

Pre-trial detention and its alternatives in Germany

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PTD in Germany - in a nutshell

Pre-trial detention (*Untersuchungshaft*) = deprivation of liberty of an untried or not finally convicted person

- can be preceded by a temporary detention by the police of a maximum of up to 48 hours, usually less (person “must be brought before a judge no later than the day following that of his arrest”, Art. 104 III Grundgesetz)
- Any further detention must be ordered by a judge (“detention judge” or “investigating judge”) by issuing an arrest warrant
- main objective of pre-trial detention:
 - securing a criminal procedure / trial according to the rule of law (no in absentia trials possible)
 - but: prevention of a new crime also accepted as legitimate ground

Alternatives?

- Suspension of an arrest warrant
- Possibly (and usually) under conditions (reporting to the police, financial surety, etc.)

Legal basis and developments:

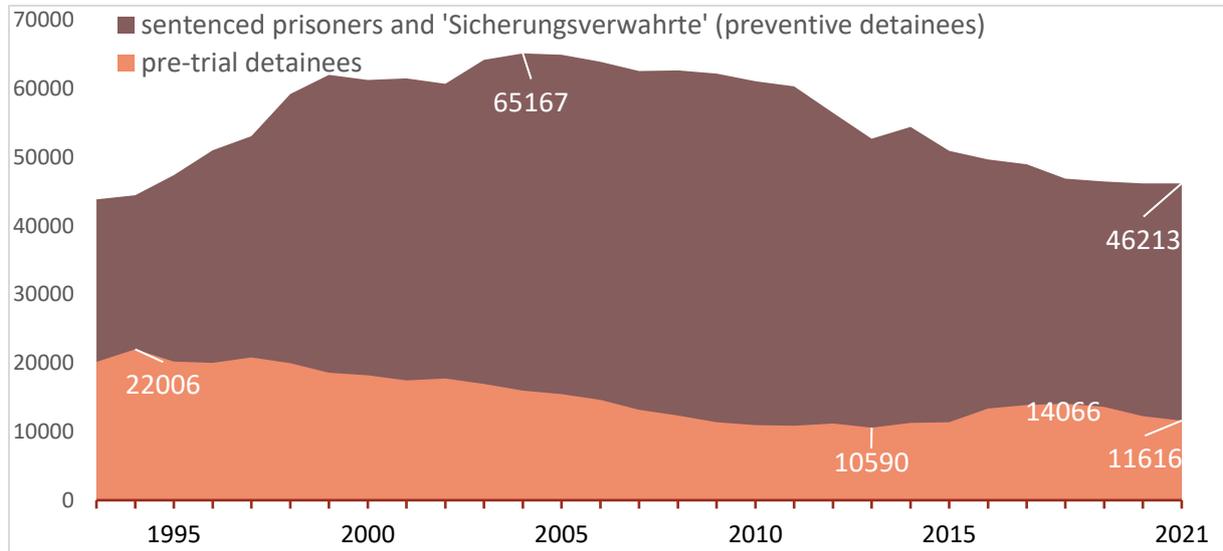
- Constitution (*Grundgesetz*) and Code of Criminal Procedure (*Strafprozessordnung*)
- Recent reforms tried to strengthen the suspect’s right regarding early mandatory assignments of a defense lawyer (incl. legal aid); access to files and information rights;

¹ This presentation is based on two research projects: *Untersuchungshaft in Europa. Eine vergleichende Untersuchung unter rechtsdogmatischen, kriminologischen und europarechtlichen Aspekten* - Deutsche Forschungsgemeinschaft (DFG), published 2018 by NOMOS, <https://www.nomos-shop.de/nomos/titel/die-untersuchungshaft-id-77293/>; and DETOUR - Towards Pre-trial Detention as Ultima Ratio, www.irks.at/detour.

debatable impact on practice – strong European influence (jurisprudence by the European Court of Human rights; policies and norms of the European Union)

