Dangerousness, long prison terms, and preventive measures in Germany

Séminaire GERN "Longues peines et peines indéfinies. Punir la dangerousité" (Neuchâtel, 3 septembre 2008)

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Introduction

1 Imprisonment has been a wide-spread sanction of deviant behaviour for decades and, in some parts of the Western world at least, even for centuries. Germany seems not to be a very special case in this respect of its history. In this country, the origins of the modern prison are conventionally set by historians in the beginning of the 17th century – that is, only some years after the opening of the Amsterdam rasphuis, which was used as a model especially in the North of Germany. From a broader perspective of institutionalisation, Germany is among the European countries who established asylums and similar institutions for deviant persons early in history. Both the prison and the asylum existed in German territories for long before a national state was founded.

2 In the twentieth century, Germany introduced like many national criminal justice systems specific types of sanctions for some groups of offenders that were considered to be dangerous. If we are interested in the practice of prison sentences and other forms of detention, we have to bear in mind that the political and social history of Germany cannot be written without considering both the the Nazi regime after 1933 and the coexistence of two rather different political systems from 1949. The history of the prison and of “total institutions” in general is, of course, also one aspect of the history of the State.

3 The present article tries to take both a historical and a criminological perspective. It will focus on the field where discourses of dangerousness and of “total institutions” meet,
that is, forms of long-term detention of some groups of criminal offenders considered to be dangerous. For this purpose, it will be useful first to give a short overview on legal concepts of dangerousness and detention in Germany. The main part of the article will deal with the quantitative development of some important sanctions according to official statistics, especially life sentences, preventive detention, and hospital orders for mentally disordered offenders during the twentieth and the first years of the twenty-first century.

1. Legal concepts of detention in Germany

The prison sentence is today, according to the law, one of only two principal types of punishment in Germany, the other one being the fine. According to s. 38 of the Criminal Code (Strafgesetzbuch – StGB), imprisonment is for a fixed term up to 15 years or for life. Moreover, several sanctions for “dangerous offenders” exist, which are not categorised as punishment but as preventive measures. But the legal concept of dangerousness is broad enough to go far beyond the limits of criminal law.

1.1. Criminal law

Dangerousness is a legal concept that can be mobilised in several ways. In principle, the German concept of punishment as enacted in the Criminal Code is founded on a variety of legal theories. While the statute only sets very general rules for determining punishment, both the courts and scholars of criminal law established so-called “combined theories” that encompass just retribution, deterrence, but also individual prevention and “positive general prevention” – the reassurance of the community that its fundamental rules are being safeguarded (Roxin 2006: 85 sq.; Safferling 2004: 1481 sq.). The Federal Constitutional Court (Bundesverfassungsgericht) confirmed this view in its landmark decisions on abortion and on the life sentence.

First of all, a life sentence may be executed even beyond guilt and until the convicted person’s death. This seems to be a common penal strategy to cope with “dangerous offenders” in many criminal justice systems. In the German legal system, however, this approach is rather a possibility left open by the law for some extreme cases. The view of the life sentence is influenced especially by decisions of the Federal Constitutional Court emphasising the legal chance to be released from prison. The law therefore rules that after 15 years having been served at least the court may grant conditional release from a sentence of imprisonment for life (s. 57a StGB). If the court rules the guilt in a specific case is exceptionally severe this minimum period of execution of the life sentence may be extended.

In a more specific sense, dangerousness is reserved for a category of criminal sanctions other than punishment. Translations for this category have been changing. In an older official translation of the Criminal Code, they were called “measures of reform and prevention”, while Bohlander (2008) translates them as “measures of rehabilitation and incapacitation”. As this legal concept is virtually nonexistent outside the jurisdictions of Austria, Belgium, Switzerland, and Germany, it will need some explanation. Although these sanctions require a conviction by a criminal court for a criminal offence, they are, in theory at least, thought to be independent of any guilt. The purpose of a preventative measure is pure prevention of severe future offences – and nothing else. Specific preventive measures have been devised for different groups of offenders (Dessecker 2004)
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1. Preventive detention (s. 66–66b StGB) is intended to provide for secure placement in a prison as an additional measure only after punishment. In its most important traditional form, punishment and preventive detention are both parts of a sentencing decision at the end of a trial. The complexity of the legal provisions has been increased, however, by several changes since 1998. Moreover, new subtypes were introduced. The recently enacted model of continued detention – a notion borrowed from Australia – postpones the decision to the end of a prison sentence. This scheme applies to violent or sexual offenders if they are considered dangerous at the end of a longer prison sentence and certain legal conditions are met. For offenders convicted only once in their lifetime, continued detention requires a sentence of 5 years or more. Continued detention was first introduced as a measure of administrative law in five federal states since 2001. Only after a Federal Constitutional Court decision that this was indeed a matter of federal criminal law, the scheme was enacted as part of the Criminal Code in 2004.

