European Journal of Probation
University of Bucharest
www.ejprob.ro
Vol. 3, No.1, 2011, pp 20 – 35
ISSN: 2006 – 2203

Judicial Rehabilitation in Germany – The Use of Criminal Records and the Removal of Recorded Convictions

Christine Morgenstern[1]
Ernst Moritz Arndt Universität Greifswald

Abstract

This paper has two aims: First, it will explore the German legal system of central data collection on convicted offenders, the limited access to the data stored and the different modes of removing data. This exploration will be linked to the question of re-socialisation as a right of the offender and, more practically, to his 'real life chances' of finding a workplace as a decisive element of the re-integration process. Second, debates about judicial rehabilitation through the means of a formalized redemption ritual or ceremony (see Maruna, 2011) that acknowledges the desistance of ex-offenders will be examined in the German context.

Keywords*:* Re-socialization – Re-integration - Judicial rehabilitation – Criminal record

Introduction: Labeling, re-biographing and the right to re-socialization

The articles in this Special Issue of the European Journal of Probation (EJP) are based on two theoretical considerations: First, we assume that having a criminal record may seriously impede the process of re-integration of an ex-offender into society; in particular because it may hinder him or her in finding a job. A piece of paper, identifying somebody as previously convicted, literally is a label in the Beckerian sense (Becker, 1973: 9) – with possible negative consequences for the desistance process. It therefore seemed to be interesting to ask in a comparative approach, how strong is such a label if stamped on a convicted offender? How long does he have to bear this label and to whom is it visible? To that end, the German legislative framework and practice for keeping a criminal record and the possibilities to access this information will be explored. Second, different techniques to render entries in the criminal register inaccessible or to remove them are of interest and will be explained in the German context. This analysis will be linked to debates about desistance-supporting measures and specifically to the question of whether 'redemption rituals' (that acknowledge or honors

1 My sincere thanks go to Martine Herzog-Evans for directing (and structuring) my attention to this important topic; to Wolfgang Wirth and Klaus Boers for information and to Fergus McNeill for helping me with the language.
Correspondence concerning this article should be addressed to Christine Morgenstern, Department of Criminology, Faculty of Law and Economics, Ernst-Moritz-Arndt-Universität Greifswald, Domstraße 20, D-17487 Greifswald, Germany. E-mail: mostern@uni-greifswald.de.

the ex-offender as a desister [Maruna 2001, 2011]) can be integrated in this wider process of judicial rehabilitation. Although such a redemption ritual according to Maruna could take place in a court setting, less ambitious forms such as a 're-biographing as policy' (Maruna, 2001: 164) - judicial rehabilitation by the legal system itself - could well serve the purpose. In the German system no formal court redemption ritual is known, but different steps of re-biographing in the form of legal rehabilitative measures are used.

The term 'rehabilitation' (Rehabilitierung) in the German legal terminology as well as in everyday language is usually connected to the rehabilitation of persons that, for political reasons, have been wrongfully convicted or otherwise suffered from an unjust legal system – be it during the Third Reich or be it in the former GDR between 1945 and 1990.[2] For them, legal rehabilitation means the formal revocation of judgments as well as, at least for those affected after 1945, the provision of financial or other support. The judgments or other decisions usually included far-reaching restrictions of civil rights and disenfranchisement in the widest sense, so the general idea behind the rehabilitative measures of course is to formally restore the full status of a good citizen.

It should be noted, however, that according to German law and doctrine today the legal citizenship[3] of a criminal convict/prisoner remains intact, because his civil rights can only be restricted as far as necessary to enforce the sanction and only on a statutory basis.[4] In the context of criminal (ex-)convicts, rehabilitation therefore is more closely linked to the idea of re-socialization (or can be understood as being a part of the latter). It is recognized amongst German scholars and other experts that this concept of 're-socialization' is blurry, has several important aspects and the term obviously is filled with different meanings depending on who uses it for what (Cornel, 2008) - this discussion cannot be pursued further here.[5] Crucial for the practical success of this concept (with all its vagueness) in the judicial world, however, was a decision of the German Federal Constitutional Court (FCC) from 1973 that recognized the right to re-socialization as an integral part of constitutionally guaranteed rights: The Court derived it from the right of the individual to dignity and to develop his personality freely (Art 1 and 2 of the German Basic Law) as well as the duty of the state to assist groups who, for whatever reason, require social assistance (Sozialstaatsprinzip, Art. 20)[6]. From the view of the constitution this legal entitlement thus consists of both negative fundamental rights against state infringements (the right to be left alone) and positive rights to state action.[7]

[2] For the historical development of the legal term 'rehabilitation' see also Götz & Tolzmann, 2000: 1.