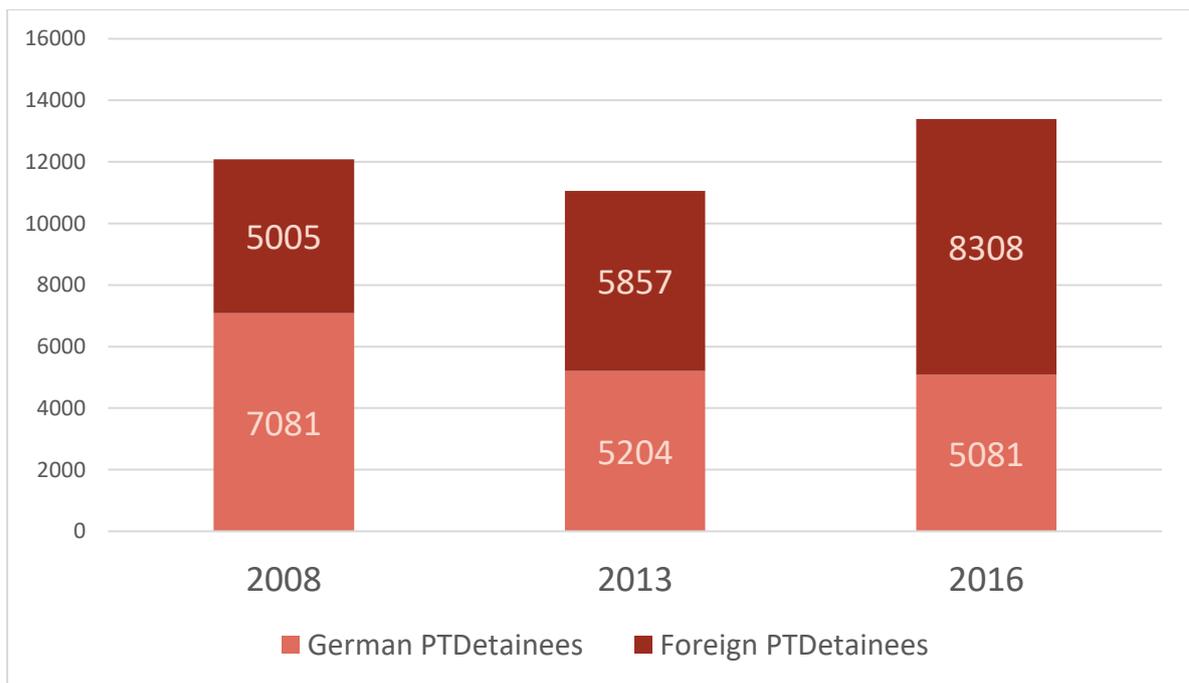
‘Too often, too quickly, too long’? - Some data

Figure 1: Sentenced and remand prisoners at 31 March of each year, Source: Statistisches Bundesamt, Prison Statistics



- Of all persons tried and who receive a final decision (Conviction + sentence; acquittal, other court decisions, e.g. hospital placements), (only) about 3% have been in PTD according to the conviction and sentencing statistics (Strafverfolgungsstatistik)

Figure 2: German and foreign remand prisoners at 31 March of each year, Source: Morgenstern 2018; Council of Europe, SPACE I (<https://wp.unil.ch/space/space-i/>)



- Stark overrepresentation of foreigners in PTD: 6,5% of those with a final decision have been in PTD; they represent 60% of the remand prison population (data for 2017) as opposed to 12% of the resident population, 31% of suspects registered by the police and 30% of all persons with a final court decision, 32% of all sentenced prisoners)
- Comparability of offence structure? Scarce data!
- Most important factor for overrepresentation: arrest warrants based on the risk of absconding, usually (often? automatically?) assumed for foreigners