2. The association of the notion of dangerousness with mentally disordered offenders is much more common. In Germany, the placement in a psychiatric hospital for criminal offences (s. 63 StGB) is also considered a preventive measure. This requires a mental disorder but not a complete lack of criminal responsibility. In the less frequent cases of a state of only diminished criminal responsibility, this sanction will typically be combined with a prison sentence – although most of these offenders will not go to prison but only to a psychiatric institution. Following the term used in British law and Bohlander's (2008) translation of the German Criminal Code, these sanctions will be called “hospital orders” in this paper.

Although the empirical sections to follow will focus on long prison terms, preventive detention, and hospital orders, it is worth noting that these are not the only legal provisions dealing with dangerousness in the context of criminal sanctions. Another group of offenders cited by the law is those with addiction, which refers to alcohol as well as illegal drugs. If these persons are considered dangerous, a custodial addiction treatment order is possible (s. 64 StGB). Addiction treatment orders are indefinite but tend to exceed three years’ time only rarely. Moreover, both mental hospital and addiction treatment orders may be suspended from the beginning. Some non-custodial measures also rely on the dangerousness concept but are left out here.

1.2. Non-criminal forms of detention

It is not always easy to draw a distinct line between preventive measures, which are considered a part of criminal law, and other legal instruments that fulfill similar functions in the fields of administrative or even private law. In the long run, the commitment of persons with mental disorders to mental health institutions is most important. There is a host of legal norms that allow for such a commitment, both by administrative law of the federal states and by the Civil Code (Bürgerliches Gesetzbuch – BGB). Beyond these statutes, hospital treatment is only legal with a patient’s consent. As a recent European Court of Human Rights case shows, even confinements of non-consenting patients to a clinic for medical treatment not authorised by a court order have occurred, and they raise serious human rights problems.
2. Longitudinal data on long-term sentences and preventive measures

The empirical overview that follows is limited in a number of ways. This account will rely on official statistics for the most parts, while the results of criminological research can only be mentioned for some aspects. Statistical data on criminal justice and sentencing in Germany have been collected from the last decades of the nineteenth century. For the longitudinal analyses presented here, some sanctions have to be selected and some limitations to be observed. On the other hand, data on confinement in psychiatric hospitals are less easily to be found especially as far as non-criminal forms of detention are concerned.

After some short remarks on data sources, the main part of this paper will look at each sanction separately. It seems impossible to establish a clear hierarchy between these sanctions because they all rely on the dangerousness concept in a certain way and they all aim at long-term detention.

2.1. Data sources

For a historical account of criminal sanctions, a system of justice statistics stable for several decades will be most useful. Of course, the validity of longitudinal studies based on official statistics depends heavily on the quality of the data compiled by statistical authorities.

For Germany, the longest series of sentencing data exist for convictions, not for prisons or psychiatric institutions. Conviction statistics for West Germany and Berlin have been published by the Federal Statistical Office (Statistisches Bundesamt) from the beginning of the 1950s, which means that we can look back onto a time series of more than 50 years without important changes in the geographical area covered. For the version of conviction statistics published every year, the German reunification of 1990 did not have much impact in general due to some legal problems. Even recently, conviction statistics have not been published for all the federal states in the East of the country.

Commitments to psychiatric institutions are covered by conviction statistics as far as these measures are taken by a criminal court. Non-criminal commitments, however, may only be found in statistics of the civil courts, which have existed since 1992.

Conviction statistics are also available for the first half of the twentieth century as they came into being as Reichskriminalstatistik in 1882. For this period of history, interpretation has to take into account the frequent change of political systems, the two World Wars, and the use the Nazi authorities made of the law.

Prison statistics, on the other hand, have a long tradition in some parts of the country – going back to the nineteenth century for some territories – but have existed on a national basis only from the beginning of the 1960s. They reflect those sanctions that are executed within the prison system quite well – that is, in the present context, life sentences and preventive detention. Hospital orders, which are executed within the health system, can only be considered on the basis of West German data (Dessecker 2008: 3 sq.). For psychiatric inpatients in general, official statistical data tend to be even less complete.
2.2. Life sentences

The life sentence has been the most severe punishment of German criminal law for rather a long time. While the Federal Republic of Germany abolished the death penalty by its Basic Law (Grundgesetz) of 1949, the last execution in the German Democratic Republic took place in 1981, and capital punishment was legally abolished there in 1987 (Evans 1996). When the death penalty still existed, the function of the life sentence was different.

2.2.1. Life sentences as an alternative to capital punishment (1882–1945)

In a first overview, Figure 1 compares the frequencies of life sentences with those of capital punishment in the period between the introduction of national conviction statistics and World War II. Before 1950, capital punishment was the most severe punishment according to German criminal law, the life sentence following in the second place.