[3] It is therefore not 'offenders *or* citizens' (the title of a collection of texts on rehabilitation recently edited by Priestley and Vanstone, 2010) but 'offenders *and* citizens'. A comprehensive understanding of a prisoner´s legal citizenship (or, in Dutch, 'rechtsburgerschap') is explained in van Zyl Smit & Snacken, 2009: 69. It is quite clear, however, that regardless of this formal status, in reality the ex-convict may still be regarded as a 'less than average citizen' (Uggen, Manza, Behrens, 2004) by others and/or him- or herself.

[4] This was made clear by the German Constitutional Court in 1972 (BVerfGE 33,1) that declared the so-called 'besonderes Gewaltverhältnis' (special subordination relationship) for prisoners to be unconstitutional. In Germany, all convicts are allowed to vote while in prison unless the loss of the right to vote is part of the sentence; courts can only apply this sentence for specific crimes and for a duration of two to five years (Art. 45 Criminal Code). This is hardly ever done (no case in 2007 and 2008 according to the Conviction Statistics, [Strafverfolgungsstatistik], www.destatis.de). All convicts sentenced to at least one year in prison also automatically lose the right to be elected in public elections for the duration of five years, and lose all positions they held as a result of such an election.

[5] For most of what 're-socialization' stands for, another translation – namely 're-integration' – would probably be more suitable; see also van Zyl Smit &Snacken, 2009: 78.

[6] Article 20 of the Basic Law reads: '[Basic institutional principles; defense of the constitutional order]: (1) The Federal Republic of Germany is a democratic and social federal state.'

[7] See also van Zyl Smit & Snacken, 2009: 78.

The occasion the Court developed this right (in the famous case named 'Lebach') was in fact a post-prison-situation where the possible obstacle to re-socialization came from the media.[8] Three men had robbed a German army depot in the small town of Lebach, killing four sleeping soldiers. A public TV operator planned a documentary about this spectacular crime. The broadcast was scheduled to coincide with the release of an accomplice who had received ten years of imprisonment. He sought injunction against the publication of his name and picture, claiming a right to a new start after serving his sentence. In the judgment, the court gave priority to the protection of personality[9] over freedom of expression/information. It evaluated the opposing rights and was of the opinion that, in view of the circumstances of the case, such an intensive invasion of the protection of personality would take place that the freedom of expression must give way to the protection of personality. Moreover, it stated that

> 'from the point of view of the offender, this interest in re-socialization accrues from his constitutional rights in terms of article 2 (1) in conjunction with article 1 of the Basic Law. Viewed from the perspective of the community, the principle of the social state requires public care and assistance for those groups in the community who, because of personal weakness or fault, incapacity or social disadvantage, were adversely affected in their social development; prisoners and ex-prisoners also belong to this group. Not least, re-socialization serves the protection of the community itself: it lies in its distinct interest that the offender will not re-offend…' (BVerfGE 35, 202: 235-236).

Only later jurisprudence by the FCC developed further how this re-socialization has to be understood and shaped as a positive right to state action and assistance, namely with regard to the enforcement of prison sentences (also life sentences) and prison conditions, remuneration of prison work, prison leave, and so forth.

Connecting both concepts, one of the classic German textbooks for students of Criminal Law (Jescheck & Weigend, 1996) presents the topic of criminal records in the chapter on 'Rehabilitation', clearly seeing this form of rehabilitation as one crucial aspect of resocialization. The authors identify three steps in the German system:

- not to include minor offences in certificates of conduct that are issued on the basis of the criminal records;
- not to include offences in certificates of conduct after a certain period if the person concerned has not reoffended;
- finally to remove entries in the register after another period without re-offending.

