinary measures in prison law, disciplinary detention may be implemented (according to the Federal Prison Act) for up to four weeks . Restrictions of liberty going beyond the mere deprivation of liberty due to imprisonment itself and isolating conditions cause an increased vulnerability of the respective prisoners. This is acknowledged by German prison law explicitly for the execution of disciplinary detention. The law requires to hear a doctor before executing disciplinary detention inside prison and the execution has to be supervised by the doctor. The reason for this regulation is the knowledge that otherwise dangers for the health of the prisoner could occur, especially an increased risk of suicide (Walter 2012, § 107, marginal No. 1).

d) Resume

As a result, the situation is more difficult than it may appear at first glance. While in case of a prisoner who appears to be restricted in the free formulation of his or her will, it is important and can be life-saving to intervene, suicide prevention at the same time may be used as an excuse for disciplinary and isolating measures against the will of a prisoner. With respect to isolating measures such as accommodation in a security cell, the measure that is probably most often taken in Germany in the name of suicide prevention, it has to be kept in mind that they may cause a danger of suicide even if it had not existed before. In other words: measures of suicide prevention may increase the vulnerability of prisoners at least in cases without a prior danger of suicide.

2. Practices

a) Knowledge about the occurrence of suicide

In comparison to the residential population the suicide rates of male prisoners were 5.6 times higher and that of female prisoners 8.6 times higher (Opitz-Welke et al., p. 388). The German study also shows that the suicide rate in terms of both male and female pre-trial prisoners was much higher than the suicide rate of sentenced prisoners (5.2 times higher for male pre-trial detainees and 5.9 times higher for female pre-trial detainees) (ibid., pp. 387, 388). Pre-trial detainees who were accused of sexual offences and homicides committed suicide relatively more often than prisoners who were accused of other offences (ibid., p. 388). Beyond that, the authors of the study found that most suicides were committed on Sundays and on public holidays (ibid.). The study gives no information on the mental health of the prisoners who committed suicide, 26 percent of which had attempted suicide before (outside prison). That may be an indicator for mental health problems (ibid.).

b) Connection between occupation density and suicide

As research shows, there is a conspicuous connection between occupation density and the suicide rate for both men and women. While the number of prisoners in Germany declined (from 2006 until today), suicide rates among male prisoners also fell simultaneously (Opitz-Welke et al., p. 387). In the period between 2000 and 2011 in Germany, 934 male and 26 female prisoners committed suicide. The suicide rate of male prisoners shows a linear decline from 117 suicides of men in prison in the year 2000 to 50 suicides in 2011 (ibid.). Although the suicide rate decreased in the residential population in Germany during the same time as well (ibid., p. 388), the linearity and parallelism of the decline is still striking. The suicide rate of female prisoners rose during the same period (no suicides of women in prison in 2000 and only two in 2001, 3 suicides in 2011), but it has to be considered that the total number of suicides of female prisoners is very small (ibid., pp. 387, 388). Overcrowding can be considered as a risk factor for prison suicide as it leads to poorer access to resources for the prisoners (ibid., p. 388). Since the results fit into a pattern of relations also described for occupation numbers

and suicide rates in Eastern European prisons for 1997–2008, overcrowding has to be discussed as an independent risk factor for prison suicide (Rabe 2012, pp. 222–230; Opitz-Welke et al., p. 388). Since there is still a remarkable number of remaining cases, it is obvious, on the other hand, that there is a remaining need for further discussion.

c) Initial screening

The WHO recommends initial screenings with respect to suicide risk of all newly arriving prison inmates (WHO 2007, Suizidprävention; also recommended for the UK in the Council Report CR99: Suicide in prisons, Royal College of Psychiatrists 2002, p. 20). Even though those screenings may help to detect some risk factors of suicide, it is not sufficient for a clear assessment of the risk of suicide. This will be probably more successful when conducted by an inter-disciplinary group of medical doctors, psychologists and social workers while general prison officers will usually lack the ability to do this.