Figure 1: Life sentences compared to death sentences in Germany (conviction statistics, 1882–1942)

Capital punishment clearly dominates the figure as there were thousands of executions during the most terrorist phase of the Nazi regime. As Nikolaus Wachsmann (2004: 218) points out, in 1943 and 1944 alone, more people were sentenced to death than in the entire 80-year period between 1861 and 1941. The figures shown here include those death sentences that were covered by official criminal statistics until 1940. Convictions by regular criminal courts, by special courts (Sondergerichte) and the so-called People’s Court (Volksgerichtshof) were included, but not those of the military courts and other courts operating outside the justice system, especially those of the police and the SS in occupied...
Poland. For some years internal information of the Ministry of Justice exists, and to some extent historical research has to rely on estimates carried out by one of the established executioners of the time (Blau 1952: 72 sq.; Düsing 1952: 212 sq.; Evans 1996: 641 sq.; Wachsmann 2004: 218).

19 Capital punishment is not the only severe criminal sanction the extremities of Nazi justice caused to go up to an extent unbelievable before. But they did not change the relative importance of life sentences compared to capital punishment very much. In every year for which statistical data were collected, the frequency of convictions for life was considerably lower than that of death sentences. This is true for the Nazi regime (1933–1945), for the Weimar Republic (1919–1933), and for Imperial Germany (1871–1918). In several years of the Kaiserreich (1883, 1897, 1910, 1918) there were not more than just two life sentences that were recorded in conviction statistics, and the figures never exceeded 18 (for 1894). Although the figures were higher during the crisis period in the early 1920s going up to 27 convictions in 1920, there was another slump until 1930. And if we decide to believe what the Nazi state published, there were just 7 life sentences in 1936. From 1937, the recorded figures were higher but they never exceeded 69 convictions a year – a figure not officially published that refers to Germany and all the territories the Nazis had incorporated in their “Greater Germany” (Grossdeutsches Reich) in 1941 (Blau 1952: 72).

20 As long as capital punishment existed, the life sentence was never regarded as a punishment for the most severe crimes. It only came in the second position. Until the late 1930s, capital punishment was the standard sentence for murder and very rarely applied for some other crimes, and life sentences were typically imposed on offenders convicted for manslaughter. In some cases, life sentences were imposed for rape or arson resulting in death. When the Nazi regime intensified legal terror, many new offences were introduced to allow capital punishment for, e.g. listening to foreign radio broadcasts or any offence committed while taking advantage of anti-airraid measures (Evans 1996: 689 sq.; Röhl 1969: 27 sq.; Werle 1989: 210 sq.). Life sentences were imposed more often than in any earlier period since the end of the nineteenth century, but by the Nazis, this sanction was not regarded as efficient enough to exterminate those then labelled “enemies of the people” (Volksschädlinge) (Werle 1989: 266 sq.).

2.2.2. Life sentences as the most severe punishment (1950–2006)

21 After the abolition of capital punishment in West Germany, the role of the life sentence changed. From 1949, the life sentence has been the most severe punishment the criminal law allows. It took over most of the function the death penalty had fulfilled in earlier times.
Although several statutes exist that make a life sentence possible, it has been almost exclusively reserved for murder cases in practice. According to the law, murder has to be punished with imprisonment for life. But in a substantial number of convictions, the sanction will be a fixed term of imprisonment. The Criminal Code provides that an attempt may be punished more leniently than the completed act, and the same rule applies for diminished responsibility cases. Moreover, the Federal Court of Justice (Bundesgerichtshof) acknowledged there are exceptions for some cases of treacherous killings.

Recorded figures of life sentences have been higher in West Germany since 1950 than the figures recorded for any year before 1937 although the population of this area is substantially smaller than that of pre-World War II German Reich. Conviction statistics suggest there has been a substantial increase especially since 1970. During the 1950s, 56 life sentences were imposed on average, and the mean rose to 58 in the 1960s. It was almost 60 in the 1970s, 73 in the 1980s, 88 in the 1990s, and 103 since 2000.

It seems difficult to find a plausible explanation for this rather steady career of the life sentence. There has been no concurrent increase in police statistics. Police statistics show some increase in the early 1990s due to the criminal prosecution of former GDR officials that was not possible before 1989. But the level of murder and manslaughter in 2007 is lower for the whole country than it was in 1987 for West Germany.

The critical discussion of imprisonment for life culminated in the late 1970s, when the most important reforms of criminal law in the Federal Republic of Germany had finally come into force. This was the political climate that helped the Regional Court (Landgericht) of Verden to bring the murder statute before the Federal Constitutional Court arguing the life sentence was unconstitutional because it violated the principle of human dignity. The Federal Constitutional Court then ruled that there was no violation of the principle of...
human dignity as long as there was a chance for prisoners to be released, which had to be
secured by due legal process, and that some subtypes of murder had to be applied in a
restrictive way.²²

Today, the life sentence is not very controversial.²³ For many, it goes without saying there
has to be a very long prison for very severe crimes. Some even argue it should also be
available for juvenile offenders. Most life sentence cases will reflect guilt and retribution.
But the notion of dangerousness resides in the background of this discussion.