In general, this article follows the agreed four-part structure laid out by Herzog-Evans (2011a) for this Special Issue. It should be made clear in advance that it deals only with conviction records. Different de-centralized and centralized police and prosecution registers exist in Germany (and have significant impact within the criminal justice system), but generally may only be used by these law enforcement authorities. Other authorities have very restricted access; public or private employers have no access at all. The article is mainly based on an analysis of the relevant legislation and jurisprudence as well as a review and analysis of

[8] This case is considered again and again as leading judgment from different research perspectives. Apart from penologists these are the public and civil lawyers that research personality rights in various contexts. The judgment is listed in this respect in the so-called 'personality database' by the *AHRC Research Centre for Studies in Intellectual Property and Technology Law* at the University of Edinburgh. http://www.law.ed.ac.uk/ahrc/personality/gercases.asp#Lebach) under the headline 'Right to privacy and its limits'; the aspect of re-socialization, however, is not explicitly considered here.

[9] 'Privacy' (instead of 'personality') is a term more commonly used in the English speaking world in this context. It might be used here as well because this aspect stands in the foreground. The two terms, however, are not synonymous: At least as translation for the German term 'Persönlichkeitsrecht' the latter is far more comprehensive (including not only privacy but more generally the right of self-determination).

existing literature (in part. Rebmann 1983; Götz & Tolzmann 2000; Pfeiffer 2000; Sonnen 2008). It cannot draw on empirical research -- and hardly on existing empirical findings at all -- as the relevance of this topic so far seems to have been underrated, although particularly for the probation service it is significant (Veith, 1999; Pfeiffer, 2000).

Criminal records

Aims, History and Organisation of the Criminal Register

Three - partly conflicting - aims may be achieved by keeping statutory-based, centrally administered criminal records:

- to provide all parts of the criminal justice system with relevant information about the development of a criminal career, and, if necessary, to provide others (administrative bodies and employers) who have a legitimate interest with that information;
- to avoid unfair and far-reaching stigmatizing effects of the registering, in particular for convictions that date back a while;
- to provide information for scientific research (e. g. for recidivism studies) or criminal policy ('preparation of legislation', Art. 42a and b BZRG).

Legal provisions for collecting and registering comprehensive up-to-date information on the criminal background of persons date back to the late 19th century. Following the French example,[10] the German Länder adopted a Register Act in 1882 and kept registers on convictions mainly for purposes of the criminal justice system (particularly to assess recidivism) and administrative decisions such as granting or revoking licenses. Private individuals (employers) had no access to this source of information (but could request codes of conduct issued by the police where other registers existed). Once in the criminal register, convictions were kept there without time limit and no formal removal procedures were foreseen. Although not explicitly intended, but as an aspect of general prevention/deterrence willingly accepted, the stigmatization aspect and labeling effect of a criminal record in the register was recognized early in its history (Rebmann, 1983: 1514).

In 1919, during the early liberal and reform-oriented years of the Weimar Republic, the German 'Straftilgungsgesetz' (literally: *Conviction Redemption Act*) was adopted. In the legislative material, it was justified as follows: 'Who, after completion of a sentence, precisely *because* of this completion only finds closed doors; who, despite honest efforts, is over and again punished with public disregard and is hampered in his struggle for life because he once failed and has been punished, finally must lose hope and motivation to find his way into reputable civil life and will be recoiled to the path to crime.'[11] This quote reflects the very limited readiness of the society to welcome back ex-offenders (particularly in times of economic crisis);[12] consequently, the Act itself called for more tolerance within the community and introduced far-reaching restrictions regarding access to information from the register, as well as regulations for the removal of entries.

[10] The registers were based on the 'Casiers judiciaries', a system which was kept in Alsace-Lorraine when it became part of the German Reich in 1871 and served as model for the German legislation, Rebmann, 1983: 1514.

[11] Cited in Sonnen, 2008: 509, translation by the author.

[12] This problem of rejection by the society and the dependency on the mercy of welfare institutions in the 1920s is painfully described in the famous novel 'Wer einmal aus dem Blechnapf frisst' written by Hans Fallada in 1932 and based on the author's own experiences (Who Once Eats Out of the Tin Bowl (UK) / The World Outside (US), translation by Eric Sutton, 1934, in English out of print).

