LEGALITY, NON-ARBITRARINESS, AND JUDICIAL AND ADMINISTRATIVE DISCRETION IN SENTENCING AND ENFORCEMENT OF SENTENCES IN THE GERMAN SYSTEM

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1 INTRODUCTION

2014 was an eventful year for German football fans, with Germany winning the World Cup. Some months before this, on 13th March, Uli Hoeness, former national football player and (at the time) president of FC Bayern Munich, had been sentenced to three years and six months of imprisonment by the Higher Regional Court of Munich.[1] Hoeness was found guilty of tax evasion with an overall damage of 28.5 million Euros. For several years, he had not declared capital income for money in Swiss bank accounts. The verdict was discussed controversially all over Germany:[2] was it too mild? Did Hoeness enjoy advantages because of his high social position and reputation? Or was it unnecessarily cruel to lock an honourable elderly man up after all he had done for German football in general, and particularly for FC Bayern Munich?

Even though this case falls within tax law (being a special legal area), it illustrates quite well the general problems in German sentencing law. First of all, the range of punishment for tax evasion in a severe case (sec. 370 para. 3 German Tax Act) is broad and can be anything from six months to ten years of imprisonment – which is no exception in German law. Secondly, it was not easy to predict the outcome of the trial, as it was not clear at all what factors the court would take into account, and how the court would weight them. Considering the huge amount of money involved, three and a half years in prison might

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1 LG München II, Judgment of 13 March 2014, Reference W 5 KLs 68 Js 3284/13.

2 See, for example, Thomas Grosse-Wilde, 'Brauchen wir ein neues Strafzumessungsrecht? – Gedanken anlässlich der Diskussion in der Strafrechtsabteilung des 72. Deutschen Juristentages in Leipzig 2018', 14 *Zeitschrift für Internationale Strafrechtsdogmatik* 2 (2019), p. 130.

look like a comparably mild sentence. On the other hand, Hoeness himself had filed a report of false or incomplete tax declaration (*Selbstanzeige*, sec. 371 German Tax Act) to the tax authorities before being caught.[3] If this report had been complete and valid, Hoeness could not have been punished at all, as he had also fully compensated for the damage in the meantime. This was considered to be a mitigating factor alongside his lifelong achievements – the last point especially remained quite controversial.[4] What we can conclude from this case is the starting point for our discussion: German law leaves remarkable discretion to the sentencing judge. In spite of "German law's strong attachment to the idea of codification"[5] (as opposed to countries with a case law approach), in the area of sentencing, strict boundaries and precise instructions by the legislator are a rare phenomenon. The range of possible sentences is, as shown above, regularly very broad, and the central regulation on sentencing in sec. 46 Criminal Code is not much of a help in this regard.[6] It states that the amount of "guilt" of the concrete offence is the "basis" for sentencing (sec. 46 para. 1 s. 1 Criminal Code); the effect that punishment will have on the future life of the offender is to be considered (sec. 46 para 1 s. 2 Criminal Code), as well as general preventive needs that are mentioned in other regulations, such as sec. 47 para. 1 Criminal Code. What is euphemistically called a "unifying theory"[7] is in fact a hotchpotch of different and in part conflicting purposes of punishment with no clear hierarchical order.

Considering all of this, it is no surprise that empirical studies have shown remarkable discrepancies within the sentencing of comparable cases across Germany. Empirical studies[8] indicate that sentencing decisions depend on the individual judges' personal attitudes and preferences, but even more so on regional unregulated sentencing traditions which are passed on from one generation of (older and more experienced) judges to the next in an informal, and therefore also non-transparent way. It is obvious that this is not a satisfying status quo if one considers fundamental principles of Constitutional Law such

3 For theoretical and empirical aspects of sec. 371 AO see Johannes Kaspar, 'Kriminologische und strafrechtliche Aspekte der strafbefreienden Selbstanzeige gem. § 371 AO', in: Fahl et al. (eds), *Festschrift für Beulke*, Heidelberg: Müller, 2015, p. 1167.

4 Tobias Stadler, *Die Lebensleistung des Täters als Strafzumessungserwägung*, Tübingen: Mohr Siebeck, 2019.

5 Benjamin Vogel, 'The core legal concepts and principles defining criminal law in Germany', in: Matt Dyson & Benjamin Vogel (eds), *The Limits of Criminal Law*, Cambridge: Intersentia, 2018, p. 39-69; Ulrich Sieber, 'Administrative Sanction Law in Germany', in: Dyson & Vogel (eds) (fn. 5), p. 311.

6 See also Johannes Kaspar, 'Sentencing Guidelines vs. Free Judicial Discretion. Is German Sentencing Law in Need of Reform?', in: Kai Ambos (ed), *Strafzumessung / Sentencing. Angloamerikanische und deutsche Einblicke / Anglo-American and German Insights*, 2020 (in press).

7 For an instructive overview of penal theories see Claus Roxin & Luis Greco, *Strafrecht Allgemeiner Teil*, Munich: C.H. Beck, 2020, p. 128-160; Tatjana Hörnle, *Straftheorien*, Tübingen: Mohr Siebeck, 2017.

8 See Johannes Kaspar, *Gutachten C für den 72. Deutschen Juristentag*, Munich: C.H. Beck, 2018, p. C 18 et seq.

as equality (Art. 3 Basic Law), as well as the principles of proportionality and legality (Art. 103 para. 2 Basic Law).

2 THE PRINCIPLE OF LEGALITY AND/OR THE RULE OF LAW AS REGARDS CRIMINAL PUNISHMENTS

The rule of law regulated in Art. 20 para. 1 Basic Law (*Rechtsstaatsprinzip*),[9] and the principle of legality as its specification (Art. 103 para. 2 Basic Law; see also sec. 1 and sec. 2 Criminal Code, and Art. 7 ECHR) are both applicable to criminal law. Art. 103 para. 2 Basic Law states that "an act may be punished only if it was defined by a law as a criminal offence before the act was committed". Whilst the wording seems to indicate that the principle only refers to whether one is to be punished at all, it is widely agreed upon (and confirmed by the German Federal Constitutional Court, *Bundesverfassungsgericht* - BVerfG) that it also relates to sanctioning.[10] An important purpose of this principle is that every citizen should be able to know beforehand if certain behaviours might be punished, but also, what kind and what amount of punishment he or she will have to face.[11] And it is for the legislator, not the judiciary, to decide on these matters, at least in the sense of creating a normative framework with guiding rules and principles. Arbitrary judgments which are affected by criminal law judges' personal preferences or political influences should thus be avoided, and vice versa the influence of the democratically legitimised legislator should be strengthened.

What seems to be a good idea in theory does not actually have a strong impact on German sentencing law and sentencing practice, however.[12] When creating new or changing existing criminal law regulations, the legislator can make use of a considerable margin of discretion. Broad sentencing frames are accepted, as well as unspecified aggravated cases of certain offences, where the judge can choose from a higher sentencing frame if he or she considers the offence to be especially serious. A notorious example is sec. 212 para. 2 Criminal Code, which contains lifelong imprisonment for "aggravated" cases of homicide, without clear indications by the legislator which cases might be considered aggravated.[13] Generally, the Federal Constitutional Court (BVerfG) is not very

9 Franz Streng, 'Sentencing in Germany: Basic Questions and New Developments', 8 *German Law Journal* 2 (2007), p. 153.

10 BVerfGE 86, 288, 313; 105, 135, 153.

11 Claus Roxin, 'Der Grundsatz der Gesetzesbestimmtheit im deutschen Strafrecht', in: Eric Hilgendorf (ed), *Das Gesetzlichkeitsprinzip im Strafrecht*, Tübingen: Mohr Siebeck, 2013, p. 113 et seq.