Prison statistics show that the numbers of prisoners convicted to a life sentence have
gone up quite steadily. After a first peak in 1969 when there were almost 1,100 of those
prisoners in West Germany the figures have been on an even higher level for every year
since 1987. In 2007 there were some 2,000 prisoners for life. An obvious reason for the
high number of life prisoners is the gap between those being convicted during a given
year – at least 94 in 2006 – and those who are released or whose prison terms ends for
other reasons – 61 in 2006. Recent data on the length of stay are only available for ex-
prisoners released in a given year, the median fluctuating within a range of 17–19 years (Dessecker 2008).

2.3. Preventive detention

Preventive detention is a special sanction aimed at dangerous offenders that may also
look back on several historical phases of the twentieth century. This sanction was most
often used by the criminal justice system of Nazi Germany, with more than 3,700 cases in
1934 and another peak around 1940. After the foundation of two new German states in
the East and the West in 1949, preventive detention was soon abolished in the GDR as
“one of the most terrorist preventive measures”. In West Germany, conviction figures
never reached the pre-1945 level. In the period between 1958 and 1969 there were more
than 200 convictions every year. After a sharp drop, only the most recent figure for 2006
is approaching the threshold of 100 cases a year again.

2.3.1. The Nazi period

For the criminal justice system in Nazi Germany, preventive detention was the most
important of those measures available to the courts. Preventive measures were
introduced by the Nazi government from 1934. The basic legal construction of these
sanctions was not new but drew heavily on the criminal law reform discussion during the
years of the Weimar Republic. This is why there has been a debate on the character of
preventive measures and especially preventive detention ever since. Some argue this is
pure national socialist legal thinking while others – probably the majority today – defend
the position that preventive measures in themselves do not violate the principles of a
criminal justice system founded on human rights of citizens. This cannot be elaborated in
the present paper.²⁴

One of the issues for which the Nazi government departed from earlier Weimar bills was
the retroactivity of the new measures – a question most important for preventive
detention. The so-called Habitual Offenders Law (Gewohnheitsverbrechergesetz)²⁵ featured
several provisions that made it possible to direct this measure not only against
defendants who were convicted for a crime committed in 1934 or later, but also against
those whose criminal proceedings were still pending and even against those who had
committed a crime years before and were still in prison. This explains the extremely high level of preventive detention in the first two years, which came out three to four times higher than the Ministry of Justice had predicted (Baumann 2006: 86; Dessecker 2004: 97; Müller 1997: 53 sq.).

After this first wave had run out, statistical figures went down. Another sharp increase from 1938 may be attributed to a pronounced official policy – advocated both by the government and the Supreme Court (Reichsgericht) – to make use of preventive detention in a more aggressive way. This effort came only to an end during World War II when the extra-legal possibilities to exclude and kill dangerous offenders had been multiplied. After the decision to kill prisoners by “annihilation through labour”, long prison terms and even preventive detention had become superfluous for the Nazi state (Baumann 2006: 87 sq.; Dessecker 2004: 97 sq.; Müller 1997: 56 sq.; Wachsmann 2004: 284 sq.).

Preventive detention as the most frequent measure was immediately followed by the commitment to a workhouse, a form of detention for petty offenders, vagrants, beggars, and prostitutes following the completion of an initial prison sentence. According to the 1934 statute, detention in a workhouse was limited to two years but only for those individuals who had never been held in such an institution before (Wachsmann 2004: 129 sq.). For all others, there was no time limit.

2.3.2. Preventive detention since 1949

The history of preventive detention in the Federal Republic of Germany is different. From 1949, the question still has always been present how many people are sent to preventive detention every year. But it no longer refers to thousands of prisoners but to hundreds of them, and most recently to dozens. Figure 2 shows this in more detail.

In the 1950s and 1960s, West German courts established preventive detention as a normal criminal sanction for a certain group of offenders. During most of these years, no critical discussion of it took place. On the contrary, the international movement of the Défense sociale nouvelle – as it was widely understood in Germany – rather favoured preventive measures of any kind as it blurred the boundary between punishment and pure prevention. This movement was not so powerful as in France and Italy but it still had some influence on the German discussion. Standard works of both Marc Ancel and Filippo Gramatica were translated (Ancel 1966; Gramatica 1961). Moreover, several leading authors in the field even suggested the Nazi criminal justice was quite successful in eliminating habitual offenders.

