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ARTICLE

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# Developments in German Criminal Law: The Urgent Issues Regarding Prolonged Pre-Trial Detention in Germany

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**Abstract**
Freedom is one of the fundamental rights enshrined in Art. 2(2)(2) of the German Constitution. However, nearly 30,000 remand prisoners were incarcerated in pre-trial detention in Germany in 2017 pending trial. Due to the presumption of innocence, remand prisoners are subjected to a flagrant violation of their constitutional right to freedom. After outlining the legal pre-requisites of pre-trial detention under German law, this article addresses various legal areas of conflict arising from periods of prolonged pre-trial detention by examining a case brought before the Federal Constitutional Court in Germany in 2018. At the same time, the article demonstrates how severely pre-trial detention affects the personal lives of remand prisoners. The longer any such period of pre-trial detention lasts, the more important the question is whether this deprivation of liberty can be justified. Over the past few years, the number of cases involving protracted pre-trial detention has increased dramatically due to overworked courts. By emphasizing that a lack of judicial resources cannot justify lengthy terms of pre-trial detention, this article highlights the importance of the fundamental right to freedom of each and every one of us.

**Keywords** Right to freedom; prolonged pre-trial detention; case study; overworked courts in Germany

## A. Introduction

Imposing pre-trial detention on a suspect is one of the most drastic measures courts can undertake. However, under certain circumstances, it is indispensable to maintain order in society and to protect the community from offenders. In light of Article 2(2)(2) of the Basic Law (*Grundgesetz* (GG)),[1] Germany's constitution, which grants German citizens the right to freedom, it is important that pre-trial detention is implemented appropriately and is not abused by the judicial system. With regard to pre-trial detention, the right to freedom is of the utmost importance as the accused has not yet been tried by a court of law and there may indeed not be any sufficiently compelling evidence that the accused is guilty of the offense. Therefore, pre-trial detention may only be ordered in exceptional circumstances. Nevertheless, judges are increasingly facing difficulties such as a short time span to decide whether imposing pre-trial detention is necessary to protect the

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[1] Grundgesetz [GG] [Basic Law], *translation* at https://www.gesetze-im-internet.de/englisch_gg/ (Ger.).

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community. Furthermore, when ordering pre-trial detention, the prosecution service may often not yet have adduced sufficient evidence to support the judges in their assessment. This is exacerbated by an increased caseload and a significant lack of judicial resources. As a consequence, courts are overloaded, which often leads to excessively lengthy terms of pre-trial detention. Thus, the question arises as to whether the malfunctioning of the judicial system can justify the limitation of the suspects' constitutional rights. This Article will, therefore, focus on reassessing the general concept of pre-trial detention.

## B. Recent Case Concerning Prolonged Pre-Trial Detention in Germany[2]

In Dresden, on November 3, 2016, a suspect was placed in pre-trial detention, accused of having committed aggravated blackmail and the use of force or threats against life or limb pursuant to § 255 of the German Criminal Code (*Strafgesetzbuch* (StGB))[3] as well as of having formed a criminal organization in violation of § 129 StGB. The corresponding indictment issued by the prosecution service in Dresden was served on the third criminal chamber at the Regional Court of Dresden (*Landgericht Dresden*) on April 27, 2017. On the same day, the third criminal chamber's presiding judge announced that the respective criminal chamber could not set a firm trial date in the immediate future due to a considerably increased volume of criminal cases and resultant backlogs, which contributed to extended waiting times. Thus, an additional criminal chamber—the sixteenth criminal chamber —was created, and a new panel of judges was assigned to the case. Consequently, the main proceedings were not opened until December 6, 2017. At this juncture, the defendant in question had already spent thirteen months in pre-trial detention, even though he had applied to revoke the arrest warrant and lodged both a complaint and a constitutional complaint. Subsequently, complex legal disputes arose with regard to the lengthy period of time that the suspect had been kept in pre-trial detention. These disputes will be examined below, once the legal pre-requisites of pre-trial detention in Germany have been outlined.

## C. Legal Pre-Requisites of Pre-Trial Detention in Germany

The main objective of pre-trial detention is to ensure the execution of criminal procedures by preventing suspects from evading criminal proceedings, committing further offenses, or tampering with evidence pending their trial.[4]

### *I. Fundamental Principles*

Pre-trial detention is a measure employed to monitor suspects. When assessing pre-trial detention matters, three fundamental principles must be heeded: The principle of proportionality, the presumption of innocence, and the principle of expediency.

#### *1. Principle of Proportionality*

The principle of proportionality is the principle that frames any use of pre-trial detention.[5] In the German Code of Criminal Procedure (*Strafprozessordnung* (StPO)), § 112(1)(2) StPO explicitly

[2]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 6, 2018, Neue Juristische Wochenschrift [NJW] 2948, 2018 (Ger.).