12 Lothar Kuhlen, 'Das Gesetzlichkeitsprinzip in der deutschen Praxis', in: Hilgendorf (ed) (fn. 11), p. 45 et seq.

13 According to BVerfG, Decision of 24 April 1978, Reference 1 BvR 425/77 (see 1979 *Juristische Rundschau* 1 (1979), p. 28), however, the principle of legal certainty is not violated by sec. 212 para. 2 Criminal Code,

strict with regard to the principle of legality, nor when it comes to the prerequisites of criminal liability; even vague terms and general clauses are not excluded in this area.[14] According to new rulings of the BVerfG, some kind of a framework by the legislator is sufficient, and it is the task of the courts to fill this gap with specifications in concrete cases, therefore making the law more precise and adding to legal certainty (duty of specification – *Präzisierungsgebot*).[15]

In the past, the BVerfG have only considered very few regulations concerning criminal sanctions to be unconstitutional. The most prominent example is the confiscatory expropriation order (*Vermögensstrafe*), which was introduced in 1992 in sec. 43a Criminal Code (former version). In 2002, the Court's main argument against this kind of punishment was that there was no general upper limit, so the amount of punishment was dependent on the (unpredictable) total amount of assets owned by the offender.[16] Apart from that, sentencing regulations leaving huge margins of discretion to the judge are generally accepted by the BVerfG. One could argue that the aforementioned duty of specification also applies here: by coming up with sentences in concrete cases on a daily basis, courts actually do deliver specifications of broad sentencing frames, which might help to foresee a possible punishment in certain (standard) cases. But for several reasons, that would not be very convincing: firstly, as the example of Uli Hoeness shows, the idea of specification does not help to deal with exceptional cases with individual features that courts have not yet faced. Secondly, we have to confront the fact that the specification of sentencing in this sense will differ from court to court and region to region, and is (for all we know) not based on different legal considerations (let alone different laws), but mostly on the fact that locally or regionally, a certain sentencing tradition has developed. This is why the aforementioned sentencing disparities are not only a problem with regard to equality, but also to legal certainty. Lastly, the idea of engaging the courts in order to ensure legal certainty seems a bit odd: as the expression "legal" certainty clearly indicates, it is primarily a duty of the legislator. If it is the courts' task to "heal" unclear and vague regulations by interpretation, the legislator might be tempted to neglect their duty.[17] And for citizens, it is obviously much harder to inform themselves of the current legal situation by studying different legal commentaries and verdicts, instead of just taking a look at the law itself. Therefore, it should be clear that the legislator has to guarantee at least a minimum level of

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because the legislator had at least laid down, in sec. 211 Criminal Code, which circumstances lead to the assumption of murder instead of homicide. This is doubtful, as the catalogue of sec. 211 contains a heterogenous mixture of objective and subjective criteria with no clear common denominator, which makes it hard to identify comparable aggravating circumstances.

14 Roxin (fn. 11), p. 133.

15 BVerfGE 126, 170; cf. also Kuhlen (fn. 12), p. 54 et seq.

16 BVerfGE 105, 135; cf. also Roxin (fn. 11), p. 138 et seq.

17 See also Vogel (fn. 5), p. 45.

legal certainty. Some existing regulations are at any rate problematic in this sense;[18] the legislator could improve legal certainty by narrowing sentencing frames, getting rid of unspecified aggravating rules such as sec. 212 para. 2 Criminal Code,[19] or by establishing more precise sentencing rules based on a clear theoretical concept regarding the purposes of punishment and their hierarchical order.[20]

3 HUMAN RIGHTS REQUIREMENTS AS REGARDS THE SENTENCING PROCESS, AND THE ENFORCEMENT OF SENTENCES (WITH THE EXCEPTION OF THE HUMAN RIGHT PRINCIPLE OF LEGALITY)

Firstly, there are human and basic rights regulations which prohibit certain kinds of punishment in the first place. Art. 102 Basic Law contains an absolute ban of the death penalty; in addition, most scholars argue that the death penalty is a violation of human dignity (Art. 1 para. 1 Basic Law), and so even an amendment of constitutional law would not be admissible here (see Art. 79 para. 3 Basic Law).[21] Furthermore, the protection of human dignity prohibits torture as well as cruel and inhumane punishment (see also Art. 3 European Convention on Human Rights, ECHR). Prison sentences (including lifelong imprisonment) are not considered to be a violation of these principles. The BVerfG has ruled that in spite of its possible harmful effects on inmates' social lives and mental wellbeing, lifelong imprisonment is not a violation of human dignity or other basic rights as long as the offender gets a fair chance to regain his or her freedom (at least on probation) after a certain period of time (which is a minimum of 15 years under German law, see sec. 57a Criminal Code).[22] Here, but also in several other rulings, the BVerfG has made it clear that no matter what kind of crime the offender has committed, they are principally protected by basic rights[23] and are entitled to rehabilitation and reintegration.[24]

Apart from the aforementioned absolute boundaries, there are further principles of German constitutional law which influence sentencing. The principle of culpability or principle of guilt (*Schuldprinzip*)[25] is not explicitly regulated in the German constitution, but derived from human dignity and personal rights of the offender. It states that no one

18 Very critical in this regard: Bernd Schuenemann, *Nulla poena sine lege?*, Berlin/Boston: De Gruyter, 1978.

19 The latter reform proposal was accepted by the majority of votes on the 72. Convention of German legal scholars and practitioners (Deutscher Juristentag) in 2018.

20 Cf. Kaspar (fn. 8), p. C 104 et seq.

21 Cf. Johannes Kaspar, *Grundrechtsschutz und Verhältnismäßigkeit im Präventionsstrafrecht*, Berlin/Boston: De Gruyter, 2014, p. 630.

22 BVerfGE 45, 187.

23 See BVerfGE 33, 1.

24 See e.g. BVerfGE 35, 202; BVerfGE 98, 169.

25 Franz Streng, 'Sentencing in Germany: Basic Questions and New Developments', 8 *German Law Journal* 2 (2007), p. 153; Kaspar (fn. 21), p. 267-330; Vogel (fn. 5), p. 43 et seq.

shall be punished if he or she has acted without culpability (which relates to minors under the age of 14, and offenders with certain mental disorders, see sec. 19 and sec. 20 Criminal Code). It also states that no one should be punished in a way that exceeds the level of individual guilt (or "blameworthiness"[26]). This relates to sec. 46 para. 1 s. 1 Criminal Code, with the expression of guilt being the basis for sentencing (see infra). Critics argue that this 'upper limit' of punishment by the amount of 'guilt' or 'blameworthiness' of his or her offence is not a very strong protection against excessive punishment, as there are no clear standards for how guilt is to be measured and (especially) how it is to be transferred into concrete numbers (e.g. days in prison) – so again, there is a great deal of discretion for the individual judge to decide on these matters.

The idea of guilt-oriented individual sentencing decisions is the reason why equality, which is also guaranteed in the German Constitution (Art. 3 Basic Law), does not play an important role with regard to sentencing decisions. Legally, the judge is not bound by other sentencing decisions in comparable cases. Each case is individual, one could argue, so it is no violation of equality if the judge comes up with a different sentencing decision in similar cases. In fact, the Federal Court of Justice (BGH) stressed that it would even be a legal mistake to use sentencing decisions in other cases as a decisive argument for sentencing in the actual case.[27] This traditional view has slightly changed in recent years. The BGH still rejects "comparative sentencing"[28] in the narrow sense, but the Court has conceded that there are situations where the judge should indeed take into account other sentencing decisions, e.g. in cases of co-perpetrators with similar contributions to an offence.[29] While still accepting most sentencing decisions to a very wide extent, the Court has increasingly started to annul judgments because the sentencing decisions had differed too much from the "usual punishment" in comparable cases[30] – so in this sense, equality has started to come into play, and to influence sentencing at least 'through the backdoor' of judicial control.

Finally, the principle of proportionality (*Grundsatz der Verhältnismäßigkeit*) has to be mentioned. This principle is not explicitly regulated in the German Constitution, but is based on the rule of law and the nature of constitutional liberty rights being a protective shield against intrusions by the state.[31] The principle demands that state measures which interfere with citizens' right to liberty (with punishment being a very clear example) always have to be apt, necessary, and proportionate with regard to a legitimate purpose.

26 See e.g. Vogel (fn. 5), p. 53.

27 BGHSt 56, 262; see also BGHSt 25, 207.

28 See Matthias Maurer, *Komparative Strafzumessung*, Berlin: Duncker & Humblot, 2005.

29 BGH at Klaus Detter, 'Strafzumessungsrecht', 2017 *Neue Zeitschrift für Strafrecht* 11 (2017), p. 631.

30 See e.g. BGH, 'Rückfall in Drogenabhängigkeit als schulderhöhender Umstand', 1992 *Strafverteidiger* 11 (1992), p. 570.

31 See Kaspar (fn. 21), p. 102 et seq.

Most courts and scholars argue that proportionality in this sense does not have to be checked in cases of punishment, as long as the aforementioned (and supposedly stricter) guilt principle is obeyed.[32] However, this is questionable, as the latter does not contain all the criteria of the former, including the duty of the state to always choose the mildest measure, which seems apt to fulfil the purpose of the measure in question.[33] To acknowledge proportionality issues within sentencing (alongside or perhaps even instead of the difficult question of measuring individual 'guilt') would therefore support the idea of criminal punishment being an *ultima ratio*[34] that has to be applied not only appropriately (in relation to the offence), but also cautiously.