The CPT standards also emphasise the role of the medical screening on arrival which required trained staff that is aware of the topic of suicides in any situation and capable to recognise at least some prisoners at risk of suicide in the course of the initial screening. According to the CPT standards, suicide prevention is a matter affecting the prison's health care service. In the case a person is considered to be at risk of committing suicide, the person ought to be observed for as long as necessary and should not have easy access to things which are suitable to commit suicide (CPT standards 2013, p. 44).

d) Removing cloths

As mentioned above, according to German prison law, exceptional measures can be adopted in the case suicide prisoner is likely to commit suicide. Two of these security measures are surveillance at night and the accommodation in a specially secured cell (“besonders gesicherter Haftraum”, called “Bunker” by prisoners). Often these cells only contain a mattress and a toilet, while the equipment should include non-endangering items like books or the possibility to watch TV through a glass panel (Feest/Köhne 2012, § 88 marg. No. 15). Undressing prisoners for several days for the purpose of preventing a suicide was denied by the European Court of Human Rights as this is a degrading treatment and alternatives may be used, like tear-resistant clothes.

As the example of being detained naked shows, sometimes the prison administration reacts to the risk of suicide with measures potentially perceived as disciplinary instrument and even degrading treatment in the sense of Art. 3 ECHR by the prisoner. Another example for this is the surveillance of a prisoner during night time. While such surveillance is only convenient to prevent a suicide if it takes place frequently, constant observation leads to a situation which can even reinforce the decision to commit suicide (Feest/Köhne 2012, S. 573). The same problem arises with some other measures to prevent a suicide like, for example, the accommodation in specially secured cells.

d) Aliveness control

A further measure that – while originally being intended to prevent suicides – may be perceived as restrictive by the prisoner is the so-called “Lebendkontrolle” (aliveness control). It implies that prison staff controls every morning whether the prisoners are still alive by waking them up and talking to all prisoners, even to those who are still asleep allowed to sleep longer. This can also be perceived as a humiliating (Graebisch 2005, p. 66). Even though this may seem to be a comparatively small intervention, it should be kept in mind that it happens on a daily basis and for all of the prisoners.

e) Misuse of suicide prevention measures for disciplinary reasons

As it is in the nature of such things, it is hard to prove a practice of re-naming and misusing legal instruments within a total institution. But there are regular and convincing reports about it by prisoners, e.g. to the Prison Archive at the University of Applied Sciences and Arts Dortmund (and before: the University of Bremen). But even in official documents a hint to this kind of practice can be found: One of the two decisions by the European Court of Human Rights on German Prison Law, the

one that was already mentioned about the prisoner being detained naked for one week, deals with a case that is remarkable in several aspects. The prisoner tried to make use of his indisputably existing right to single accommodation when prisoner officers announced to move him to a three-persons-cell against his will. He immediately applied formally to the prison governor, as well as to the court, but did not receive a decision until in four years. While this decision was proving that he had been right, he had no possibility to gain justice within reasonable time. He was forced to leave his former cell by the use of physical force while he resisted. He was brought to a security cell and had to stay there while being naked until he was transferred to the prison hospital one week later. Even though he showed visible injuries and the prison officers did not, the use of force was seen to be justified by the need of the prevention of violence. The courts, as well as the German government, pointed to a perceived need of leaving him naked by means of suicide prevention – the latter being the isolated fact that finally resulted in a judgement against Germany because of a violation of Art. 3 ECtHR. Even if one would not take for granted that the prison officers used measures provided for suicide prevention with the intention of disciplinary punishment, it has to be acknowledged that prisoners in situations like this suffer from a specific lack of evidence if it happens.

Against this backdrop it may also be more understandable, even though not justified, why German legislators continuously insist on the possibility to deprive prisoners of their right to outside exercise or even to withhold it completely, as mentioned above. In a recent response of the German Government to the last report of the CPT, the Government argues in favour of this security measure in a three-step argumentation, saying that 1) it is almost never made use of; 2) it is absolutely necessary to make use of it for reasons of i.a. suicide prevention, and 3) accommodation in a “specially secured cell” and outside exercise are mutually exclusive. This partly contradictory line of argument points to the strong urge of obtaining the authorisation to take such measures which – in turn – can be used for reasons closer to disciplining than protection as well.