[3]Strafgesetzbuch [StGB] [Penal Code], § 255.

[4]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1965, 19 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 342, 347–49, 1965 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 3, 1966, 20 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 45, 49, 1966 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 27, 1966, 20 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 144, 147, 1966 (Ger.).

[5]Urs Kindhäuser & Kay Schumann, Strafprozessrecht § 9 (Baden-Baden ed., 5th ed. 2019); Löwe-Rosenberg, Die Strafprozessordnung und das Gerichtsverfassungsgesetz – Großkommentar, Zweiter Band §§ 72-136a, 112 para. 29 (Peter Rieß ed., 25th ed. 2005) [hereinafter Löwe-Rosenberg Großkommentar].

stipulates that custody "may not be ordered if it is disproportionate to the significance of the case or to the penalty . . . likely to be imposed."[6] Despite not being stipulated in the German Basic Law, the principle derives from the rule of law pursuant to Article 20(3) of the German Basic Law and is valid throughout German public law.[7] It states that any measure by the State must be convenient to achieve its purpose,[8] which means that there is no way of attaining the purpose[9] which is more lenient and appropriate than its influence on those affected.[10] In the case of custody, this deprivation of liberty can only be the *ultima ratio* if it is entirely necessary for the common benefit.[11] Regarding criminal procedure, this implies that custody cannot be imposed if it is not proportional to the crime or the penalty, as expressly stated in §§ 112(1) StPO.[12] There is also a need for one of the grounds stated in §§ 112(2), (3), and 112a StPO, which must be equally important compared to the right to freedom of the accused in order to justify the measure.[13] This purpose must be reasoned meticulously.[14]

### 2. Presumption of Innocence

The second principle is the presumption of innocence stated in Article 6(2) of the European Convention on Human Rights (ECHR): "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."[15] Similar wording can be found in the Charter of Fundamental Rights of the European Union.[16] In Germany, however, this has no constitutional priority.[17] This is justified with the concept of human dignity under Article 1(1) GG[18] as well as the principle of the rule of law under Article 19(4) GG[19] and Article 20(3) GG. Pre-trial detention basically rejects the presumption of innocence as there is no conviction based upon the alleged offender's guilt, but rather merely on the grounds of arrest under §§ 112(2), (3), and § 112a StPO.[20] The sole option available to vindicate this is by strictly maintaining the principle of proportionality.[21]

### 3. Principle of Expediency

The third principle that has particularly practical relevance is the principle of expediency.[22] Even though the wording is ambiguous, expediency, in this case, does not aim for a short but, rather, an expeditious trial. Article 5(3)(1) ECHR stipulates that "everyone arrested or detained . . . shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time."[23] The importance of this becomes apparent as it

[6]StGB, § 112 at para. 1, sentence 2.

StGB, § 112 at para. 1, sentence 2.

[7]Löwe-Rosenberg Großkommentar, *supra* note 5.

[8]Hans D. Jarass & Bodo Pieroth, Grundgesetz für die Bundesrepublik Deutschland – Kommentar art. 1, para. 46 (15th ed. 2018).

[9]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 10, 1997, 96 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 10, 21, 1997 (Ger.).

[10]*Id.*

[11]Strafprozessordnung: mit GVG und EMRK § 112, para. 106 (H. Satzger et. al. eds., 2d ed. 2016) [hereinafter Strafprozessordnung].

[12]HubertSchorn, Der Schutz der Menschenwürde im Strafverfahren 115 (1963).

[13]Jürgen Peter Graf, Karlsruher Kommentar zur Strafprozessordnung § 112, paras. 1, 44 (8th ed. 2019).

[14]*Id.* at para. 2.

[15]European Convention on Human Rights art. 6(2) (1950) [hereinafter ECHR].

[16]Charter of Fundamental Rights of the European Union art. 48(1), 2010 O.J. (C 83) 389 [hereinafter Charter].

[17]Klaus Böhm & Eric Werner, Münchener Kommentar zur Strafprozessordnung § 112, para. 4. (1st ed. 2014).

[18]GG; *see also*, Löwe-Rosenberg Großkommentar, *supra* note 5, § 112 at para. 38.

[19]19 BVerfGE 342, 348 (Ger.).

[20]Löwe-Rosenberg Großkommentar, *supra* note 5, § 112 at para. 37.

[21]Kindhäuser & Schumann, *supra* note 5, § 9 at para. 4.

[22]Strafprozessordnung, *supra* note 11, § 112 at para. 132.