More critical statements turned up from the early 1960s. Now, the practice of preventive detention under Nazi rule was also evaluated by more extensive empirical research (Hellmer 1961). This was the most important phase of criminal law reform in West Germany. For the new general part of the Criminal Code that was to come into force in 1975, the treatment-oriented alternative bill (Alternativ-Entwurf) written by a group of criminal law professors was very influential. They were highly critical against the version of preventive detention inherited from the 1934 law and, although they did not advocate its complete abolition, proposed to reduce it to very few cases of untreated or untreatable offenders. The revised Criminal Code voted by Parliament did not subscribe to every detail of these propositions but clearly reduced the scope of preventive detention. Legislators found this aspect of the reform so urgent that they decided to enact it from
1969. This was correctly understood by the courts as a clear signal to restrain preventive detention.

The most recent phase in the history of “dangerous offender” legislation in Germany goes back to a public debate on sexual murder cases, which began in 1997 and may well be called a moral panic. Within some months, a series of sensational abductions and killings of girls had occurred, which provoked extensive scandalisation in the media. The victim story that was most important for legislation was that of Natalie Astner, a seven-year old girl from Bavaria. The offender who killed her, who had been convicted of sexual abuse and other offences before, was released on parole fourteen months before his re-offending. Although he would never have met his victim had he been in prison, he had never been considered a “dangerous offender” before. The Natalie Astner case was more exceptional in terms of public attention than in terms of its inherent quality as a crime – although there were not many sexual murder cases recorded by the police and their number has been decreasing over time. On the other hand, it also turned out in 1997 that the Dutroux case in Belgium was probably without precedent (Debuyst 1998; Grevisse 2001). But the Dutroux case was the only one cited in the public that came from abroad, and it was probably less important in this context than the cases from Germany.

Although the conviction figures of preventive detention did not explode, influences of this more punitive and more security-fascinated political climate may be seen in the statistics. While during the ten years from 1997 to 2006, there were 64 preventive detention cases in an average year, the average was only 36 in the decade before. This is reflected by prison statistics showing 870 detainees in 1964 but less than 200 in the early 1980s and 1990s. In March 2008 there were 435 persons in preventive detention. As soon as the new continued detention cases will show up in conviction statistics, it may easily be predicted the increase in prison statistics is going to continue.

Preventive detention for an indefinite period does not mean these offenders stay in prison as long as those with a life sentence. There are only some data on the length of stay based on surveys of those whose detention period has ended. Medians range from 4.5 to 6.5 years for preventive detention alone and from 10 to 17 years if the preceding prison sentence is included in the calculation (Dessecker 2008: 22 sq.).

One of the most intriguing issues of preventive detention since it was introduced in 1934 refers to the offenders concerned. How legitimate is it to call these offenders “dangerous”? Critics of preventive detention have always argued that this preventive measure has been ordered not against persons who tend to commit very serious crimes but against those who committed a lot of typically petty offences and are likely to continue this sort of career. Empirical research has repeatedly shown that this critique is founded on solid ground. In the 1930s and still in the 1960s, non-violent offences against other people’s property dominated at large. On the other hand, more recent studies on offenders convicted in the 1980s after criminal law reform in West Germany found sexual offences and robbery were more important while theft and fraud were still present.

2.4. Hospital orders for mentally disordered offenders and the context of the mental health system

Preventive measures for persons with mental disorders may be ordered both by the criminal courts and by civil courts. The most important measures in the context of criminal law are of course those that link dangerousness and criminal offences in a
specific way, called “hospital orders” in this paper. These sanctions were also enacted as a part of the 1934 law. A general overview is shown in Figure 3.

Figure 3: Hospital orders and preventive detention in Germany (conviction statistics, 1934–2006)

Differences between historical periods of the Nazi regime and West German democracy are far less obvious than for preventive detention. On the contrary, the graph gives the impression there is a continuity since this measure was introduced into legislation, the 1940s only appearing as a time when no statistical data were being collected. This impression would be clearly misleading. However, the sheer quantitative importance of hospital orders around 1939 was only a little higher than around 2004. If the limitations of conviction statistics are reflected, the frequency of hospital orders by 100,000 population appears to be higher in the West of Germany and Berlin today than in “Greater Germany” territories in the beginning of World War II.

2.4.1. The Nazi period

In the first years until 1938 when the Nazi authorities collected statistics on preventive measures of criminal law, hospital orders were only in the third position. Like preventive detention and repeated workhouse commitment, hospital orders were made for an indefinite period of time. The figures of these orders recorded every year rose very steadily until 1939, and they stayed on a high level as long as these statistics were collected in the early 1940s. As only very few of those convicted were released from mental health institutions, the numbers of inpatients were estimated at 4,000 in 1939 (Creutz 1939: 140 sq.).

Although this figure may appear to be high in itself, offenders labelled mentally disordered at the time were only a small minority of all inpatients in psychiatric institutions. Caused by an extensive use of non-criminal commitments but also by very
strict social control of all people with psychiatric disorders or just deviant lifestyles, the inpatient population had grown to reach the level of more than 340,000 in 1939. This was the result of a long-term wave of institutionalisation of mental patients, which had begun during the last years of the nineteenth century and was only broken by high death rates in the asylums towards the end of World War I. During the first years of the Nazi regime this wave of exclusion was still radicalised (Blasius 1994: 74 sq.; Müller 2004: 83 sq.; Schmuhl 1993: 116 sq.). But from 1939, mental patients as well as those in preventive detention and long-term prisoners were systematically murdered.