4 JUDICIAL DISCRETION IN SENTENCING IN GENERAL: THE POSITION OF THE INDEPENDENT JUDGE, AND RESPONSIBILITY FOR FAIRNESS

In Germany, the judiciary is completely independent from the public and the administration, at least in the legal sense. The independency of each judge is guaranteed by the Constitution (Art. 97 para. 1 Basic Law), which reads as follows: "Judges shall be independent and subject only to the law". Judges are not subject to orders by the executive branch, and they are not elected by public vote. However, in at least some German Federal states, such as Bavaria, judges are appointed and promoted by the Justice Department. This might endanger total judicial independence, as judges are somewhat dependent on the goodwill of the Justice Department (being a part of the executive branch). That is why critics (including the German Association of Judges) have demanded to move the right to appoint and promote judges to independent judicial commissions.[35]

Judges are bound by the law, but as hinted above, legislation in the area of sentencing is not very strict, and leaves wide margins of discretion. Of course, the starting and end points of sentencing ranges are boundaries for the judge; fixed minimum sentences become especially relevant, whereas the maximum punishment is applied very rarely anyway. With the exception of lifelong imprisonment for very grave offences such as murder (sec. 211 Criminal Code) or genocide (sec. 6 International Criminal Law Code), there are no absolute or fixed sentences. Even in such cases, there can be exceptions. These

32 See e.g. Vogel (fn. 5), p. 44 and 46.

33 Cf. Kaspar (fn. 21), p. 155 et seq. and p. 283 et seq.

34 Wolfgang Wohlers, 'Criminal Law as a regulatory tool', in: Dyson & Vogel (eds) (fn. 5), p. 235-261 has a point when he states that the idea of *ultima ratio* has become a theoretical 'fairytale' that is neglected in criminal law practice and policy. One of the reasons for this might be that the respective content of the principle of proportionality is not always considered properly, and is outshined by a predominantly retributive penal theory which focuses on stressing individual guilt.

35 See e.g. Deutscher Richterbund (at: https://www.drb.de/positionen/themen-des-richterbundes/selbstverwaltung-der-justiz) (last visited: 11 September 2020).

are not based on written law, but on verdicts by the BVerfG, which pointed out in a leading case in 1977 that even in the case of murder, there must be a possibility of refraining from lifelong imprisonment in special cases with strong mitigating circumstances. Otherwise, the aforementioned principle of proportionality[36] would be violated. For this reason, the BGH ruled that in these exceptional cases, lifelong imprisonment could be replaced by a prison sentence of between 5 and 15 years (so-called *Rechtsfolgenlösung*).[37]

The fact that judges enjoy considerable discretion without strict judicial control by the higher courts is also reflected in the leading sentencing theory,[38] which combines retributive and preventive purposes: the judge is supposed to find the appropriate punishment by focusing on the upper and lower limit of the spectrum of possible guilt-oriented sentences. Within this frame, he or she is supposed to take into account preventive purposes as well. In doing this, he or she is granted a considerable margin of discretion that also appears in the theory's name, as it is called the 'margin' or 'leeway' theory (*Spielraumtheorie*).[39]

In spite of the general tendency to not interfere too much with sentencing decisions, some of the BGH's general verdicts are the source of additional guidance for sentencing judges. The Court produced a distinction between the 'average case' (*Regelfall*) of a certain type of offence as it frequently appears before the courts, and a case of 'medium severity' (*Durchschnittsfall*). In terms of the statistical median, the average case is below the medium severity.[40] This means that, regularly, judges are supposed to pick a sentence from the lower half of the sentencing frame (which, according to various empirical studies, is actually the case).[41]

In recent verdicts, the BGH produced more concrete sentencing instructions within Tax Law. The Court ruled that, generally, in cases with a damage of 100,000 Euros or more, a mere fine would no longer be sufficient. If the damage is 1,000,000 Euros or more, the Court ruled that a prison sentence should be executed and shall no longer be suspended on probation.[42] It is understandable that the BGH tries to give some guidance for sentencing judges, and to reduce sentencing disparities and inequalities in this way. However, if such abstract and general sentencing rules (especially if they aim at severely

36 See supra 3.

37 BGHSt 30, 105; see also Thomas Weigend, 'Sentencing in West Germany', 42 *Maryland Law Review* 1 (1983), p. 50.

38 For the role of sentencing theories in this regard see Kaspar (fn. 6).

39 Tatjana Hörnle, 'Moderate and Non-Arbitrary Sentencing without Guidelines: The German Experience', 76 *Law & Contemp. Probs.* 189 (2013), p. 194.

40 Decisions by the Federal Court of Justice (*Bundesgerichtshof*) in criminal cases: BGH, Judgment of 21 April 1987, *Richterliche Aufklärungspflicht: Bestellung eines weiteren Sachverständigen; Strafrahmen bei geringem Schweregrad der Tat und Strafrahmenverschiebung*, Reference 1 StR 77/87, par. 13; BGH, Decision of 13 September 1976, Reference 3 StR 313/76, par. 7.

41 Kaspar (fn. 8), p. C 16 et seq.

42 BGHSt 53, 86; BGHSt 57, 130 et seq.

punishing the defendant by limiting milder sentences) can really be established by the judiciary, the question remains whether such important decisions should rather be made by the legislator.

5 JUDICIAL DISCRETION WITHIN A FRAMEWORK

Whilst the General Part of the Criminal Code lays down general principles for sentencing, the Special Part comprises offence descriptions with a sentence range for each offence. Nearly all offences have upper and lower limits and, as mentioned before, most of them leave wide judicial discretion for sentencing options. Sec. 12 Criminal Code distinguishes between 'less serious criminal offences' (*Vergehen*) and 'serious criminal offences' (*Verbrechen*):[43] the minimum punishment for serious criminal offences begins with one year of imprisonment (para. 1), while for all other less serious criminal offences, punishments are to be a lesser minimum term of imprisonment, or a fine (para. 2).

German law only has two sentences for adults: fines and imprisonment. The statuary maximum range for a fixed term of imprisonment is from one month up to 15 years (sec. 38 para. 2 Criminal Code), and is limited by the provisions of the Special Part of the Criminal Code, "which can increase the minimum length, decrease the maximum length, or both at the same time".[44] Concerning monetary punishment, the day fine system ranges between five daily units up to 360 daily units, and a daily rate between one Euro and 30,000 Euros (sec. 40 para. 1, 2 Criminal Code).

5.1 *Sentencing rules in the General Part of the Criminal Code*

As briefly mentioned above, in addition to the offender's guilt as the foundation for sentencing, the expected effects of the sentence on the offender's future life are to be taken into account (sec. 46 para. 1 sent. 2 Criminal Code). If the two considerations are in conflict with each other (e.g., where there is severe guilt, but long imprisonment will lessen the chance of rehabilitation), the provision is rather vague on how to come to a specific sentencing outcome.[45] Sec. 46 para. 2 Criminal Code refers in more detail to specific circumstances, which speak in favour of and against the offender, and which the

43 Stefan Harrendorf, 'Sentencing Thresholds in German Criminal Law and Practice: Legal and Empirical Aspects', 28 *Criminal Law Forum* 3 (2017), p. 504-505 chose "misdemeanor" and "felony", but emphasized the translation as misleading due to the wide sentencing ranges; this also applies to the above mentioned wording.

44 Harrendorf (fn. 43), p. 503.

45 Tatjana Hörnle (fn. 39), p. 193; Thomas Weigend, 'No News Is Good News: Criminal Sentencing in Germany since 2000', 45 *Crime & Justice* 83 (2016), p. 88.

court must take into account. These are: the offender's motives and objectives, the attitude reflected in the offence, and the degree of force during its commission, the degree to which the offender breached their duties, the modus operandi and the consequences caused by the offence to the extent that the offender is to blame for them, the offender's prior history, personal and financial circumstances, and the offender's conduct in the period following the offence (in particular, efforts to make restitution for the harm caused and efforts at reconciliation with the victim).[46] Sec. 46 Criminal Code is unique in including rudimentary principles for determining the type of sentence, as well as its level.[47] Consequently, the sentencing norm is at least in part faced with massive reproaches.[48] The BVerfG, however, approved the sentencing norm as constitutional with regard to the principle of legal certainty (*Bestimmtheitsgrundsatz*).[49]

Types of facultative mitigating grounds (*fakultative vertypte Milderungsgründe*) include victim-offender reconciliation and restitution (*Täter-Opfer-Ausgleich, Schadenswiedergutmachung*) (sec. 46a Criminal Code), and the Grand Leniency Notice called Contributing to Discovery or Prevention of Serious Crimes (*Hilfe zur Aufklärung oder Verhinderung von schweren Straftaten*) (sec. 46b Criminal Code). Since its introduction in 2009, this provision has given rise to massive criticism. The only point that the opponents agree on is that the provision generally participates in a problematic development towards strengthening cooperative criminal proceedings.[50] A constitutional review is not yet in sight.[51] Initial empirical findings point to a cautious application of th Grand Leniency Notice.[52]

With regard to short prison sentences, sec. 47 Criminal Code emphasises the exceptional character. Fines are given before sentences of imprisonment of less than si months, which are regarded as a last resort.[53] Though their imposition should be avoide as far as possible, the number of short prison sentences continues to be high.[54] A court

46 Translation provided by Prof. Dr Michael Bohlander. Translation completely revised and regularly updated by Ute Reusch; version information: The translation includes the amendment(s) to the Act by Article 2 of the Act of 19 June 2019, Federal Law Gazette I, p. 844 (at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0244) (last visited: 11 September 2020).