[23]ECHR, art. 5(3).

is once again stated in Article 6(1)(1) ECHR. The Charter of Fundamental Rights of the European Union also mentions the right to a hearing within a reasonable time by a tribunal established at law.[24] Under German legislation, this is again not directly stated in the German constitution; however, it is implied in the right to freedom of the accused set down in Articles 2(2) and 104 GG[25] and under the rule of law in Article 20(3) GG.[26] With regard to remand detention, the principle of expediency is even more significant than in other criminal proceedings.[27] The right to freedom gains in importance the longer the custody lasts, as any such deprivation of liberty causes serious problems at a personal level for a remand prisoner. After months—or even years—of pre-trial detention, prisoners are subjected to financial problems, loss of employment, health issues, the destruction of their social life, and even reputational damage. Therefore, the effect on the detainee during the period of pre-trial detention, and the consequences that the person concerned has to deal with afterward, must be viewed critically.[28]

### II. The Level of Suspicion

Section 112(1) StPO provides two cumulative prerequisites for pre-trial detention. Pre-trial detention may only be imposed by the competent judicial authority if there is evidence giving rise to the strong suspicion that the accused committed the offense and if an additional ground for the arrest exists. Under German law, there are three different levels of suspicion, each of which is required to be able to enter a new stage of the criminal proceedings.

For the first level, the public prosecution office needs to be provided with sufficient factual indications to initiate investigations by the police pursuant to § 152(2) StPO, the lowest level of initial suspicion, commonly referred to as the *Anfangsverdacht*. If the investigations proffer sufficient grounds to then be able to proffer public charges—which constitutes the next level of suspicion, the so-called *hinreichender Tatverdacht* (adequate grounds for suspicion)—the public prosecution office is obliged to press charges by submitting the indictment to the competent court in accordance with § 170(1) StPO. However, imposing pre-trial detention upon someone requires the highest level of suspicion, namely *dringender Tatverdacht* (strong suspicion). Pursuant to § 112(1) StPO, judges may only order pre-trial detention if there is a strong probability that the suspect has actually committed the offense.[29] At the same time, the probability that the suspect will actually be convicted must outweigh the likelihood of an acquittal.[30] When judges decide whether to remand a suspect in custody pending trial and are satisfied that both these requirements are met, they are empowered to issue a written arrest warrant pursuant to § 114 StPO. The judges are obliged to make an expeditious decision thereupon relating directly to the current findings by the prosecution service and the police.[31]

### III. The Grounds for Remand Detention

In addition, §§ 112 and 113 StPO[32] provide three grounds for arrest: Flight or the risk of absconding, tampering with evidence, as well as other grounds for remand detention.

[24]Charter, art. 47(2).
[25]Strafprozessordnung, *supra* note 11, § 112, at para. 132.
[26]Löwe-Rosenberg Großkommentar, *supra* note 5, § 112 at para. 35.
[27]Strafprozessordnung, *supra* note 11, § 112 at para. 132.
[28]Graf, *supra* note 13, § 112 at para. 3.
[29]Klaus Böhm & Eric Werner, Münchener Kommentar zur Strafprozessordnung § 112, para. 22. (1st ed. 2014).
[30]*Id.* at para. 24.
[31]*Id.* at para. 27.
[32]Strafprozessordnung [StPO] [Code of Criminal Procedure] §§ 112, 113.

### 1. Flight or the Risk of Absconding

Among the reasons for arrest, flight and the risk of absconding are by far the most common reasons for imposing pre-trial detention. In Germany in 2017, 27,836 remanded prisoners from a total of 29,548 detainees were held in pre-trial detention on precisely these grounds.[33] The term *Flucht* (flight) pursuant to § 112(2) no. 1 StPO covers two alternative actions, which can exist contemporaneously and which both lead to the imposition of pre-trial detention: The action of absconding itself *(fliehen)* and the action of going into hiding *(sich verborgen halten)*. Both alternatives require the accused's will to evade ensuing criminal proceedings.[34] Section 112(2) no. 2 StPO, in turn, covers the risk of flight, which is, by definition, a higher probability of the suspect evading the criminal proceedings than participating in them, and the assessment thereof requires a case-by-case analysis.[35] However, in light of the flagrant violation of the right to freedom, judges deciding this must not merely focus on a small number of criteria such as the length of the penalty anticipated and the gravity of the offense committed.[36]

### 2. Tampering with Evidence

In accordance with § 112(2) no. 3 (a)–(c) StPO, the judge deciding whether to remand a suspect in custody may issue an arrest warrant based upon the risk of tampering with evidence when the "accused's conduct gives rise to the strong suspicion that he would, pending his trial, destroy, alter, remove, suppress, or falsify evidence; improperly influence the co-accused, witnesses or experts, or cause others to do so." [37]