2.4.2. Hospital orders since 1949

In the 1950s and the early 1960s in West Germany, hospital orders stayed on a high level with 500 to 600 cases every year. Those were the times when many petty offenders labelled mentally disordered or psychopathic on the basis of rather superficial expert statements were sent to psychiatric institutions. From 1965, there was a clear drop. Institutional psychiatry was now heavily being criticised for its often extended confinement of persons whose mental disorder was not so obvious and for the complete lack of adequate medical treatment. At the same time, a more general debate on the reform of criminal law had developed. It may be striking that the slump in hospital orders (and workhouse confinement) began several years before even preventive detention decreased.

While the workhouse was abolished in 1969, hospital orders stayed on a fairly stable level around 400 cases for almost twenty years. From 1987, another increase started that made the figures to go up to 968 orders recorded in 2004. Since, it seems to have levelled off a little. But it is necessary to remember that official statistics are not perfect. Conviction statistics underestimate preventive measures in a significant way. Federal states in the East of Germany do not appear, and a substantial part of hospital orders made by the courts is not recorded, a conservative estimate being 20%.

Mental hospital statistics, on the other hand, show a level of hospital order inpatients never reached before – more than 6,000 of them in West Germany in 2007. Since 2002, the median length of stay has increased from 4.5 to 5.9 years for those released after suspension of the measure by the court (Dessecker 2008: 35).

The growing importance of hospital orders in the last twenty years might be described as an increasing tendency to psychiatrisation of crime problems. But it is difficult to find specific reasons for this development. Some are impressed by the new moral panic around sexual offenders, which may of course have some impact on individual court decisions. But the striking popularity of hospital orders in the courts began ten years before the Natalie Astner case was widely discussed in the media. Convictions for sexual offences do of course make up a substantial part of hospital orders, but impressional evidence from single cases tends to be misleading. Conviction statistics show there were 12% sexual offences in 2006, 13% in 2005, and 17% in 2004 and 2003. In the early 1980s, however, there were more than 20% sexual offences. Their relative importance has decreased over time.

What seems to be more convincing as an explanation is a general trend favouring more punitive sanctions even for a group of offenders that may not be punished in the legal sense of the word. If two thirds of those sent to a psychiatric hospital by a decision of a criminal court are not considered responsible for their offences, the courts may lower the
threshold of what they define as dangerousness. The most significant offences for hospital orders are now assault cases, which are responsible for more than one third of all hospital orders and even 37% in 2006. Most of these are cases of dangerous bodily injury (s. 224 I StGB), which is an offence that was aggravated in 1998. While more than half of those convicted in 1997 were only punished by a fine, there have been more than 70% prison sentences since 1998.

2.4.3. Non-criminal involuntary admissions

Available data on involuntary admissions to institutions outside the criminal justice system, hospitals and mental nursing homes included, are far more limited. These statistics have only existed from 1992 as there was a major law reform that came into force in this year. This is why Figure 4 (see Annex in the PDF file attached) only shows data since 1992.

Figure 4: Involuntary admissions to psychiatric hospitals and similar institutions in Germany, 1992-2007

Statistics of non-criminal commitments, which have been collected by the Federal Ministry of Justice, show a very steady increase starting around 92,000 commitments in 1992 and going up to 200,000 commitments in 2007. These figures are a lot higher than those on hospital orders made by the criminal courts. From these statistics, it is impossible to find out more on the circumstances of the proceedings in court. It is not even possible to know how many of these court decisions refer to the same persons. Empirical research on this sort of commitments showed the average length of stay for psychiatric inpatients was typically limited to some days or weeks (G. Bruns 1993: 67, 145 sq.; Siegel 2001: 31, 46). But this will enhance the probability that some patients will be committed several times a year.
The only variables that may be singled out from commitment statistics are those on the legal basis of proceedings. As described earlier, commitment to a mental health institution without consent is possible both according to the law of the federal states and according to the Civil Code. Proceedings are basically identical in both cases. The specific material prerequisites, however, are not. The federal states’ statutes provide for commitment as a measure to prevent dangers both for other persons as well as for the mentally disordered themselves. Typical cases will be violent attacks against family members. It may happen that such acts will be defined as a crime, but in most cases of a documented psychiatric history they will be not. Note that commitment cases for dangerousness have been on a fairly constant level for the last fifteen years.