47 Klaus Miebach & Stefan Maier, 'StGB § 46 Grundsätze der Strafzumessung', in: Wolfgang Joecks & Klaus Miebach (eds), *Münchener Kommentar zum StGB*, Munich: C.H.Beck, 2016, par. 1.

48 With further references Jörg Kinzig, 'StGB § 46 Grundsätze der Strafzumessung', in: *Schönke/Schröder Strafgesetzbuch*, Munich: C.H. Beck, 2019, par. 1; Kaspar (fn. 8), p. C 58 et seq.

49 BVerfG, Judgment of 20 March 2002, Reference 2 BvR 794/95.

50 Kinzig (fn. 48), par. 2.

51 Kinzig (fn. 48), par. 2.

52 Johannes Kaspar & Stephan Christoph, 'Kronzeugenregelung und Strafverteidigung', 2016 *Strafverteidiger* 5 (2016), p. 318-322. See also Stephan Christoph, *Der Kronzeuge im Strafgesetzbuch*, Baden-Baden: Nomos, 2019.

53 Stefan Maier, 'StGB § 47 Kurze Freiheitstrafe nur in Ausnahmefällen', in: Joecks & Miebach (eds) (fn. 47), par. 1.

54 Nearly 30% of all prison sentences in 2015, see Kinzig (fn. 53), par. 1.

imposes short-term imprisonment if there are special circumstances either in the offence or in the offender's character, which strictly require its imposition to influence the offender or to defend the legal order (sec. 47 para. 2 Criminal Code).

Pursuant to sec. 49 Criminal Code, the sentence framework may shift in case of statutorily defined mitigating circumstances (*besondere gesetzliche Milderungsgründe*) (e.g., diminished responsibility, participation in the form of aiding, and attempt). In this respect, sec. 49 does not regulate under which conditions the sentence framework is to be or may be mitigated, but merely provides legal consequences.[55] The provision has decisive importance for determining the sentence framework, with its corresponding upper and lower limits, as well as for determining the concrete amount of punishment.[56] Sec. 49 comprises three case groups with regard to the sentence framework: an obligatory reduction (para. 1), a facultative reduction (para. 1), and a facultative reduction up to the legal minimum or the imposition of a fine instead of imprisonment (para. 2). The provision should avoid very broad sentence frameworks in order to ensure a fairer punishment, and to contribute to the calculability and predictability of sentencing.[57] There are doubts about this objective, particularly regarding the facultative mitigation up to the legal minimum (para. 2).[58]

In the case of multiple offences, the penalty is also reduced pursuant to sec. 52 to 55 Criminal Code: "they demand a cumulative sentence (separate and consecutively enforceable sentences may not be imposed) and result in mandatory sentencing discounts".[59]

5.2 *Sentencing rules in the Special Part of the Criminal Code*

The Special Part of the Criminal Code restricts the scope of judicial discretion by adding specified aggravating and mitigating grounds to the basic offence. These grounds are characterised by circumstances that would otherwise be relevant in sentencing.[60] The legal classification of serious and minor cases is accomplished in different ways. Qualifications and privileges are variations of the basic offence, and their application is mandatory if the conditions are met in such a way that qualifications have an aggravating effect, and

55 Gabriele Kett-Straub, 'StGB § 49 Besondere gesetzliche Milderungsgründe', in: Urs Kindhäuser, Ulfrid Neumann & Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch*, Munich: C.H. Beck, 2017, par. 2.

56 Stefan Maier, 'StGB § 49 Besondere gesetzliche Milderungsgründe', in: Joecks & Miebach (eds) (fn. 47), par. 1.

57 Gabriele Kett-Straub (fn. 55), par. 3.

58 Gabriele Kett-Straub (fn. 55), par. 3.

59 Hans-Jörg Albrecht, 'Sentencing in Germany: Explaining Long-Term Stability in the Structure of Criminal Sanctions and Sentencing', 76 *Law and Contemporary Problems* 1 (2013), p. 214.

60 Jörg Kinzig, 'StGB Vorbemerkungen zu §§ 38 ff.', in: Albin Eser (ed), *Schönke/Schröder Strafgesetzbuch*, Munich: C.H. Beck, 2019, par. 45.

privileges a mitigating effect.[61] One example of a privilege would be an offender who committed homicide upon request, with a minimum sentence of six months and a maximum of five years' imprisonment (sec. 216 Criminal Code). Examples of a qualification would be armed theft, gang theft, and domestic burglary,[62] with a minimum of six months and a maximum of ten years' imprisonment (sec. 244 para. 1 Criminal Code).[63]

Furthermore, the Criminal Code distinguishes between serious and minor cases by means of presumptive examples (*Regelbeispiele*). Presumptive examples are sentencing rules which are similar to the constituent elements of a crime due to their indicative function, and are the most important cases for the use of an enhanced sentencing range, without prescribing a final determination.[64] If the conditions of the presumptive example, such as stealing on a commercial basis (aggravated theft in sec. 243 para. 1 no. 3 Criminal Code), are fulfilled, the sentence is generally to be taken from the modified sentence range. An additional examination is not required as to whether its use appears appropriate in relation to average cases.[65] If these conditions are missing, the court is obliged to justify the imposition of a more severe sentence taken from the aggravated sentence range.[66] If, however, a court considers that the indicative effect of a presumptive example has been disproved, the grounds of the judgment have to include the particular features on which the deviation from the modified sentence range is based.[67]

Finally, the Criminal Code knows unspecified minor and particularly serious cases (*unbenannte minder und besonders schwere Fälle*) which have already been mentioned and criticised above. They simply change the sentence range, without specifying the conditions under which the modified punishment is to be applied. In the absence of any mentioned attributes, it is entirely up to the court to decide on the circumstances that constitute a minor or particularly serious case.[68] If an especially serious case is in question, the external and internal circumstances of the offence must be weighed up against each other, taking into account all further relevant factors.[69] An especially serious case is to be assumed if the overall picture of the offence deviates from the average cases to such an extent that the use of the aggravated sentence range appears necessary; this requires an overall assessment of the objective and subjective circumstances, as well as the circumstances affecting the

61 Dennis Bock, *Strafrecht Allgemeiner Teil*, Berlin: Springer, 2018, p. 23.
62 Burglary in a private living space is a serious offence, with a minimum of one year and a maximum of ten years of imprisonment (sec. 244 para. 4 Criminal Code).
63 The basic offence of 'theft' is punishable by a fine or a prison sentence for up to five years.
64 Jörg Kinzig, 'StGB Vorbemerkungen zu §§ 38 ff.', in: *Schönke/Schröder Strafgesetzbuch* (fn. 48), par. 47.
65 Kinzig (fn. 64), par. 47.
66 Kinzig (fn. 64), par. 47.
67 Kinzig (fn. 64), par. 47.
68 Kinzig (fn. 64), par. 53.
69 BGHSt 2, 181.

offender's personality, which are inherent in the offence itself or are otherwise connected with it.[70] Even if sufficient circumstances exist, an especially serious case may be disregarded due to mitigating factors, such as if the offender's restitution compensates for or substantially reduces an exceptionally high damage.[71] In the case of an unspecified less serious case, the approach is the same, but an overall consideration is added, in which all circumstances that can be regarded as relevant to assess the offence and the offender must be taken into account.[72]

6 SENTENCING BY NON-JUDICIAL ENTITIES

"The administration must not punish."[73] This guiding principle prevails almost unanimously both in literature and jurisdiction with reference to Art. 92 German Basic Law (*Grundgesetz*).[74] Pursuant to this Article, the judicial power shall be vested in the judges.[75] The BVerfG confirmed the monopoly of jurisdiction in 1967. In their verdict, the judges recognised a violation of Art. 92 Basic Law, and declared the practice of tax authorities imposing administrative penalties to be unconstitutional.[76] The Basic Law highlights the autonomy and uniformity of judicial power in order to safeguard the foundation of the rule of law by 'entrusting' it solely to judges for independent fiduciary exercise on behalf of the people.[77] The legally binding effect of court decisions distinguishes jurisdiction from administration.[78] Administrative decisions may gain enforceability, but the administrative authorities are allowed to change them in line with legal limits to protect legitimate expectations.[79] While the administration is authorised to pursue own

70 BGHSt 5, 130; BGHSt 28, 319.

71 BGH NStZ 1984, 413.

72 BGHSt 4, 8; BGHSt 26, 97.

73 Wolfgang Mitsch, 'Einleitung', in: Wolfgang Mitsch (ed), *Karlsruher Kommentar zum OWiG*, Munich: C.H. Beck, 2018, par. 98.