Since 1972, when the Federal Central Criminal Register Act came into force,[13] the *Bundeszentralregister* (Federal Central Criminal Register, as an organisational umbrella term for the Federal Crime Register and the Register of Youth Offences) has replaced the 93 criminal registers of the public prosecution offices at the Regional Courts (which had been maintained until then by the Länder). In Germany, criminal records are held (only) for those who have been sentenced or otherwise 'assessed' in a criminal procedure (that is because they were not held criminally responsible due to mental illness). This means in numbers: the Register currently holds entries on roughly 6.3 million individuals with 15.3 million rulings. Each day about 10,000 decisions have to be registered; each day about 40,000 requests for information by courts, police and public prosecution services as well as requests for codes of conduct by private individuals have to be processed (and ,usually are on the same day). More than nine million disclosures are issued every year.[14]

In 1998, criminal legislation underwent a series of changes, mainly concentrating on a harsher approach towards sex offenders which also affected the Central Criminal Register Act. Since 2007, the register itself has been operated by the Federal Office of Justice (Bundesjustizamt),[15] before it had been kept by the Federal Prosecution Agency (Generalbundesanwalt). Since 2009, all employers in the area of child care, youth welfare institutions, and so forth are obliged to check their employees (and applicants for jobs); this also led to changes in the Central Criminal Register Act (see below for details).

Content

The Register holds judgments of the criminal courts which have become final (mainly convictions and sentences, but also judgments that found that a person lacks criminal capacity due to mental illness as well as certain rulings of administrative authorities (e. g. with regard to decisions that withdraw a business license or not to keep weapons), and – after an assessment entailing a comparison of laws – foreign criminal convictions handed down against Germans or against foreigners living in Germany. Additionally, search notices can be deposited in the Register.

More precisely, a file contains the person's name(s), gender, address, nationality, date and place of birth, as well as the court that has issued the judgment and the case number, the date the judgment became final, the description of the offence(s) (e.g., 'bodily injury'), and the relevant norm(s) of the Criminal Code (e.g., '§ 223 StGB'). With regard to the latter, it is important that not only the norms that define the offence, but also all norms that relate to the sentence and its enforcement are included, particularly the fact that a sentence of imprisonment is suspended (and the length of the probation term), that a probation officer is appointed, or, in cases of day fines, the number and amount of the daily fine. Also any additional measure (e. g. withdrawal of a driving licence) must be registered. Finally, everything with regard to the completion or other later developments relevant to the execution of the sentence has to be registered to get a complete picture of the course of events. Certain privileges apply to juveniles and young offenders up to 21 if they were treated as juveniles in court: Most sanctions according to the Juvenile Justice Act (Jugendgerichtsgesetz, JGG) will

[13] In accordance with Art. 1 of the Federal Central Criminal Register Act (Act on the Central Criminal Register and on the Register of Youth Offences = Gesetz über das Zentralregister und das Erziehungsregister; short: Bundeszentralregistergesetz – BZRG) of 18 March 1971.

[14] Federal Office of Justice, http://www.bundesjustizamt.de.

[15] The Federal Office of Justice in Bonn is the central service authority of the federal German judiciary, and is the port of call for international legal transactions (in part. in the EU context). It is part of the subordinate area of the Federal Ministry of Justice.

not be registered in the Federal Crime Register but in an additional register, to which access is far more restricted. Only a prison sentence ('Jugendstrafe', Art. 27-30 JGG) - suspended or not - will be included, that means only about 16% of all sanctions issued against juveniles and adolescents (Heinz 2008, data for 2006). Also, drug addicts who have committed the offence because of their addiction (Art. 17 BZRG) may benefit from certain privileges, so these circumstances are also recorded in the registry (in particular for those that undergo drug therapy [Art. 35-38 BtmG]). These provisions seem to be a special source of errors and obviously the persons concerned do not profit from them because the relevant circumstances are often not recorded properly (Pfeiffer, 2000).

Access to criminal records

The detrimental impact of a criminal record on the offender´s re-integration into society may depend on the determination of who can access it. In Germany, two types of access to the information have to be distinguished:

- access to the register itself;
- access to some of the information via a so-called certificate of conduct.