The notable increase in commitments has almost exclusively been caused by Civil Code commitments. According to the law, these commitments are made to care for the well-being of the person committed. They are made to protect persons who are not completely capable to safeguard their own rights because of mental illness or some kind of impairment (s. 1906 I BGB) (Bode 2004: 58 sq.; Hoffmann and Klie 2004: 1). If this kind of commitments has been dramatically increasing, it seems reasonable to relate this trend to changes in population, with a growing percentage of older people. On the basis of the statistics available, however, this does not go very far beyond speculation. Socio-legal research on the basic concept called guardianship (Betreuung) has shown that more than half of the persons under guardianship are older than 60 (Hoffmann and Künstler 1995: 10). It may occur that even Civil Code commitments are sometimes mobilised to prevent dangerousness to others, although this is not the legal concept.

Psychiatrists from several European countries recently argued that Germany was among the countries where deinstitutionalisation in psychiatry was partly compensated for by rising numbers of forensic beds, involuntary hospital admissions, and places in supported housing (Priebe et al. 2005). The data shown here do not allow to test this hypothesis. They suggest, however, that involuntary hospital admissions not based on a prediction of dangerousness are more important than those depending on such a prediction.

3. Conclusion

The present paper relies on long-term statistical information wherever such data are available. For Germany, this implies to draw on conviction statistics as much as possible. Other statistical sources in Germany do not allow to go back so many decades.

There is a second aspect of the decision to rely primarily on convictions. Not every person convicted will in fact go to prison. It seems reasonable, however, to suppose that the attrition rate will be very low for the long-term sanctions treated here. Moreover, it cannot be singled out from the beginning how long a convicted person will actually stay in prison or in a psychiatric hospital. Legal rules depend on the qualification of the sanction. While there is presently a legal minimum stay of 15 years in prison for those convicted to a life sentence, there is no fixed minimum stay for preventive detention and hospital orders. The general impression is that there is a lot of variation between federal states and even between psychiatric hospitals.

From the two traditional perspectives of looking at statistical data on custodial sanctions (Aebi et al. 2006: 125), this strategy implies that some data can be shown to approximate
the flow of those going to prison or a mental health institution, while the stock of those that are in the institutions at a given date is widely neglected.

57 Keeping these caveats in mind, a general conclusion is that the role of dangerousness varies. More specifically, the variation depends on the sanction in question. For the life sentence, dangerousness criteria are improbable during the period for which capital punishment is the more severe sanction. Since 1950, dangerousness might play a minor role but it is difficult to sort out on the basis of statistical data how minor it is. While the increasing frequencies of life sentences in the last decades may be influenced by more general crime and security debates in the background, these debates bring perhaps even more influence to bear on release decisions.

58 Preventive detention and hospital orders are both seen as preventive measures aimed at dangerous offenders, and the length of these measures is indefinite from the beginning. In the 1930s, preventive detention was introduced as a political weapon of the Nazi regime to fight some forms of crime they defined as politically relevant. Especially in the first decades of the Federal Republic, preventive detention continued to exist in a different political system and on a much lower level – but the groups of offenders convicted to preventive detention were much the same. Only since 1970, the notion of dangerousness applied by the law was restricted in a rather narrow way. But some years after this law reform, another increase began, and preventive detention is probably to go up some more.

59 The level of hospital orders was high in the 1930s as well as it is in the present. The groups of offenders sent to a psychiatric institution in both periods will be different, however, in terms of offences they were convicted for and in terms of their mental disorders defined by psychiatrists as expert witnesses. Until the 1960s, it was not unusual in Germany to make a hospital order for someone who had committed non-violent property offences. Today this would be a little awkward as dangerousness is primarily seen as linked to more severe violent offences. Before 1970, many expert statements were superficial, the qualification of the experts was often doubtful, and they relied on concepts of mental disorder which are not accepted any more by the psychiatric profession. In the meantime, there have been extended debates on the quality of expert statements, certified trainings for forensic psychiatrists and for legal psychologists have been established, and psychiatry has considerably revised its manuals on mental disorders.

60 In April 2004, the Federal Government proposed a bill that was to become the Continued Detention Act. This was just four weeks after the Federal Constitutional Court had ruled continued detention of offenders was a matter of federal law (Haffke 2005: 33). In the official document summarising its view, the Federal Government argued the community had a paramount interest to be protected from certain extremely dangerous offenders in an efficient way. Statutes existing in 2004, especially those on the several forms of preventive detention, provided security in most cases, the Government said. But there were rare cases of dangerousness that could only be stated after judgment, perhaps even at the end of a prison sentence. In these cases, alarming security gaps existed which were to be closed by the new legislation. This has been called the logic of security gaps and it was already criticised by others (Albrecht 2004; Haffke 2005; Hassemer 2008: 47). In this argument, there will always another security gap to be found because perfect security is simply impossible. Security will never be produced as it will always call for enhancement.
In this structure and in its political usability the future of measures relying on dangerousness resides.