74 Dominik Brodowski, 'Die Verwaltung darf nicht strafen – warum eigentlich nicht? Zugleich eine Vorstudie zu einer rechts-evolutionären, weichen Konstitutionalisierung strafrechtsdogmatischer Grundannahmen', 128 *Zeitschrift für die gesamte Strafrechtswissenschaft* 2 (2016), p. 370.

75 Translated by: Professor Christian Tomuschat, Professor David P. Currie, Professor Donald P. Kommers and Raymond Kerr, in cooperation with the Language Service of the German Bundestag, Version information: The translation includes the amendment(s) to the Act by Article 1 of the Act of 28 March 2019, Federal Law Gazette I, p. 404 (at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0516) (last visited: 15 March 2023).

76 BVerfGE 22, 49, Judgment of 6 June 1967, Reference 2 BvR 375/60, 2 BvR 53/60, 2 BvR 18/65.

77 Gerd Morgenthaler, 'GG Art. 92 [Gerichtsorganisation]', in: Volker Epping & Christian Hillgruber (eds), *BeckOK Grundgesetz*, Munich: beck-online, 2019, par. 1.

78 Claus Dieter Classen, 'GG Art. 92', in: Hermann von Mangoldt, Friedrich Klein & Christian Starck (eds), *Grundgesetz*, Munich: C.H. Beck, 2018, par. 15.

79 Sec. 48-49 Administrative Procedures Act (Verwaltungsverfahrensgesetz); Classen (fn. 78), par. 15.

(material) aims, and to take (procedural) initiatives, both are denied to jurisdiction to ensure impartiality and neutrality.[80]

Though criminal law is the domain of the judge, and only the courts are allowed to impose penalties, administrative authorities have jurisdiction to sanction infringements below the threshold of the criminal law (administrative offences) pursuant to the Administrative Offences Act[81] (*Ordnungswidrigkeitengesetz*). For the first time, the legislator introduced administrative offences in the Economic Criminal Act from 1949, which served as a role model for the Administrative Offences Act in 1952.[82] The intention of the legislator, and indeed the outcome, was to decriminalise criminal law, and to relieve the criminal courts.[83] Over the years, the Administrative Offences Act underwent a step-by-step upgrading, gained more independence, and especially more popularity.[84] Administrative offences are also attractive because the federal government, federal states (*Bundesländer*), and municipalities have the competence to enact administrative offences in other laws and regulations. Consequently, administrative offences consist of a wide range of prohibitions and requirements of conduct in completely different spheres of life. On a local level, municipal regulations address a range of issues, for example when the cemetery can be entered, or where swimming is permitted.[85] In view of this, no reliable order of magnitude for administrative offences can be given, despite there being thousands of offences of this kind.[86]

However, the distinction between criminal and administrative offences is known as question of the century.[87] The Administrative Offences Act includes a formal definition that meets the practical needs of administrative authorities. Pursuant to sec. 1 of the Act, an administrative offence is an unlawful and censurable act, constituting the factual elements in a statute that enables the act to be sanctioned by imposing an administrative

80 Classen (fn. 78), par. 15; Volker Haas, *Strafbegriff, Staatsverständnis und Prozessstruktur: zur Ausübung hoheitlicher Gewalt durch Staatsanwaltschaft und erkennendes Gericht im deutschen Strafverfahren*, Tübingen: Mohr Siebeck, 2008, p. 350.

81 Another translation is "Act on Regulated Offences" provided by Neil Mussett, Version information: The translation includes the amendment(s) to the Act by Article 5 para. 15 of the Act of 21 June 2019, Federal Law Gazette I, p. 846 (at: https://www.gesetze-im-internet.de/englisch_owig/index.html) (last visited: 15 March 2023), Wolfgang Wohlers, 'Criminal Law as a regulatory tool', in: Dyson & Vogel (eds) (fn. 5), p. 235, 253 et seq. uses the similar term 'regulatory offences'; see also Sieber (fn. 5), p. 302.

82 Wolfgang Mitsch, *Recht der Ordnungswidrigkeiten*, Berlin, Heidelberg: Springer, 2013, p. 1.

83 Günter Heine, 'Unterscheidung zwischen Straftaten und Ordnungswidrigkeiten', 12 *Jurisprudencija* 4 (1999), p. 19; Klaus Rogall, 'Vorbemerkungen', in: Wolfgang Mitsch (ed) (fn. 73), par. 1.

84 Heine (fn. 83), p. 19.

85 For more information Roland Hefendehl, 'Ordnungswidrigkeiten: Legitimation und Grenzen. Ein vergleichender Blick auf Deutschland und Chile', 10 *Zeitschrift für Internationale Strafrechtsdogmatik* 9 (2016), p. 638.

86 Hefendehl (fn. 85), p. 638-639.

87 Hefendehl (fn. 85), p. 640.

fine.[88] In contrast, a material definition is still highly debatable.[89] The prevailing opinion in literature and judiciary is to use the mixed qualitative quantitative approach which the BVerfG decisively shaped.[90] According to this approach, the distinction depends on their classification to the core and the fringe areas. The core area is reserved for criminal law, and the fringe area for administrative offences law. While criminal offences are characterised by a particular social-ethical wrongfulness, administrative offences comprise mere disobedience, and lacks the seriousness that is reflected in criminal punishment by the state.[91] This qualitative distinction is not helpful when it comes to the wide intermediate area of criminal and administrative offences with gradual differences.[92] Therefore, the legislator has a margin of discretion for the classification of a criminal or administrative offence.[93]

In contrast to criminal proceedings, the opportunity principle is applicable to administrative offences (sec. 47 para. 1 Act on Administrative Offences). Consequently, the administrative authority in charge may refrain from the imposition of an administrative fine, particularly when there is no public interest in sanctioning.[94] The simplified procedure for administrative offences allows for the high amount of misdemeanours to be dealt with in a prompt and flexible way.[95] However, a diligent balance between an efficient administration, and the rights of the person concerned needs to be safeguarded.[96] This especially applies for the tangle of administrative offences on a municipal level, which are directed against conduct prohibited only in certain areas (e.g., alcohol ban), or for economic reasons (e.g., aggressive begging, speed trap).[97] Another problematic area is economic crime, where the sanctioning of corporations by imposing huge administrative fines of 1 billion Euros and more has risen recently.[98] *Sieber* speaks of "mega-Ordnungswidrigkeiten", and asks if the classification of mere administrative offences

88 Translation mainly provided by Neil Mussett, Version information: The translation includes the amendment(s) to the Act by Article 5 para. 15 of the Act of 21 June 2019, Federal Law Gazette I, p. 846 (at: https://www.gesetze-im-internet.de/englisch_owig/index.html) (last visited: 15 March 2023).

89 For an overview Rogall (fn. 83), par. 1.

90 BVerfG, Decision of 4 February 1959, *Wirtschaftsstrafgesetz*, Reference 1 BvR 197/53, par. 19; BVerfG, Judgment of 6 June 1967, Reference 2 BvR 375/60, par. 105; BVerfG, Decision of 16 July 1969, *Ordnungswidrigkeiten*, Reference 2 BvL 2/69, par. 40-42; BVerfG, Decision of 21 June 1977, *Verbot der gemeinschaftlichen Verteidigung im Ordnungswidrigkeitsverfahren*, Reference 2 BvR 70/75, par. 35-36.

91 BVerfG, Decision of 16 July 1969, *Ordnungswidrigkeitenrecht, Kammergerichtsbarkeit*, Reference 2 BvL 2/69, par. 31; BVerfG, Decision of 4 February 1959 (fn. 90), par. 5, 19; BVerfG, Decision of 21 June 1977 (fn. 90), par. 35-36.