Access to the register (complete register statements)

Referring to the aforementioned aims of keeping a register, access not to the register itself, but to register information is possible mainly for purposes of the criminal justice system and certain administrative procedures as well as for research. Unrestricted access to all information (Art. 41 BZRG) by requesting a so-called register statement (Bundeszentralregisterauszug) thus is possible for courts, public prosecution and prison administrations, criminal investigation departments of the police and the tax authorities, and specialized administration agencies that deal with particularly sensitive areas, such as agencies for the supervision of the private security business, drugs and pharmaceutical products, radiation protection, or flight safety. Most important – and problematic - in this regard is the unrestricted access of the authorities responsible for foreigners, immigration, asylum and naturalization (particularly because there is an additional register, the Central Register of Foreign Nationals (Ausländerzentralregister, AZR)[16]).

An additional protection of the person concerned (constitutional right to 'informational self-determination'[17]) is provided by Art. 42 BZRG: He or she may inspect his or her files upon request, but only in a court room and alone (and without making copies or notes) to make sure that he or she is not forced to disclose any information to third persons (e. g. employers). When researchers apply for access to information, they get it anonymized as far as possible and several restrictions apply (Art. 42a BZRG).

[16] It is kept by the Federal Office for Migration and Refugees. The problems with regard to data protection and possible discrimination cannot be discussed here; a critical account can be found e.g. in Hassemer & Starzacher 1995. Meanwhile the Court of Justice of the European Communities in Luxembourg (C-524/06) has decided that the system for processing data relating to Union citizens that differ from the national rules relating to the personal data of citizens of the State in question constitutes a breach of the respective EU legislation (Huber vs. Germany, Official Journal of the European Union, 21.9.2009). This was found particularly because more data could be used for criminal law enforcement purposes than is the case with regard to German citizens. The practical problems relating to residence permits etc., however, certainly are more important for Non-EU citizens.

[17] This represents another fundamental right developed in 1983 by the FCC from Art. 2 of the Basic Law (personal freedoms); BVerfGE 65, 1 ('Volkszählungsurteil' [Census judgment], 15.12.1983; in English language http://www.law.ed.ac.uk/ahrc/personality/gercases.asp#Volksz%C3%A4hlung).

The certificate of conduct

Assuming the criminal and administrative authorities handle the information of the register carefully, no private individual has access to the full register information. Also with regard to hiring or concession procedures, the person concerned remains - technically – master of the information, because only he or she can apply for a so-called certificate of conduct if needed.[18] The crucial question, of course, is: Who may request such a certificate from a person who wants a job (or a license)? These questions relate to labour and partly to public law[19] and are characterized by the legitimate interest of the employer to know who he is hiring and the interest of an (ex-)offender not to be discriminated against because of his or her criminal past. Again, two types of certificate have to be distinguished: firstly, the certificate of conduct for private employers and secondly, the certificate of conduct for public employers and authorities that are responsible for licensing in different areas.

No entry in the certificate of conduct for minor offences

As mentioned above, according to Jeschek and Weigend (1996), a first step to rehabilitation for minor offenders (or rather a countermeasure to de-socialization) must be seen in the fact that minor offences (punished with a maximum of 90 day fine units or three months of imprisonment) are usually not included in a certificate of conduct. As a rule, the inclusion of entries and later on the deletion of entries depend on the actual sentence, not on the legal classification (possible penalty *in abstracto*) of an offence. That means that minor offences of first offenders are usually not included in the certificate because they were punished mildly, while the same minor offence committed by a repeat offender may be included. My own experience has shown that judges (and defense counsels) are well aware of this fact when they determine a sentence.

Following Art. 32 BZRG, convictions will not be included in the certificate of conduct in 12 different cases. By far the most important regulation refers to day fines and very short prison sentences: a day fine below 90 units or a prison sentence below three months will not be included in the certificate if no other entry can be found in the register. Roughly[20] 77 % of all offenders convicted receive day fines below 90 units (of course not all of them being offenders without other entries) – this clearly shows the immense quantitative impact of the regulation. Further restrictions on including entries in the certificate of conduct again apply to juveniles, where only non-suspended prison sentences of more than two years will be included. This also applies to those drug addicts whose prison sentence of not more than two years is suspended because they are undergoing therapy or whose prison sentence is suspended for other reasons but the crime they have committed was linked to their drug addiction (provided that there is no other entry in the register). All other entries in the register must be included in a certificate of conduct, and since 1998, as an exception to the rule, most sexual offences must be included regardless of the actual penalty (Art. 32 I BZRG; Art. 174-180 and 182 Criminal Code).