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NOTES

1. A first version of this article was presented to the GERN seminar on “Prison, pénalité, modernité” at its second session in Neuchâtel, Switzerland, 3 September 2008. The author wishes to thank the organising committee, especially Daniel Fink for the invitation, Annie Kensey for her critical remarks and all the participants for the inspiring discussion.

2. For a short overview, see Kaiser (2002: 12 sq.).


6. Thanks to Philippe Mary for making this point.

7. The term as it is used here conforms with an older official translation provided by the Federal Ministry of Justice. Wachsmann (2004) prefers the more literal translation as “security confinement”, Bohlander’s translation uses the terms “detention for the purpose of incapacitation” or “incapacitation order”.

8. See McSherry (2006). Bohlander’s term is “subsequent incapacitation order”.

9. For some aspects of the discussion in Germany, see, e.g., Esposito and Safferling (2008: 706), who prefer the term “supplementary preventive detention”, and Kreuzer (2006). This subtype of preventive detention appears to be rather similar to the French rétention de sûreté introduced in February 2008. In France, however, the Conseil Constitutionnel followed the principle that criminal law was not to be applied retroactively, which would not apply for preventive measures in Germany.

11. Part III of the Mental Health Act 1983 provides powers for Crown or Magistrates Courts of the criminal justice system to make a hospital order (on the basis of two medical recommendations) for the detention in hospital of a person convicted of an offence who requires treatment and care.


13. For a more extensive account of criminal sanctions and sentencing practice in Germany, see Heinz (2008).

14. Fink (2008) and Harcourt (2008) have recently shown some of the data problems for other countries.

15. For the most recent data, see Statistisches Bundesamt (2007).


17. Beyond official statistical sources, a more or less extended body of empirical research exists for every sanction involved. The present article is not intended as an extensive review on life sentence, preventive detention, or hospital orders in Germany. This is why results of empirical studies are only referred to for selected issues.

18. Both the legal and political system of the Federal Republic of Germany and its rather stable system of conviction statistics suggest to rely on data for West Germany, which will facilitate comparisons over time. This is not to say there are no data for the German Democratic Republic. But official statistics were reduced to some very general tables, and they were produced by a completely different justice system. Some data were not published at all, for others it was shown that they were subject to intentional manipulation for political reasons. The legal and social history of the GDR criminal justice system has still to be written. For a remarkable approach on the local level of a district city, see Markovits (2006: 123 sq.). On life sentences, see Arnold (1995).

19. There has been some debate on selective publication practice not only for capital punishment. See Blau (1952: 79); Röhl (1969: 29).


21. Police statistics are available on the Internet, see http://www.bka.de/pks/zeitreihen/pdf/t01.pdf.


23. The most notable exception in the literature is Weber (1999).

24. My own position concedes the continuity on the statutes level while stressing this was left behind by legal practice. See Dessecker (2004: 89 sq.).

25. The official wording was Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Sicherung und Besserung, published on 24 November 1933 (RGBl. I 995).


27. For an historical account, see Baumann (2006: 280 sq.).


30. Some empirical studies described the asylum-like atmosphere, see, e.g., Hemprich and Kisker (1968).
32. These statistics are a part of a broad overview on civil cases processed by the local courts (Amtsgerichte). For the most recent data, see Bundesministerium der Justiz (2008).
33. There is some empirical evidence for a very disproportionate usage of these legal instruments in different parts of the country. See Crefeld (1998); Dreßing and Salize (2004: 38, 92 sq.); Hoffmann and Klie (2004: 7); Krischke (2006: 20 sq.).
34. Although the argument of Priebe et al. (2005) is more limited than Harcourt’s (2008) approach, both suggest a sort of functional equivalent to traditional forms of the asylum.

ABSTRACTS

The article gives an overview on the historical development of life sentences, preventive detention, and hospital orders for mentally disordered offenders in Germany on the basis of official conviction statistics. The life sentence is the most severe punishment today, while its role was less important as long as capital punishment existed. Preventive detention and hospital orders both are viewed as preventive measures, and they are indefinite from the beginning. While preventive detention is widely discussed today, convictions by the courts have been increasing from a low level. The level of hospital orders is much higher today.

S’appuyant sur les statistiques des condamnations officielles en Allemagne, notre article entend donner un aperçu de l’évolution historique de la peine d’emprisonnement à perpétuité, de la détention préventive ainsi que des ordonnances de détention en milieu hospitalier pour personnes souffrant de troubles mentaux. En Allemagne, la peine d’emprisonnement à perpétuité est actuellement la punition la plus sévère, mais son rôle était moins important du temps de la peine capitale. La détention préventive et les ordonnances de détention en milieu hospitalier sont, elles, toutes deux perçues comme des mesures préventives dont la durée d’exécution apparaît d’emblée indéterminée. Alors que la question des détentions préventives est largement débattue aujourd’hui, les condamnations prononcées par les cours ont légèrement augmenté. Quant aux ordonnances, elles semblent toujours plus nombreuses.

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