f) Communication technology

Prisoners are confronted with diverse stress situations in their daily life in prison like the fear of the loss of close persons or fear of the trial and many restrictions (Bennefeld-Kersten 2009, S. 79). For some prisoners a well-structured daily routine or the closeness to other persons can have a protective function (ibid.). Another link exists between bullying and suicidal behaviour, even though it is not ascertained whether inmates who committed suicide had been more affected by bullying than other inmates or whether suicidal inmates had interpreted more situations as threatening than other inmates (ibid., pp. 92). Social support could help to manage problematic occurrences of contact and communication could help the inmates to deal with their situation. One possible measure could be an intranet or telephone counselling for inmates where new inmates cannot only find information (also during the long night-time) but can also learn that other inmates had similar feelings and problems in their situation and found ways to deal with it (ibid., pp. 202). However, the technical infrastructure for this kind of approach is not even available in almost all of the prisons, and where it is, it would probably not be used for a purpose like this due to fear of security risks.

g) Listeners

As the suicide rate is the highest at the beginning of the time in prison (WHO 2007, p. 143), one measure for the prevention of suicides is to provide for a possibility for newly arriving and potentially suicidal inmates to have conversations with other inmates which are specially trained as „listeners“ (Lohner and Pecher 2013, p. 581). For prisoners, the training to become a listener and the support they get as a listener is perceived as a good possibility to qualify and make use of their own empathic skills which can be an important step of development (ibid.), also with respect to self-efficacy. The concept of listeners was first developed in English-speaking countries and is based on the idea of self-help amongst inmates. The new prisoner is not left alone, especially not at night, and may prefer to talk about certain thoughts rather with another inmate than with a prison officer (Lohner and Pecher 2013, p. 581). One danger of misuse could be that these listeners could potentially serve as informants, who pose questions to new inmates in the interest of other authorities, instead of treating the information of

the new prisoners as confidential. This is especially problematic in pre-trial detention with respect to the presumption of innocence and the right not to contribute to one's own incrimination. Due to the very same reasons though, it may be especially attractive for the authorities to gain knowledge from a prisoner at this stage of the criminal proceeding. The phenomenon of a different kind of "listeners" is well known from practice. These are prisoners talking to new arrivals about especially their offenses. Afterwards they give the information to the prison officer and/or serve as a witness in court hoping to get some privileges during their own prison time. While this is on the one hand especially likely to happen in pre-trial-detention, prisoners in pre-trial detention are at the same time at the highest risk for suicide. Thus, if misuse could be prevented, it may serve as a promising model even though it is a very limited one from the beginning. If restricted to the first night after arrival it may help to prevent suicides happening as a first reaction to imprisonment, and the first 48 hours are the most dangerous. Against this backdrop the model of "listeners" has recently been tested in Munich prison. The listeners were recruited from a special unit for social therapy and shared a specially equipped room with a remand prisoner. For implementing the model of listeners the demand for a separation of convicted prisoners (like those from the social therapy unit) and pre-trial prisoners was neglected (with the consent of the affected prisoners). It has been made clear that the listeners may not be used as assistants for tasks which should be managed by professionals (Lohner and Pecher 2013, p. 592). But while they are very close to what is already known in prisons as "listeners", the problem how to keep the one apart from the other would need some debate.

h) Reducing deprivation

Deprivation can also be a risk factor for suicide but at the same time is inevitable in prison (WHO 2007, p. 133). Even though the reduction of harm should always be important not only for the prevention of suicides but also as something both prisoners as well as staff benefit from (WHO 2007, p. 134) it as an asset can reduce the risk of suicide.

i) Suicide amongst female prisoners

While the suicide rate among female prisoners seems to be very low, one has to keep in mind the comparatively low rate of women being imprisoned. Accounting for that it turns out that the suicide rate of female prisoners is around the same as for men.