### 3. Other Grounds for Remand Detention

In addition to these grounds, the judge deciding may resort to pre-trial detention when there is a strong suspicion that the accused will re-offend or continue to commit one of the major offenses listed in § 112(a) StPO and when "certain facts substantiate the risk that prior to final conviction he will commit further serious criminal offences of the same nature or will continue the criminal offence."[38] Moreover, as stipulated in § 112(3) StPO, the judge may impose remand detention if the potential perpetrator is suspected of a particularly serious offense, including severe terrorist offenses and any capital offenses.[39]

## IV. Duration and Prolonging of Pre-Trial Detention

As stipulated in § 120(1) StPO, any arrest warrant has to be revoked as soon as the prerequisites for pre-trial detention are no longer met or when the prolonging of pre-trial detention appears disproportionate to the significance of the case or the probable sentence. Furthermore, § 121(1) StPO provides the safeguard that pre-trial detention "for one and the same offence" may only exceed the regular duration period of six months if "particular difficulty, the unusual extent of the investigation[,] or some other important reason" justifies the prolonging of the pre-trial detention.[40] In accordance with the recent leading case law of a German Higher Regional Court, a permanent backlog of cases and a lack of judicial resources cannot be considered as "other important

[33] Destatis Statistisches Bundesamt, page 380.
[34] Graf, *supra* note 13, § 112 at para. 10.
[35] *Id.* at 16.
[36] Böhm & Werner, *supra* note 29, § 112 at para. 25.
[37] StPO, § 112 (2)(3)(a–c).
[38] *Id.*, § 112a.
[39] Völkerstrafgesetzbuch [VStGB] [Code of Crimes against International Law], §§ 6(1), 13(1) (Ger.); StGB, §§ 129a(1–2), 129b(1), 211, 212, 226, 306b, 306c, 308(1–3).
[40] StPO, § 121(1).

reason(s)" which would justify the continuation of pre-trial detention pursuant to § 112(1) StPO.[41] In accordance with § 122 StPO, the competent Higher Regional Court has the jurisdiction to decide whether the requirements to order the continuation of pre-trial detention are fulfilled once an oral hearing involving the accused and his defense lawyer has taken place. Therefore, in the absence of a clear-cut provision, no mandatory time limit for pre-trial detention has thus far been stipulated under German law.

## D. Judicial Review

With regard to judicial control, remand prisoners are entitled to appeal at any time against any action or measure implemented during their pre-trial detention pursuant to § 117 StPO and § 304 StPO. Furthermore, § 121 StPO provides that the competent Higher Regional Court is obliged to review the respective pre-trial detention requirements after the regular duration of six months has expired, provided that the main trial has not yet begun.

## E. Suspect's Complaints Directed at the Constitutional Court of Sachsen and the Higher Regional Court of Dresden[42]

The following section of this Article examines whether the prolonging of pre-trial detention—which amounted to thirteen months—was wrongful in the above-mentioned case. This will be done by applying the aforementioned statutory provisions and principles governing pre-trial detention in Germany to the case. Once the Higher Regional Court of Dresden (*Oberlandesgericht Dresden* (OLG Dresden)) had ordered the extension of the suspect's pre-trial detention on May 29, 2017 and September 13, 2017, the suspect lodged a constitutional complaint to the Constitutional Court of Sachsen (*Verfassungsgerichtshof des Freistaates Sachsen*) on October 26, 2017, referring to the latter continuation order. However, after his complaint had been dismissed, his ensuing application to the Regional Court of Dresden of February 7, 2018, to revoke the respective arrest warrant pursuant to § 117 StPO (*Haftprüfungsantrag*) was also denied.

Subsequently, on February 21, 2018, the suspect lodged a complaint pursuant to § 304 StPO to the OLG Dresden, claiming that the prolonging of his pre-trial detention was wrongful. Ultimately, his complaint was dismissed by the OLG on March 27, 2018 on the same grounds for which the Constitutional Court of Dresden had previously dismissed his constitutional complaint. In fact, both courts deemed the further continuation of the pre-trial detention justified and proportionate in light of the suspect's fundamental right to freedom.

In detail, both courts held that all prerequisites pursuant to §§ 112, 114, and 121 StPO were met throughout the whole period of pre-trial detention and, therefore, they did not find a violation of the principle of expediency. At any time, two grounds for arrest—the danger of absconding and the danger of tampering with evidence—justified the judges resorting to pre-trial detention. Although the claimant is a German citizen, he has an immigrant background, which would easily enable him to flee and remain abroad. Additionally, the evasion of criminal proceedings in Germany is facilitated through the suspect's membership in a criminal organization operating in Germany. Thus, both courts concurred that the suspect was a flight risk.