92 BVerfG, Decision of 21 June 1977 (fn. 90), par. 35.

93 BVerfG, Decision of 16 July 1969 (fn. 91), par. 43.

94 Bundesministerium der Justiz und für Verbraucherschutz, *Das Ordnungswidrigkeitenrecht*, Berlin: Bundesministerium der Justiz und für Verbraucherschutz, 2015, p. 1-2.

95 Rogall (fn. 83), par. 1.

96 Rogall (fn. 83), par. 1.

97 Hefendehl (fn. 85), p. 643-644.

98 Sieber (fn. 5), p. 308 et seq.

"might not amount to simply using a false label in order to avoid having to comply with the safeguards of criminal law".[99]

7 ADMINISTRATIVE DISCRETION IN THE ENFORCEMENT AND EXECUTION OF SENTENCES

Only a final and legally binding criminal judgment is one which is enforceable (sec. 449 Code of Criminal Procedure *Strafprozessordnung*). Whilst the public prosecutor's office (sec. 451 Code of Criminal Procedure) is responsible for enforcing sentences concerning all procedural law measures to impose a final judgment (whether, when, to what extent), correctional facilities are in charge of executing sentences, which relates to the application and the content (how) of the sentence.[100] The enforcement of imprisonment comprises the procedure from the final judgment until the summons to commence confinement, as well as the general supervision of its realisation.[101]

Since the reform of federalism in 2006, the legislative power for the execution of imprisonment has been completely up to federal states, in accordance with Art. 70 Basic Law. Consequently, federal states enacted their own prison laws which largely replace the federal Prison Act (*Strafvollzugsgesetz*) from 1976.[102] Until the path-breaking decision by the BVerfG in 1972, the execution of imprisonment was based on the 'doctrine of the special relationship of subordination' (*Lehre vom besonderen Gewaltverhältnis*). This doctrine legitimated restrictions on the constitutional rights of the prisoner, without a statutory basis because of his or her subordinated relationship to the state, and the related duty to accept measures essential to achieve the purposes of punishment.[103] In its decision, the Court declared this doctrine as unconstitutional.[104] In its reasoning, the Court stated the protection of human liberty and dignity as the primary objective of the Basic Law.

99 Sieber (fn. 5), p. 311.

100 Claus Roxin & Bernd Schünemann, *Strafverfahrensrecht*, Munich: C.H. Beck, 2017, par. 1; Nina Nestler, '§ 499 Vollstreckbarkeit', in: Christoph Knauer, Hans Kudlich & Harmut Schneider (eds), *Münchener Kommentar zur Strafprozessordnung*, Munich: C.H. Beck, 2019, par. 9-10.

101 But not the execution in prison, Ekkehard Appl, 'Erster Abschnitt. Strafvollstreckung Vorbemerkungen', in: Rolf Hannich (ed), *Karlsruher Kommentar zur Strafprozessordnung*, Munich: C.H. Beck, 2019, par. 3.

102 Act on the Execution of Prison Sentences and Measures of Rehabilitation and Prevention involving Deprivation of Liberty; translation provided by the Language Service of the Federal Ministry of Justice and Consumer Protection, version information: The translation includes the amendment(s) to the Act by Article 1 of the Act of 19 June 2019, Federal Law Gazette I, p. 840 (at: https://www.gesetze-im-internet.de/englisch_stvollzg/englisch_stvollzg.html#p0028) (last visited: 11 September 2020).

103 BVerfG, Judgment of 14 March 1972, *Einschränkungen der Grundrechte des Strafgefangenen*, Reference 2 BvR 41/71, par. 26 f.; Jürgen Graf, 'Einleitung zum Vollzugsrecht', in: Jürgen Graf (ed), *BeckOK Strafvollzug Bund*, Munich: C.H. Beck, 2020, par. 5; Heinz Müller-Dietz 'Die Entwürfe zu einem Strafvollzugsgesetz und die Strafvollzugsreform', 29 *JuristenZeitung* 11/12 (1974), p. 353.

104 BVerfG (fn. 103), par. 25-26.

According to this, "basic rights shall bind the legislature, the executive and the judiciary as directly applicable law" and, thus, impede an arbitrary restriction of prisoners' constitutional rights.[105] The introduction of the federal Prison Law provided the constitutional fundament to restrict the basic rights of the prisoner,[106] and formed a standard in this respect for the prison laws by the states, though they differ considerably when it comes to the prison regime in conjunction with restrictions of the prisoner's rights within the constitutional frame.[107]

The rule of law guides the execution of imprisonment, and grants discretion to the prison authority in several areas.[108] This discretionary power, given for the order of different measures regulating individual matters, is presented using the example of the Prison Code (*Drittes Buch Justizvollzugsgesetzbuch*) in Baden-Wuerttemberg. If the prisoner claims an infringement of his or her rights by certain measures, he or she can apply for a court ruling (sec. 93 State's Prison Code, in conjunction with sec. 109 Federal Prison Act). The Criminal Chamber for the Execution of Sentences decides upon the application (sec. 93 State's Prison Code, in conjunction with sec. 110, 116 federal Prison Act). In the case of a negative decision, the person concerned can bring an appeal to a Criminal Division of the Higher Regional Court, founded only on the allegation that the decision is based on a violation of the law (sec. 93 State's Prison Code, in conjunction with sec. 116, 117 Federal Prison Act).

The decision to place an offender in accommodation in an open institution is one with restricted discretion ("should") (sec. 7 para. 1 Prison Code). The provision expresses the intention of the legislator to prioritise an open facility over a closed facility, though it is not the standard accommodation in prison due to the required eligibility of the person concerned.[109] In the assessment of the undetermined legal term "eligibility", the prison governor has a margin of judgment (*Beurteilungsspielraum*).[110] But even if the person concerned is eligible, and no reasons for escape or risk of abuse exist, a transfer to an open institution is not necessarily to be granted, due to restricted discretion.[111] Nevertheless, the prisoner has a claim to faultless use of discretion.[112] Re-transfer to a closed facility because of a lack of eligibility is regulated in a provision which leaves no discretion to the prison

105 BVerfG (fn. 103), par. 28.
106 Graf (fn. 103), par. 5.
107 See the criticism of the consequences of the federalism reform Bernd Maelicke, 'Sinn Und Unsinn Der Föderalismusreform', 27 *Neue Kriminalpolitik* 226 (2015), p. 228; Graf (fn. 103), par. 17.
108 Due to the extent this contribution is limited to a choice of provisions that allow for the exercise of administrative discretion.
109 Alexander Böhm, 'JVollzGB III § 7 Offener und geschlossener Vollzug', in: Joachim Müller (ed), *BeckOK Strafvollzugsrecht Baden-Württemberg*, Munich: beck-online, 2019, par. 4 and 27.
110 Böhm (fn. 109), par. 8 and 15.
111 Böhm (fn. 109), par. 8 and 27.
112 Böhm (fn. 109), par. 27.

governor (sec. 7 para. 2 sent. 2 Prison Code). The provision affects basic rights of the prisoner, and poses the question of whether the exclusion of discretion is constitutional.[113] This infringement may affect the principle of proportionality. Therefore, the provision requires an interpretation in conformity with the Basic Law, i.e., the circumstances relevant to discretion must be taken into account in interpreting the criterion of eligibility.[114]

The prison authority can, with the prisoner's consent, order relaxations or opening measures[115] of conditions of imprisonment, if he or she is eligible for the respective measures, and it is not to be feared that he or she might evade serving imprisonment or abuse the measure to commit criminal offences (sec. 9 Prison Code). The opening measures are outside work (*Außenbeschäftigung*) under the supervision of a prison officer, and work release (*Freigang*) without such supervision, short leave under escort (*Ausführung*) or without escort (*Ausgang*), as well as leave from custody (*Freistellung aus/von der Haft, Hafturlaub, Langzeitausgang*) (sec. 9 para. 2 Prison Code). Once again, the prisoner only has a right to a faultless use of discretion if he or she fulfils all requirements for an opening measure. Concerning the revocation of opening measures, the prison governor has discretion if he or she would be justified in refusing such a measure as a result of the circumstances that have subsequently arisen, if the prisoner fails to comply with instructions, or if the prisoner abuses the measure; in the case of serious breaches, the opening measure must be cancelled (sec. 11 para. 2 Prison Code). A withdrawal is also possible, if the prerequisites for being granted an opening measure which takes effect in the future have not been fulfilled (sec. 11 para. 3 Prison Code). In doing so, the prison governor must observe both the principle of proportionality and the protection of legitimate expectations.[116] Also, the necessary weighing of interests in light of the principle of legality of administrative action may come into play when examining the factual requirements of the provision, as well as when exercising discretion.[117]