The great significance of these regulations lies in the fact that a person applying for a job is legally entitled to say ‘no’ when a future employer asks him whether he has a criminal record

[18] The fee for the certificate of conduct currently is 13 €.

[19] The question, whether a person has a criminal record or even to present of certificate of conduct has been declared legally inadmissible in certain situations e. g. when a person wants to rent a house (Derleder &Pellegrino, 1998: 550.)

[20] Traditionally, Germany has a very high share of fines: In 2007, 81,7% of all sentences (624,529 out of 776,277) for adults were fines (Strafverfolgungsstatistik by Statistisches Bundesamt [www.destatis.de] and own calculation). In these numbers, traffic offences (as long as they are criminal offences) are included.

(Art. 53 BZRG; some restrictions to that rule, again, apply in certain cases for public purposes, see below).

The certificate of conduct for private purposes

The certificate of conduct for personal purposes (private certificate of conduct) is only sent to the person making the application. It is not absolutely clear in which cases a future employer may ask for a criminal record and thus may request a certificate of conduct as a proof. In general terms, jurisprudence has declared such a question admissible in 'recruitment procedures for positions where the nature of work makes personal integrity ('Unbescholtenheit') indispensable.'[21] This has been clarified in extensive case law (Richardi, 2005: § 611, Marg. No. 157 – 159) which has restricted the possibilities of a future employer to asking only for convictions that are directly relevant for the job: relating to traffic offences for an application as lorry driver; property offences for an application as teller, and so forth. In those cases and for criminal offences that may have importance for carrying out the job, a future employee must tell the truth about his or her criminal record; if not, this is considered a breach of (pre-)contractual duties and justifies the prompt dismissal of the employee. If the employer has sustained a financial loss, the employee may be held liable for fraud ('Anstellungsbetrug', § 263 PC) as well. It should be noted, however, that usually the employer may not request the certificate itself (because other – in this case irrelevant – convictions could be included). This restriction was developed by the labour courts and takes into account the interpretation of Art. 2 Basic Law by the FCC. It is often criticized by employers and politicians.

With regard to any workplace that has to do with children, this criticism was successful: As mentioned above, in 2009 the so-called 'extended certificate of conduct' ('erweitertes Führungszeugnis', Art. 30a BZRG) was invented in order to better protect children and young persons or others who are in a dependent position. It includes all convictions, regardless of the actual penalty, for sexual offences and amends the above mentioned catalogue e. g. by less severe sexual offences such as exhibitionism. With this legal reform, all employers in the area of child care, youth welfare institutions, schools,[22] and so forth should be obliged to check their employees (and applicants for jobs) by demanding an extended certificate. The group of persons concerned is almost unmanageable, because employers (and organizers of voluntary work with children) may also ask for an extended certificate for school bus drivers, attendants in public swimming pools, trainers, and so forth. Although the prohibition to employ persons who have been convicted for a sexual offence and certain other (severe) crimes only relate to sexual offences of all kinds, the certificate of conduct makes other entries visible (Pfeiffer 2010), even if an employer of a pool attendant usually would not have been in a position to ask for a criminal record e.g. with regard to property offences. According to media reports it seems that the reform so far has been implemented only hesitantly, mainly because of the vast number of persons concerned.

Special 'Employer´s certificates' that would contain all entries that could be relevant for a specific job were requested by many lawyers and politicians also for the financial sector (e.g., insurance companies, banking institutions). They argued mainly with liability and image problems and often referred to examples from other countries (namely the Dutch, see also

[21] E. g. Federal Labour Court - Bundesarbeitsgericht (20. 5. 1999), DB 1999, 1859.

[22] A teachers association was the only pressure group that openly advocated against this extended certificate with the argument that it creates a general suspicion against persons who want to work with children and creates a climate of fear and mistrust (Gewerkschaft Erziehung und Wissenschaft, www.gew.de, press release 15 April 2010).

Boone, 2011). Although respective new legislative provisions were already drafted some years ago, at the moment no further reform is planned (Hohenstatt, Stamer, Hinrichs, 2006,: 1065).