While none of the defendant's actions implied any tampering with evidence, both courts held that the mere fact that he was a member of a criminal organization was sufficient to presume that he was also likely to tamper with evidence. The court considered that the same organization's

[41]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 16, 2006, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1336, 1336–39, 2006 (Ger.); *BVerfG: Überlastung eines Gerichts kein Grund für Aufrechterhaltung der Untersuchungshaft*, BECK-AKTUELL (June 26, 2018), https://rsw.beck.de/aktuell/daily/meldung/detail/bverfg-ueberlastung-des-gerichts-kein-grund-fuer-aufrechterhaltung-der-untersuchungshaft.

[42]NJW 2948 (2948–50) at paras. 6–14 (Ger.).

other members had already attempted to tamper with evidence in parallel proceedings.[43] Therefore, the OLG Dresden was justified in ordering the continuation of the pre-trial detention. Furthermore, the defendant's allegations that the prolonging of his pre-trial detention violated the principle of expediency were strongly denied by both courts. In spite of being inundated with complex cases, the third, as well as the additional sixteenth criminal chamber at the Regional Court of Dresden, had actively promoted the proceedings after the opening decision.

Additionally, the Regional Court of Dresden adequately substantiated the denial of the defendant's application to revoke his arrest warrant to the effect that the defendant needed to be served with further investigative results before the main trial could begin. Thus, it was legitimate to postpone the original beginning of the main proceedings until December 6, 2018. Furthermore, an average of one hearing day a week was deemed sufficient, given the fact that two parallel proceedings dealing with other members of the same criminal organization—who were largely accused of the same offenses—were also being tried twice a week. Consequently, in total, three hearings were scheduled per week, which was deemed appropriate.

In conclusion, the unusual extent of the investigation, the overriding suspicion that the defendant had committed a serious offense, and the likelihood of a long sentence being imposed necessitated the prolonging of the pre-trial detention in light of the principle of proportionality. Consequently, both complaints were dismissed for these reasons. As a last resort, the defendant filed a constitutional complaint with the Federal Constitutional Court in Germany on April 27, 2018.

## F. Judgment of the Federal Constitutional Court (*Bundesverfassungsgericht* (BVerfG))[44]

The suspect filed a constitutional complaint against the order from the Regional Court of Dresden from March 27, 2018, as well as an action for a preliminary injunction with the Federal Constitutional Court on April 27, 2018. The appellant complained of a violation of his right to freedom, pursuant to Article 2(2)(2) GG, as well as an infringement of his right to a fair trial, under Article 2(1) and Article 20(3) GG, because the Regional Court had, in his view, contravened the principle of expediency. The appellant submitted that the courts' administrative-related issues could not justify the continuation order because the appellant had no bearing on this, and thus it should not be attributed to him. The fact that the Regional Court of Dresden was seriously overstretched was known prior to August 2017, and the relevant authorities had been notified of this situation twice, but no ensuing action had been taken. The appellant claimed that the incessant inundation of the criminal chamber is the responsibility of the judicial administration, which is obliged to provide the courts with sufficient personnel to ensure an effective prosecution of adequate proceedings.

The Federal Constitutional Court substantially granted the claim pursuant to § 93a(1)(1) in conjunction with § 93a(2b) Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*; BVerfGG). The decision of the Higher Regional Court Dresden violated the appellant's constitutional right under Article 2(2)(2) GG.[45] An individual's right to freedom must be fairly balanced with the irrefutable need for an effective prosecution when ordering and maintaining pre-trial detention. Generally, it is merely convicted offenders that can be limited in their right to freedom. In contrast, the presumption of innocence only permits an intervention into an individual's freedom under certain circumstances.

Prosecution authorities and criminal courts have to take all possible and reasonable measures to ensure that the investigations will be concluded within the requisite period of time and that a verdict will be rendered expeditiously. The Federal Constitutional Court determined that the main proceedings should commence within three months after the charge had been accepted and

[43]StPO, § 112(2)(3).
[44]NJW 2948 (2948–50) at paras. 25–42. (Ger.)
[45]*Id.* at para. 41.

thereby reiterated that the principle of expediency already applies to the interlocutory proceedings pursuant to §§ 199 – 226 StPO.[46] Pre-trial detention is not proportionate if its continuance is caused by avoidable and unjustified delays that do not originate from within the proceedings themselves and can, therefore, not be attributed to the accused.