In contrast to the aforementioned regulations with discretion, inmates have the right to communicate with persons outside the prison within the scope of the Prison Code (sec. 19 para. 1). They are allowed to receive visitors for at least one hour per month (sec. 19 para. 2 Prison Code). Additional visits should be permitted if they promote the treatment and integration of the inmate or serve individual, legal, or business matters which cannot otherwise be dealt with (sec. 19 para. 3 Prison Code). The discretion of the prison authority

113 Böhm (fn. 109), par. 34.
114 Böhm (fn. 109), par. 35.
115 Opening measures in Baden-Württemberg.
116 Böhm (fn. 109), par. 4.
117 Böhm (fn. 109), par. 4.

is limited.[118] The prison governor can prohibit visits if security or order in prison would be threatened, or if it is to be feared that visitors who are not relatives might have a detrimental influence on the inmate, or might hamper his or her integration (sec. 20 Prison Code). A ban on visits is only applied as a last resort, in compliance with the principle of proportionality.[119] If and only if milder interventions are not sufficient (e.g. acoustic monitoring, visit behind a glass barrier), a visit may be prohibited for a person from outside in individual cases.[120] A general ban on visits may also be imposed if the visitor represents a danger to every prisoner, pursuant to the prison provisions.[121] Not only can the prisoner take legal action against a visit ban, but also the external person.[122]

The maintenance of security and order in prison is of utmost importance. This crucial and sensible task within a treatment context requires on the one hand to awaken and encourage the prisoner's sense of responsibility for an orderly community life in the institution, and on the other hand the application of the principle of proportionality when it comes to duties and restrictions imposed on the prisoner (sec. 61 Prison Code). In the event of conflict with treatment, it is a priority to examine whether treatment measures might seem to be successful within a reasonable period. Otherwise, repressive measures can be taken, to which a broader view ascribes an *ultima ratio* function; a narrower opinion rejects this assumption for lack of support in the law.[123] General security measures may be ordered partially independent to the presence of imminent danger.[124] If one considers unexpected or anytime routine searches of cells (sec. 64 para. 1 Prison Code) without a concrete reason as an everyday measure in prison, the discretion of the prison authority is restricted by the obligation to respect the constitutional rights of the inmates, the prohibition on excessiveness and arbitrary action, and the general principles of the prison regime, due to the infringements on personal rights.[125] In light of the principle of proportionality, the order to strip search is subject to stricter conditions, though a general order is allowed upon admission to the prison, subsequent to contact with visitors, and after each absence from prison (sec. 64 para. 2, 3 Prison Code). However, strip searches can be disproportionate. If the risk of smuggling seems particularly far-reaching, then an exception to the general order may be required.[126]

118 Frank Arloth, 'StVollzG § 24 Recht auf Besuch', in: Frank Arloth (ed), *Strafvollzugsgesetze: Bund, Baden-Württemberg, Bayern, Hamburg, Hessen, Niedersachsen*, Munich: C.H. Beck, 2011, par. 5.

119 Böhm (fn. 109), par. 12.

120 Klaus Laubenthal, *Strafvollzug*, Berlin: Springer, 2019, par. 509.

121 Laubenthal (fn. 120), par. 509.

122 Laubenthal (fn. 120), par. 509.

123 Matthias Maurer, 'JVollzGB III § 61 Grundsatz', in: Müller (ed) (fn. 109), par. 3.

124 Laubenthal (fn. 120), par. 701.

125 Maurer (fn. 123), par. 3.

126 BVerfG, Decision of 10 July 2013, Reference 2 BvR 2815/11, *Entkleidung und körperliche Durchsuchung von Strafgefangenen.*

In contrast to general precautions, special precautions (*Besondere Sicherungsmaßnahmen*) may only be ordered if the inmate's behaviour or mental condition indicates an increased risk of escape, violence against persons or objects, suicide, or self-injury (sec. 67 Prison Code). Regarding the prognosis of escape and/or violence, the prison governor has a margin of judgment (*Beurteilungsspielraum*) with limited judicial reviewability.[127] The special precautions include deprivation or withholding of articles, observation at night time, segregation from other prisoners, deprivation or restriction of outdoor exercise, detention in a specially-secured cell containing no dangerous objects, and use of physical constraints (sec. 67 para. 2 Prison Code). The principle of proportionality is expressly highlighted (sec. 67 para. 5 Prison Code) due to the serious interference with the prisoner's basic rights, which become increasingly severe the longer the measure lasts.[128] By their very nature, special precautions may be used only to deal with temporary and acute situations of danger.[129] The regulation therefore stipulates to check special precautions at appropriate intervals to determine whether, and to what extent, they have to be maintained (sec. 67 para. 5 Prison Code). The continuous segregation of a prisoner is especially regulated as solitary confinement, which is – in contrast to segregation from other persons – restricted to factors relating particularly to the person concerned (sec. 68 para. 1 Prison Code). Additionally, the indispensability of continuous segregation must be present, and thus, solitary confinement is the last resort ordered by the prison governor.[130] After an inmate in solitary confinement died of malnutrition in Baden-Wuerttemberg in summer 2014, the subsequent investigation revealed that not only was the necessary approval of the supervisory authority missing in this case, but also in another case within this institution.[131] The working group which was then set up was entrusted the task of drafting an appropriate administrative regulation, which came into force in August 2015.[132] This administrative regulation stipulates a period of 24 hours as "uninterrupted" solitary confinement, and thus agrees with the prevailing view.[133]

Special precautions may overlap in their effect with disciplinary actions, though conditions and goals differ profoundly.[134] While special precautions constitute preventive measures, only addressing security needs and not punitive aims, disciplinary actions refer to violations in the past, are repressive, and resemble punishment.[135] However, the

127 Laubenthal (fn. 120), par. 715.
128 BVerfG, Decision of 13 April 1999, Reference BvR 827-98, *Rechtsschutz gegen Einzelhaft und besondere Sicherungsmaßnahmen.*
129 Laubenthal (fn. 120), par. 715.
130 Louisa Maria Bartel, 'StVollzG § 89 Einzelhaft', in: Graf (ed) (fn. 103), par. 6.
131 Matthias Maurer, 'JVollzGB III § 68 Einzelhaft', in: Müller (ed) (fn. 109), par. 1.
132 Maurer (fn. 131), par. 1.
133 Frank Arloth, 'StVollzG § 89 Einzelhaft', in: Arloth (ed) (fn. 118), par. 1.
134 Matthias Maurer, 'JVollzGB III § 67 Besondere Sicherungsmaßnahmen', in: Müller (ed) (fn. 109), par. 3.
135 Maurer (fn. 134), par. 3.

(preventive) purpose of disciplinary actions lies in securing the conditions for the rehabilitative aim of the execution (sec. 1 Prison Code). Disciplinary actions (e.g., a reprimand, a restriction, withdrawal of radio or television, or detention) may only be imposed on the basis of legal regulations due to the strict legal reservation (Art. 103 para. 2 GG); misconduct has to be determined in a foreseeable manner for the norm addressees.[136] The order of a disciplinary action requires a culpable breach of a duty pursuant to the Prison Code (sec. 81 para. 1 Prison Code). The prison governor orders the disciplinary action within a due process (sec. 84, 85 Prison Code). Despite strong criticism, disciplinary actions are still seen as suitable and necessary means to maintain discipline in prison, and to preserve the conditions of the prison regime needed for resocialisation.[137] Due to the primacy of treatment, disciplinary actions are understood as a subsidiary instrument of a treatment-oriented prison regime.[138] Therefore, the imposition of disciplinary actions is left to the due discretion of the prison governor, who may refrain from them if a mere warning is sufficient (sec. 81 para. 2 Prison Code), or when treatment or security measures achieve the tasks of the prison regime.[139]

8 Conclusion

German sentencing law leaves remarkable margins of discretion to the courts. The law itself does not contain much information for predicting the sentence in a particular case, which is a problem in terms of legal certainty. Neither does the law clearly state that punishment is strictly limited by the constitutional principle of proportionality, with its duty always to choose the less intrusive of several apt measures (including a milder sentence compared to a more severe sentence). To be fair, one has to acknowledge that sentencing in Germany is comparably moderate, with fines being by far the most frequent form of punishment (around 80%), and executed prison sentences being an exception (around 5%). We can conclude that for the time being, judges try to avoid excessive punishment, and to find an appropriate and proportional way of sanctioning, but hitherto without a clear normative obligation and therefore without a sufficient legal safeguard for the future.[140] Judges also try to avoid arbitrary sentencing and tend to follow local and regional sentencing traditions (with regard to the "usual" punishment in comparable cases). However, these traditions or informal "sentencing guidelines", as we might call

136 Laubenthal (fn. 120), par. 635.

137 Andreas Grube, 'JVollzGB III § 81 Voraussetzungen', in: Müller (ed) (fn. 109), par. 2.

138 Rolf-Peter Callies & Heinz Müller-Dietz, '§ 102 Dreizehnter Titel. Disziplinarmaßnahmen', in: Rolf-Peter Callies & Heinz Müller-Dietz (eds), *Strafvollzugsgesetz*, Munich: C.H. Beck, 2008, par. 1.