"A WHO guide to the essentials in prison health" contains recommendations to react to the risk of suicidal behaviour especially of female inmates in prison. According to that, prison directors need not only to ensure effective health services but furthermore, a "suicide prevention coordinator, with in-depth understanding of the risks of suicidal and self-injurious behaviour among women in prison" as necessary. The staff that works in women's prisons should be aware of the particular risks of self-harm among women in custody (WHO 2007, p. 160).

j) Self-harm amongst female prisoners

Prisoners who committed suicide have often attempted to do so before or have self-inflicted violence has been observed. There are differences though in the occurrence of self-harm in different countries and prisons. While in a big and very much closed British women's prison (London Holloway), self-harm was a major problem that was discussed and visible on a daily basis, it did not appear as any kind of important aspect in a German prison with a rather open-minded policy (Vechta Women's Prison in Lower Saxony), remarkable numbers of prisoners profiting from home leave etc. When comparing these prisons after visiting them for one week each, the degree of openness they offered was the most striking different. It was followed by the difference in being conclusive to (at least) expression of despair and offering somebody who listens. This was not a model project of implementing any kind of "listeners" but regular staff with an empathetic approach that made a perceivable difference (Graebisch 2005). It has been argued that the experience of imprisonment is

even more painful for female than for male prisoners and that this is mainly connected to intense suffering from the separation of the family. Research has shown that the atmosphere of a prison with the degree of offering at least the possibility for free expression of despair is an important approach for the prevention of suicide.

k) Pains of imprisonment and expression of despair in connection to suicide

Since around twenty years ago it is known already that an understanding of suicide by prisoners will only be possible when using ethnographic approaches towards researching the situation of prisoners at risk of suicide instead of mere medical/psychiatric diagnosis aiming at the prediction of suicide by looking at certain risk factors. Unfortunately the latter is what still happens when “screening” is done after the arrival of a new prisoner. Qualitative research reveals the fact that suicide in prison is a consequence of the pains resulting from imprisonment that and a lack of ability to cope with them. Obviously the best way to prevent suicide is as a result to reduce these pains by changing painful prison conditions and take steps towards openness of the prison. As far as these pains are inevitably connected to imprisonment the least would be to create an atmosphere conducive to the expression of despair and to make any attempt for supporting prisoners in keeping contact to the outside world and their social ties as well as offering professional social care in case there are none. What also becomes clear from the research that has been done especially by Alison Liebling from the United Kingdom, the approach of identifying risk-factors and implementing “measures” falls too short. This is especially the case with security measures that increase the pain experienced by the prisoner and thus may also increase the probability of suicide which could only be prevented by even closer efforts of surveillance leading to even more despair leading to even closer efforts of surveillance.

14) Sex-offenders

Another group of vulnerable inmates is one that prison itself creates, being a total institution creating special situations of need or suffering.

Sexual offenders may become victims of violence inside prison as they are stigmatized by other inmates and staff and as they fear for their safety. Furthermore sex-offenders often are worse positioned than other inmates regarding relaxations and other measures. Additionally, attempts of re-socialisation may include kind of force to treatment or other programmes, and after release, they may be subjected to supervision of conduct.

a) Legal regulations

According to section 6 prison act an evaluation towards the future treatment within prison has to take place at the beginning of a prison term, taking into account the living conditions and the character of the prisoner. On the basis of this evaluation an imprisonment plan (“Vollzugsplan”) should be designed which includes i.a. details on questions of accommodation, work, treatment or preparations for the release. During the time of imprisonment this plan has to be updated and by this adapted to the situation of the inmate (Seifert 2014, p. 128).

According to section 9, para. 1 prison act a location of sex-offenders in a social-therapeutic institution is obligatory in cases where this is “indicated” (“angezeigt”). But it is not specified what is covered by the term “indicated” and in which cases a social-therapeutic treatment should take place in a separate institution or department and in which cases therapeutic treatment in ordinary prisons is considered to be sufficient (Seifert 2014, p. 146). The prisoner is to be relocated from a social-therapeutic institution back into a regular prison “if the purpose of treatment cannot be achieved for reasons inherent in the prisoner's personality” (section 9, para. 1, sentence 2 prison act).

That sex offenders may become victims of intramural violence is a common anticipation, this is highlighted in a ruling by the Federal Court of Justice of Germany, according to which that already in the assessment of a sentence the anticipation of bad treatment of sexual offenders by other inmates can be taken into account (BGH, Judgement, 10 June 2008, 5 StR 180/08, marginal no. 12).