The mere gravity of the offense, as well as the resultant expectation of the sentence, cannot justify the length of pre-trial detention if the severe, yet avoidable, delays in the proceedings were caused by the state. The congestion the courts are experiencing should never be a reason for a prolonging order. Moreover, this responsibility falls within the scope of the state. One cannot expect the accused to accept the warrant's further continuation, to a point where it is longer than appropriate, simply because the state failed to fulfill its obligation to equip its courts properly.

Therefore, it was held that the order of the Higher Regional Court did not fulfill these provisions as no constitutional and acceptable reasoning that would justify the continuation of pre-trial detention was mentioned therein.[47] The proceedings had not contributed to the expediency, which intervention into the individual's freedom would require. Further, the order did not adduce any special circumstances that warranted the continuance of pre-trial detention. Thus, the constitutional requirements necessary for a prolonging order were not fulfilled.

Furthermore, the Higher Regional Court did not conclusively explain why this case should be an exception that justified the thirteen months from the beginning of pre-trial detention and the seven months from the case being accepted by the court. It is particularly inexplicable as to why the Regional Court needed two months after the arraignment to form another criminal chamber to compensate for the excessive workload and take over the proceedings. The administrative problem had been known for some time and, as mentioned above, had already been reported twice before the case was allowed. The Federal Constitutional Court reiterated that this could not be attributed to the appellant but to the judicial administration that is responsible for equipping the courts in time and in a way that sufficiently accomplishes the constitutional requirements of the proceedings. The Regional Court of Dresden failed to fulfill this obligation.

Moreover, the Federal Constitutional Court decided that the frequency of the hearings was not sufficient to meet the requirements of the principle of expediency. Because the beginning of the main proceeding took place on December 6, 2017, the criminal division had heard the appellant's case less than once a week on average. The court also stated that it doubted whether the present case was materially connected to other criminal proceedings in the same criminal chamber would be able to compensate for the delayed start to the main proceedings and the insufficient frequency of the hearings. The fact that a criminal chamber has affirmed the relationship between, but has not combined, pendent cases[48] cannot outweigh the fact that the appellant has to tolerate such delays in his trial. In conclusion, the order of the Higher Regional Court Dresden dated March 27, 2018 violated the appellant's constitutional right pursuant to Article 2(2)(2) GG. The constitutional claim was admissible and well-founded, and the order had to be set aside.

## G. Not an Isolated Incident but Rather a Series of Cases

This present case is by no means an isolated instance. Statistics provided by the Federal Statistical Office in Germany (*Statistisches Bundesamt*) illustrate that a quarter of all pre-trial detentions in Germany in 2017 exceeded the regular maximum timespan of six months due to exceptional circumstances. In absolute numbers, this amounts to 5,942 remand prisoners from a total of 29,548 detainees who were incarcerated for a period of between six months and one year; further, 1,898 remand prisoners were kept in pre-trial detention for more than one year in 2017.[49] This clearly

[46] *Id.* at para. 37.
[47] *Id.* at para. 32.
[48] *See* StPO, § 4.
[49] Statistisches Bundesamt, *supra* note 33, at 381.

contravenes the principle of proportionality as an arrest warrant can never be proportional if it is not properly justified[50] and is thus unreasonable imprisonment without trial, which fails to consider the presumption of innocence. In particular, such prolonged periods of pre-trial detention also breach the principle of expediency.

However, it still needs to be considered that these long periods of pre-trial detention exceeding one year are only for serious offenses such as murder—244 remand prisoners—or robbery—251 remand prisoners.[51] This, in turn, leads to the presumption that the German courts are inclined to impose pre-trial detention in particularly complex cases involving major offenses, which, however, seems reasonable with regard to the state's obligation to protect society. Nevertheless, pre-trial detention always results in an encroachment onto the right to freedom of affected individuals without a criminal conviction.

The aforementioned case has become the leading decision for a series of cases. On December 6, 2018, the Higher Regional Court of Brandenburg had to release a convicted murderer after one year and nine months in pre-trial detention.[52] Contrary to the principle of expediency, the appeal proceedings have been delayed significantly because the court failed to compensate for its own overstretched situation. Even though the appellant still remained a suspect, the continuation of pre-trial detention was held to be disproportionate, and the appellant was released.