139 Grube (fn. 137), par. 3.

140 Kaspar (fn. 6).

them, are not explicitly written down, let alone democratically legitimised, so the whole sentencing process and its outcome remains untransparent in this regard. And due to their local and regional character, it is no surprise that various empirical studies have shown considerable sentencing disparities across Germany.

Therefore, a reform of sentencing law with regard to unnecessary margins of judicial discretion would be recommendable. Sentencing frames should be narrowed, preferably by lowering the upper limit of sentences. Section 46 Criminal Code should be revised with regard to the objectives and relevant criteria of sentencing, including the principle of proportionality.[141] Unspecified aggravated cases with higher sentencing frames should be abolished. These measures would contribute to more equality in sentencing, and also help to avoid excessive and arbitrary outliers. However, they would still not give enough orientation with regard to a concrete amount of punishment in a particular case. In our opinion, it is the legislator's (and not the judiciary's) task to create more 'anchor points' for individual sentencing, e.g. by describing thresholds of a certain amount of damage leading to a higher or lower sentencing frame. Therefore, recent verdicts by the BGH trying to establish abstract sentencing rules for tax offences are pursuing a legitimate goal, but with the wrong means.

Introducing sentencing guidelines modelled after the Federal Sentencing Guidelines in the U.S. for example is not recommendable in our view,[142] and was declined by an overwhelming majority during the 72nd German Convention of Legal Practitioners and Scholars in 2018. One of the main arguments was that these guidelines pose a danger of overly schematic sentencing, without considering the special features of individual cases. Nevertheless, a sentencing database (e.g. such as the one used in Japan since 2009) might be a valuable source of information for judges.[143] It would help to give some guidance and make sentencing decisions, but also make their judicial control more transparent, as the usual punishment in comparable cases would then be visible, and also subject to public and scholarly debate. Such a sentencing database could also be a starting point for making use of forms of artificial intelligence within the sentencing process.[144]

The influence of the prosecutor on sentencing has not yet been discussed, and is generally underrated in Germany; the prosecutor dominates the (quite frequent) penal order proceeding (*Strafbefehlsverfahren*), because the judge has no authority to alter the penal order, and either accepts it or orders a trial.[145] The prosecutor appears to be a quasi-

141 Kaspar (fn. 8), p. 104 et seq.; Kaspar (fn. 6).

142 Kaspar (fn. 8), p. C 86 et seq.; Kaspar (fn. 6).

143 Kaspar (fn. 8), p. C 115. This proposal was accepted by the majority on the 72th German Convention of Legal Practitioners and Scholars.

144 Stefan Harrendorf & Katrin Höffler & Johannes Kaspar, 'Datenbanken, Online-Votings und künstliche Intelligenz – Perspektiven evidenzbasierter Strafzumessung im Zeitalter von „Legal Tech"', 32 *Neue Kriminalpolitik* 1 (2020), p. 35.

145 Weigend (fn. 37), p. 53-54.

judicial figure that causes a conflict between prosecutorial sentencing, and the presumption of innocence that might be violated because the defendant's guilt is not investigated, and thus plays no role.[146] A solution could be to safeguard the voluntariness of the defendant's decision: "[t]his could be accomplished by giving the defendant the right to judicial review of any sentence determined by the prosecutor, while precluding the judge from increasing the sentence".[147]

The prosecutor is responsible for enforcing sentences concerning all procedural measures, to impose a final judgment (whether, when, to what extent) (sec. 451 Code of Criminal Procedure). The prosecutor has considerable discretion in different enforcement issues that might alter the final verdict. One prominent example is default imprisonment ordered by the senior judicial officer at the prosecutor's office (sec. 43 Criminal Code, sec. 459e Code of Criminal Procedure). Though nearly all federal states[148] introduced community service in order to disburden prisons,[149] the imprisonment of fine defaulters is not an exception,[150] and contradicts the intention of a fine as a punishment for less serious offences. The reasons are on the one hand, legal differences between the states, and on the other hand, differences concerning the margin of discretion by prosecutors or senior judicial officers.[151] In practice, the need to submit an application already represents an obstacle for fine defaulters.[152] Therefore, a reform of default imprisonment seems overdue in order to considerably raise the bar for imprisonment.[153] The Swedish regulation could serve as a model, as default imprisonment is hardly ever used in practice, and is only considered as *ultima ratio* after all options for deferring payment and paying in instalments have been exhausted.[154]

The increasing role of administrative offences is ambivalent. On the one hand, they are an efficient and less intrusive way of dealing with minor forms of wrongdoing. On the other hand, one has to face the fact that this kind of procedure does not comprise all of the

146 Weigend (fn. 37), p. 84.

147 Weigend (fn. 37), p. 84.

148 Apart from Bavaria.

149 Hans-Jörg Albrecht & Wolfram Schädler, 'Die Gemeinnützige Arbeit auf dem Weg zur eigenständigen Sanktion? Entwicklung, Stand, Perspektiven', 21 *Zeitschrift für Rechtspolitik* 8 (1988), p. 278-279; Ekkehard Appl, 'Erster Abschnitt. Strafvollstreckung § 459e Vollstreckung der Ersatzfreiheitsstrafe', in: Hannich (ed) (fn. 101), par. 9.

150 A share of around 8% of all prisoners, see Nicole Bögelein, 'Money Rules: Exploring Offenders' Perceptions of the Fine as Punishment', 58 *British Journal of Criminology* 4 (2018), p. 808.

151 Albrecht & Schädler (fn. 149), p. 279.

152 Nicole Bögelein, *Deutungsmuster von Strafe. Eine strafsoziologische Untersuchung am Beispiel der Geldstrafe*, Wiesbaden: Springer VS, 2016, p. 79.

153 See the failed legislative initiative by the parliamentary group "Die Linke" to abolish default imprisonment Deutscher Bundestag, *Drucksache 19/1689. Entwurf eines Gesetzes zur Änderung des Strafgesetzbuchs und weiterer Gesetze – Aufhebung der Ersatzfreiheitsstrafe*, Berlin: Deutscher Bundestag, 2018.

154 Rita Haverkamp, *Elektronisch überwachter Hausarrestvollzug. Ein Zukunftsmodell für den Anstaltsvollzug?*, Freiburg i. Br.: Max-Planck-Institut für deutsches und internationales Strafrecht, 2002, p. 52-53.

legal safeguards that we usually recognise in criminal law. Furthermore, due to the principle of opportunity, prosecution is completely dependent on the use of discretion by the executive authority in charge – which always contains the danger of arbitrariness. This is especially problematic in the area of grave monetary sanctions for corporations, in the area of economic crime. A new statute regulating these kinds of "mega-Ordnungswidrigkeiten" might add to legal certainty.

Concerning the execution of prison sentences, disciplinary actions in particular are under criticism. A comparison of federal states reveals completely different sanctioning styles not only between states, but also between correctional facilities.[155] The legal scope for disciplinary actions is filled out by local sanctioning patterns and cultures,[156] which show that the general clause-like regulation allows far too much leeway.[157] As a result, there is a need for more precise and much tighter legal requirements in the provisions of federal states.[158] Furthermore, prison governors' extremely wide discretion should be considerably limited, because the status quo might reduce rather than improve the prisoners' chances of rehabilitation.[159] As a consequence, formal disciplinary actions should be severely restricted.[160]

155 Joachim Walter, 'Vor § 86 LandesR', in: Johannes Feest & Wolfgang Lesting & Michael Lindemann (eds), *Strafvollzugsgesetze. Kommentar*, Köln: Carl Heymanns Verlag, 2017, p. 673-674.

156 Michael Walter, 'Über Sanktionen im Jugendstrafvollzug', in: Klaus Boers et al. (eds), *Kriminologie – Kriminalpolitik – Strafrecht. Festschrift für Hans-Jürgen Kerner zum 70. Geburtstag*, Tübingen: Mohr Siebeck, 2013, p. 837.

157 Walter (fn. 155), p. 678.

158 Walter (fn. 155), p. 678.

159 Walter (fn. 155), p. 678.

160 Walter (fn. 155), p. 678.