Furthermore according to rule number 18.5 of the European Prison Rules as well as section 18 Federal Prison Act prison inmates have to be accommodated individually during rest time (as far as a prisoner is not in need of help or his life is in danger). The observance of this rule can help to protect prisoners from attacks by other prisoners (Düinkel 2010, p. 14).

According to section 68f criminal code supervision of conduct is implemented automatically after sexual offenders served at least one year without “early release”. According to section 68b criminal code the supervision of conduct may also consist of electronic monitoring by wearing a GPS device. Normally the supervision lasts for a maximum of five years, but it may also be changed into permanent supervision by the court, e.g. in the case that the offender refuses to undergo therapy (section 68c criminal code).

Since 1998 only those treatments require consent which consist of a physical intervention for the prisoner (according to section 56c sub-paragraph 3 criminal code). Especially sexual offenders are often affected by measures of therapy which may also be ordered without consent of the inmate (Hubrach 2008, marginal no. 14).

To get relaxations (allowance to leave the prison for some hours with or without an accompanying guard, granting of holidays etc.) in prison is harder for most sex offenders than for other prisoners. E.g. the Bavarian prison act contains special regulations for sex-offenders as well as for violent offenders according to which in their cases the decision about an imprisonment in an open prison, and granting relaxations has to be evaluated in special detail (section 15 Bavarian prison act). Relaxations in general can only be granted in cases in which an abuse is not to be expected. According to the Hessian prison act in the case of sex-offenders it is presumed this to be exceptional cases by law needing special reasons (section 13, para. 5, no. 1 Hessian prison act). Also the Thuringian prison act claims specially detailed examinations for most sex-offenders regarding the question if they may be located into an open prison (section 22, para. 4 Thuringian prison act) as well as the question if relaxations may be granted (section 46, para. 3 Thuringian prison act). The prison act of Lower Saxony requires an assessment of experts of different professions before relaxations may be granted or a sex-offender may be located in an open prison (section 16 prison act of Lower Saxony). The Hamburg prison act has a similar provision and furthermore requests a written advisory opinion by a psychological professional (section 11, para. 3 Hamburg prison act).

Furthermore the various state prison acts allow prisons to inform other state or non-state institutions about the time and the address of release of a sex-offender as well as about relaxations in prison if the victims of the crime can show their interest in this information is convincing and worth being protected. The prisoner does not even have to be always informed on this information been given to someone else.

b) Practices

Like Mushoff states, only if an institution provides good structural conditions for therapeutic work there is a chance for a successful therapy. Sexual offenders are often exposed to assaults by other inmates if they admit their deeds, which on the other hand is necessary for a successful therapy and by this also the atmosphere suffers (Mushoff 2005, p. 133).

In practice this is challenged in many ways.

Prison areas connected with the assumption of violence being more likely, and thus being avoided by potential victims are: other prison cells, the exercise yard, the common showers, and other unspecified areas (Bieneck & Pfeiffer 2012, p. 22). Unavoidable are shared cells. The most notorious case of prison violence of the last decade in Germany happened in a three person cell in a juvenile prison, where two inmates tortured the third one and in the end forced him to hang himself. This incident led to a commission on violence in prisons in North Rhine-Westphalia (Wirth 2006).

The principle of single cells which claimed by a German law as well as by a European Standard is followed largely by some Länder (e.g. Berlin, Hamburg, Schleswig-Holstein) and by others it isn't (Dünkel 2010, p. 14). In practice, about 29 per cent of all prisoners in Germany are not accommodated separately even though this should be a standard (Statistisches Bundesamt 2014, Rechtspflege, p. 5). The importance of single cells is as well highlighted in an evaluation on violence experienced within prison (Bieneck & Pfeiffer 2012, p. 32), since cells with two or more inmates have to be proven to be risk promoting. However, the Commission on prison violence in North Rhine Westphalia questioned whether single cells (alone) would be sufficient in terms of violence prevention in prison (Wirth 2006, p. 23).

Additionally Bieneck & Pfeiffer take a more general approach, recommending a change of prison regime, because more prisoners who became victims of violence within the prison look for protection of other prisoners, rather than they do with prison staff (Bieneck & Pfeiffer 2012, p. 21-2).