Another example of this significant problem is a decision from January 1, 2019, in which a convicted arsonist was released after two years and ten months in pre-trial detention.[53] Due to the overburdened courts, the appeal proceedings were delayed, and the continuation order was deemed to be no longer proportionate.[54]

The most recent case from January 23, 2019 is referred to as the *Babymordprozess* (the baby murder trial).[55] There, a suspect was accused of murder, aggravated battery, and hostage-taking in concomitance with attempted murder and aggravated battery. The suspect was released from pre-trial detention because the proceedings were not held with sufficient frequency. The court failed to reduce its workload in the criminal division in order to ensure effective prosecution. The suspect had been held in pre-trial detention for two years and six months without being tried. This was, unsurprisingly, held to be disproportionate and unlawful. The Federal Constitutional Court reiterated that a prolonging order is inadmissible if it is solely based upon the grounds of an overloaded and overstretched criminal division, irrespective of the seriousness of the offense.[56]

Statistics from the German Association of Judges (*Deutscher Richterbund*) recently illustrated that the Higher Regional Courts had to revoke at least sixty-nine arrest warrants throughout Germany in 2019.[57] The accused were mostly potential recidivists or dangerous criminals, who were released from pre-trial detention because the criminal courts were overburdened, and the length of the proceedings was found to be disproportionate. A matter of concern is the fact that this number has been increasing over the past several years. In 2017 there were fifty-one and in 2018 sixty-five cases in which the courts had to release suspects from pre-trial detention and forty-one cases the year before.[58] This illustrates an increase of approximately sixty percent over the past three years.

[50] STRAFPROZESSORDNUNG, *supra* note 11, § 112 at para. 3.

[51] STATISTISCHES BUNDESAMT, *supra* note 33, at 381.

[52] Oberlandesgericht Bradenburg [OLG] [Higher Regional Court of Brandenburg] Dec. 6, 2018, 1 Ws 184/18.

[53] Oberlandesgericht Brandenburg [OLG] [Higher Regional Court of Brandenburg] Jan. 3, 2019, 1 Ws 203/18.

[54] *Id.*

[55] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 23, 2019, 2 BvR 2429/18.

[56] *Id.*

[57] Matthias Schröter, *Strafjustiz am Limit*, DEUTSCHER RICHTERBUND (Jan. 11, 2021), https://www.drb.de/newsroom/presse-mediencenter/nachrichten-auf-einen-blick/nachricht/news/strafjustiz-am-limit-1.

[58] *Id.*

Furthermore, a further study provided by the German Association of Judges recently published figures stating that in 2017, 2,000 thousand judges and public prosecutors were desperately needed throughout Germany.[59] They claimed that the shortages in the justice system had to be filled by creating more jobs in order to be able to sustainably staff the criminal courts and prosecute more effectively.[60] In addition, this tense situation, which the courts in Germany are currently faced with, will become more acute within the next ten years as more than forty percent of all jurists working for the state will retire by 2030.[61] Therefore, Germany's courts are on the brink of losing more than 10,000 judges and public prosecutors.[62]

Meanwhile, the number of young professionals and junior lawyers has been declining for years. Consequently, the legal profession cannot cover the personnel requirements for suitable junior employees, and this situation will deteriorate further in the years to come. The study underlined that prompt action is required in order to ensure personnel sustainability within the German criminal justice system. Therefore, the German Association of Judges is spurring the government into action, demanding that they lay the foundations for the recruitment of these desperately needed junior lawyers in order to be able to guarantee the capacity of the courts and to safeguard the rule of law.[63]

## H. Possible Solutions and Improvements

### *I. Compensation*

Pursuant to § 2(1) of Germany's statute which regulates the compensation for wrongful criminal prosecutions (*Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen* (StrEG)), compensation shall be paid to those who have been wrongfully detained.[64] A person is considered to have been wrongfully detained when the proceedings result in an acquittal, or they are closed due to a lack of evidence.

The pecuniary losses incurred in pre-trial detention are compensated for in accordance with § 7(3) StrEG. However, the subsequent determination of the amount of lost profits, business losses, or damage caused by the closure of a commercial enterprise is mostly inadequate. In particular, proving the requisite causality between pre-trial detention and the asserted damage is usually problematic and far from straightforward.

An initiative by the German Lawyers' Association (*Deutscher Anwaltsverein*) criticizes in a statement that the current compensation of €25 per day of imprisonment is inadequate. [65] Instead, they are demanding at least €100, as an intra-European comparison clearly illustrates that the level of compensation for wrongly imposed terms of imprisonment is extremely low in Germany.[66] In contrast, the Netherlands, for instance, provides €80–€105, Spain grants €50–€250, and Denmark and Sweden offer €100–€250 per day. [67]

Additionally, there have been suggestions of allocating an assistant appointed by the state to help wrongfully detained people re-socialize and re-integrate into society.[68]

[59] *Pensionierungswelle rollt auf Justiz zu – Tausende Stellen fehlen*, Deutscher Richterbund (Dec. 28, 2018), https://www.drb.de/positionen/themen-des-richterbundes/belastung.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Die Personelle Zunkunftsfähigkeit der Justiz in der Bundesrepublik Deutschland*, Deutscher Richterbund (Apr. 2017), http://www.richterbund.info/pdf/DRB_Nachwuchs.pdf.