Grounds for detention and decision-making

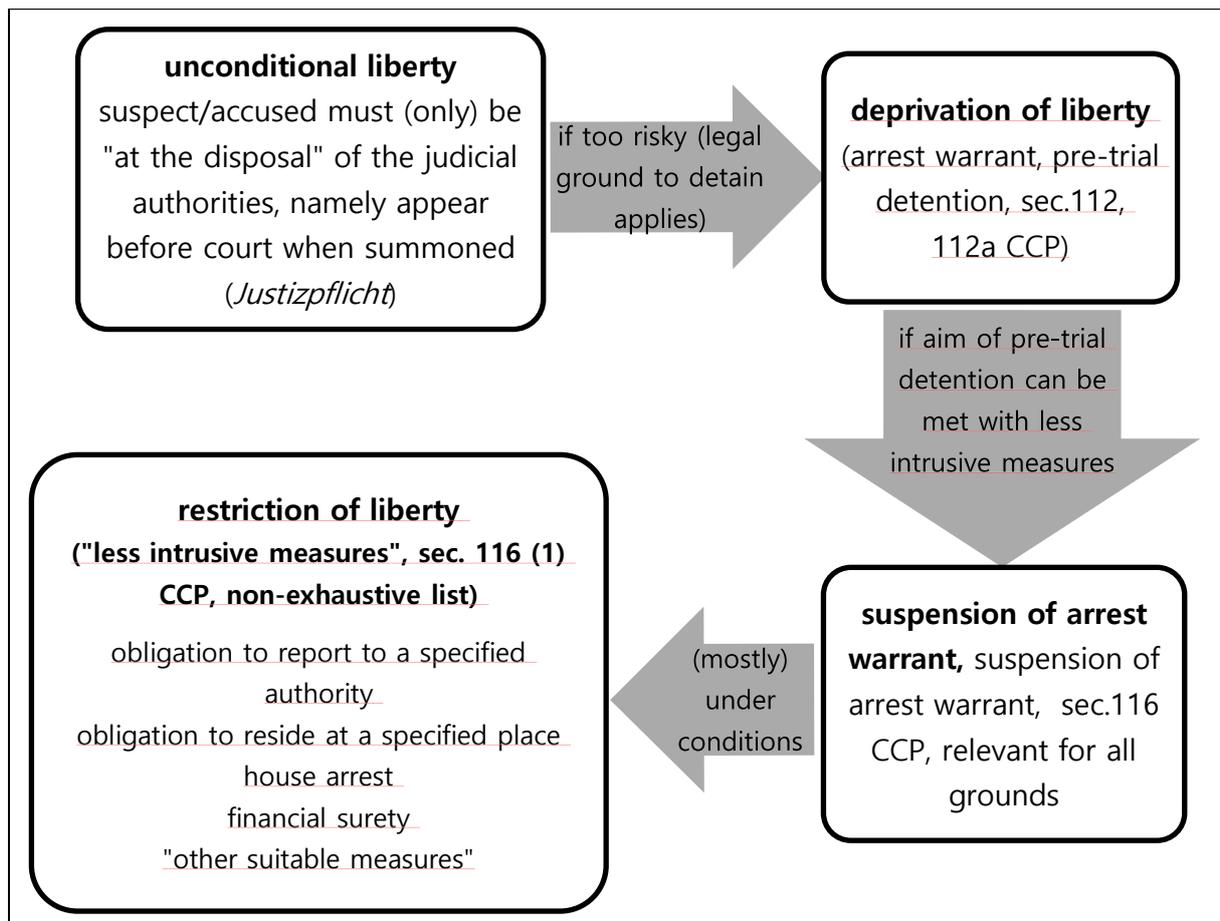
- all relevant detention decisions are judicial decision
 - initial arrest warrant (sec. 115 CCP)
 - decisions about suspending such a warrant (sec. 116 CCP) including certain conditions for suspension
 - possibly decision to revoke the suspension and order re-arrest (sec. 116 (4))
 - decisions about the revocation of the warrant and release of the suspect when the reasons for PTD have ceased to exist
- situation *de facto*? Public prosecution plays important role (requests warrant, prepares decision)
- studies estimate that 90% of all requests are granted
- Grounds for PTD:
 - flight or the risk of flight (absconding),
 - the risk of collusion, tampering with or obscuring evidence,
 - the risk of repeating or continuing a listed offence of a (relatively) serious nature (re-offending)
 - the gravity of the offence in cases of very serious allegations, mainly capital offences.
- 90% of all arrest warrants are based on the risk of absconding

What role do assessments of dangerousness play in pretrial detention, and how are they made?
- risk of re-offending is a subsidiary ground, actual risk assessments regarding dangerousness and future offending play a minor role, are not made systematically or using scales etc.

What else? The question of alternatives / bail

- “substitution model”: no initial decision for supervision in the community (conditional bail), but detention threshold has to be met, then a suspension of the detention decision (= arrest warrant) is possible without or under conditions, that means that restricted liberty substitutes the deprivation of liberty

Figure 3: Substitution model



What is the state of data collection and analysis with respect to bail and detention determinations and pretrial outcomes?

- No data!
- Empirical studies estimate that 20-40 % of all arrest warrants are suspended, but only after some time in PTD, hardly at the initial hearing

A Need for Reform?

- No reform plans, no political will for further reforms
- No evident pushes by professional organisations or activist groups
- Problem of overrepresentation of foreigners remains unsolved