With the other side of vulnerability, created by the prison system itself, one has to start looking in the above mentioned planning procedure at the beginning and during imprisonment. Already the initial evaluations and the later planning of imprisonment in practice is criticised as often not profound or undifferentiated as well as insufficiently organised, and penal institutions lacking provisions in terms of re-socialization (Seifert 2014, p. 128). According to Seifert the penal system in Germany has a negative image and the acceptance of treatment and re-socialization in prison declines. This is aggravated by regular claims out of the politician arena to hold sex-offenders only in safe-custody instead of having an agenda of re-socialization (Seifert 2014, pp. 128).

In evaluating the possibility of granting relaxations in practice, compliance or participation of the prisoner in various treatment programmes is seen as a pre-requisite, and relaxations are used as a tool to achieve it.

With this another kind of vulnerability derives from the increasing demand to undergo therapy in a social-therapy institution, or at least therapeutic measures within the ordinary prison system. On the one hand compliance of the prisoner is demanded, otherwise relaxations - granted to other prisoners without taking part in special programmes - will not be granted. Even though this is not legal (e.g. Constitutional Court 2 BvR 865/11, Decision of 20 June 2012, with respect to a forensic psychiatric institution) this is applied to some extent. At the same time not getting relaxations will influence the date of release in a negative way. Non-compliance in this context is to be understood as not taking part in programmes the prison authorities decided upon to be useful. This applies even to cases it should be obvious that demanding a certain form of therapy may end up in a dead-lock, and alternatives (e.g. individual therapy instead of group therapy oriented programmes) are not taken into account. Especially those prisoners denying the committal of a crime face additional problems, if they are asked to admit the crime at the beginning of (or even before) a therapy to show that the therapy is "indicated". On the other hand undergoing therapy may mean that every aspect of prison life is part of the therapy in a broad sense. E.g. in social-therapy institutions the majority of visits (it differs more from institution to institution than between prisoners) is more often supervised acoustically than in ordinary prisons; this is (partly) explained by the need to gain additional information for therapy (Spöhr 2009, p. 120 with further references).

Surplus, even though conjugal visits are described to be important especially for sex-offenders to be enabled to involve in relationships, the duration of such visits is usually the shorter the higher the share of sex-offenders within the group of prisoners is (Spöhr 2009, pp. 131-2).

15) Conclusion

As illustrated above, the German prison system has produced a remarkable number of vulnerabilities. However, there are even more groups that could be added to the list. One rather obvious and known vulnerable group are juvenile prisoners. While prisoners addicted to illegal drugs are usually perceived as vulnerable, those addicted to alcohol are often ignored and there is a lack of programmes for this group, despite of the known connection between alcohol abuse and criminal offences. Furthermore there are prisoners who are vulnerable because of the offence they have been convicted for. This especially applies to sexual offenders, especially with crimes against children, who have the lowest social status of all prisoners and in danger of becoming a victim of violence. There are also concepts trying to deal with this problem, like closed units for these group of prisoners. These may have some impact on protection while they are in this unit, but will later increase their stigmatization. Former police officers, politicians etc. may also be vulnerable with respect to possible reactions of other prisoners. Last but not least there is the group of prisoners that are perceived as “trouble makers”, as querulous. They are vulnerable because the officers in a prison may be annoyed by e.g. their permanent complaints to the court etc., and may be tempted to try stopping this behavior in different ways. In the end nearly all prisoners in the Federal Republic will be covered by the list of vulnerable prisoners.

Apart from those distinguishable groups of vulnerable inmates, imprisonment causes further vulnerabilities that may not be ascribed to one of the above-mentioned classifications and may even affect prisoners that generally belong to the strongest, most represented groups of the prison population. The reason for this result is the fact that imprisonment itself is the cause for a special vulnerability.

Even though both federal and regional penitentiary law has adopted regulations that intend to counter the vulnerability of certain prisoner groups, and German penitentiary case-law has repeatedly pointed to the principle of anti-discrimination, most measures only make the daily prison routine of those prisoners slightly more bearable, and insignificantly less inhuman.

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