[64] Reinhold Schlothauer, Hans-Joachim Weider & Frank Nobis, Untersuchungshaft para. 1341 (5th ed. 2016).

[65] *SN 21/18: Haftentschadigung*, DeutscherAnwaltVerein (May 31, 2018), https://anwaltverein.de/de/newsroom/sn-21-18-haftentschaedigung?pdf=24.

[66] *Id.*

[67] *Id.*

[68] *Id.*

Nevertheless, it has to be concluded that monetary compensation is not appropriate to compensate for the deprivation of liberty sustained, as, under German law, the value of liberty cannot be quantified in material terms, which is why financial compensation can only possess a symbolic value.

### II. Alternatives

Regarding possible alternatives to pre-trial detention, one must differentiate between cases where custody is absolutely necessary and cases where more favorable measures could apply. Some of these measures are set down in 116(1)(2) StPO.[69] The first option for avoiding remand detention is using a bail system, explicitly mentioned in §116(1)(2) No. 4 and §116a (1) StPO. Article. 9(3)(2) of the International Covenant on Civil and Political Rights (ICCPR) states in particular that "it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."[70] This means that it would be far more appropriate to grant bail at an international level than to hold suspects in remand detention unreasonably.

Other options are offered in § 116(1)(2) Nos. 1–3 StPO. The judge can impose an order to force the accused to report at certain time intervals to the judge or the criminal prosecuting authority,[71] remain at a certain place or in a specified area,[72] or leave his or her private premises only under the supervision of a designated person.[73] Section 116 (1)(2) is not final; consequently, there are further measures such as the order to surrender one's passport or ID-card, undergo therapy, or not enter certain buildings or premises.[74] Furthermore, suspects could be subjected to electronic tagging. Pursuant to § 68b StGB, convicted persons can be directed to carry technical means for the electronic monitoring of their whereabouts for the duration of the supervision of conduct.[75] This could be used as an alternative to pre-trial detention, which is not only more cost-effective but also a less severe infringement of the accused's fundamental rights.[76]

According to Germany's Federal Constitutional Court case law, judges must suspend the execution of the arrest warrant if a more lenient option, like those mentioned above, is available.[77] Whether these options are available still depends on each individual case, but they always must be considered.

Regarding cases where remand detention is necessary due to one of the grounds under § 112(2) and (3) or 112a, resorting to pre-trial detention becomes more problematic. A simpler solution would merely be to equip the courts and prosecution service with more staff. However, this problem has been discussed for decades, and no satisfactory solution has yet been found.[78]

## I. Conclusion

In conclusion, it cannot be justified that remand prisoners are subjected to excessively protracted pre-trial detention merely because the courts have failed to fulfill their obligation to guarantee proceedings within an appropriate period of time. Countermeasures must be taken in order to avoid

[69] In the juvenile law, those measures are generally overriding section 72(I) of the Juvenile Procedure Code.
[70] International Covenant on Civil and Political Rights (ICCPR), art. 9(3)(ii).
[71] StPO, §§ 116(1), 116(2) no. 1.
[72] *Id.* at § 116(2) no. 2.
[73] *Id.* at § 116(2) no. 3.
[74] Graf, *supra* note 13, § 116 at para. 12.
[75] Strafgesetbuch [StGB] [Penal Code], § 68b.
[76] Stephan Beukelmann, *Elektronische Fußfessel*, 2011 NJW-Spezial 632 (2011).
[77] 19 BVerfGE 342 (351) (Ger.).
[78] Claus Roxin& Bernd Schünemann, Strafverfahrensrecht § 16, para. 7 (28th ed. 2014).

such scandalous treatment. Even though effective prosecution must be maintained, the presumption of innocence and the human right to freedom under Article 2(2)(2) GG is a constitutionally granted right that can only be encroached as an *ultima ratio* measure. The overloaded courts evidently cannot accomplish the principle of expediency. Therefore, a prolongation order of pre-trial detention infringes the principle of proportionality if the delays fall within the scope of the state's duties. The judgments of Germany's Federal Constitutional Court, as well as the statistics, all underline the significance of this problem. Furthermore, the issues relating to the individual during and after pre-trial detention must be taken into consideration as suspects face significant problems such as social rejection, unemployment, or financial and health issues. Government compensation for wrongfully accused people is simply inadequate, and there is a lack of support for victims from the judicial system. Given that the problem is likely to become even more severe in the years ahead, alternatives must be urgently considered, and solutions must be found.

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