The certificate of conduct for public purposes

The certificate of conduct for presentation to a German authority (certificate of conduct for official purposes) must be requested by the person concerned,[23] but is sent directly to the authority. Fewer restrictions than for private certificates apply in order to enable the authorities (in cases where they do not have unrestricted access, see above) e.g., to assess the suitability of somebody who applies for a commercial licence. This also refers to anybody who wants to be employed by a public authority (including universities).

Practical implications

Although I have listed several legal provisions that aim at protecting ex-offenders against discrimination and helping to re-integrate them into working life, practice may look different. First of all, employers may ask more questions and request more certificates than they are entitled to. Secondly, even if this were not the case, the system of different regulations named above already may block the path for many applicants with regard to a lot of workplaces (in particular where public authorities are either the employers or are otherwise concerned): E.g. nobody who has been convicted for drug offences (and certain other offences) may employ or instruct juveniles according to the Youth Employment Protection Act (Art. 25 Jugendarbeitsschutzgesetz). One of the booming parts of the service sector is geriatric care – for employers in this area, a legitimate interest with regard to a criminal record containing certain property but also violent offences cannot be denied. The same can be said about another booming branch, the security companies, but also for classic jobs that are often chosen by persons with few professional qualifications such as taxi-driving etc. (examples taken from Veith [1999: 132] who explicitly recommends probation officers to take these problems – be it in the private or the public sector - into account). It might thus be difficult for ex-offenders to find work because of their record but additional problems, in particular for untrained persons in the modern, highly specialized labour market, often may be in the foreground (e.g. Wirth, 2006).

It is, however, not clear, whether the generally prevailing idea that somebody, who has a criminal record will *therefore* not get a job, is always justified. Empirical research has been conducted in Germany to evaluate several projects that focused on re-integrative programs for the transition from prison to working life (within the EQUAL Initiative by the EU; Wirth 2006; 2007; 2009). These studies indicate that this assumption may not always be true: 275 officials in temporary employment agencies were asked whether they would employ ex-prisoners. Even in the group that had no previous experiences with ex-prisoners as employees only 10% explicitly said 'no, never'; about 50% had no reservation at all (Schmitz et. al., 2009). It is debatable whether these results can be generalized because the survey was connected to a relatively large and well-known project that also received media coverage. This project was linked to a comprehensive strategy of prison education (cf. additional professional training for prisoners resulting in formal certificates), preparation for release and aftercare. The answers thus may also reflect a certain degree of social expectancy. On the

[23] The authority must grant inspection of the certificate of conduct to the person making the application on request. The person making the application may require that the certificate of conduct, if it contains entries, is first of all sent to him/her by a Local Court of his/her choice for inspection. The registration authority must inform the person making the application of this possibility. The Local Court may only permit inspection by the person making the application in person. The certificate of conduct is to be passed on to the authority after inspection or, if the person making the application opposes this, is to be destroyed by the Local Court.

other hand the results suggest that as long as the target group is well-informed (both about the program and about the past of the potential employee) and the ex-prisoner is backed by institutional support the readiness to employ him or her is far higher than expected.[24] It seems to be a promising strategy to appeal to the 'social conscience' of potential employers via their umbrella organizations: A follow-up project is now concentrating on networking with the regional chamber of crafts and its associated, mainly small and mid-sized companies (Bex, Grosch, Wirth, 2010).
Nevertheless, having a criminal record may strongly impede the way (back) to a secure civil existence, particularly in times (and regions) of high unemployment. To help ex-offenders in desisting, step two and three - no further inclusion in the certificate of conduct after a certain period and finally a removal of entries in the register if the person concerned has not reoffended - on the way to rehabilitation (Jescheck, Weigend 1996, see above) are necessary.

Expunging techniques: desistance-supporting measures

Following the classification of Herzog-Evans (2011b), expunging techniques performed with regard to the criminal records may be divided into three sub-groups: those which are granted automatically; those which are granted based simply on the absence of further reconvictions and those which require some form of desistance evidence. This classification can easily be adopted for the German system, but again it has to be distinguished between the register itself and the certificate of conduct. The legislation has created a graduated (and complicated) system of deadlines. The expiry of recording periods results first in a ban from inclusion of convictions in a certificate of conduct (in the model by Jescheck & Weigend, the second step of rehabilitation). In a last (third) step, after expiry of another period, they are finally removed from the Register altogether (cf. sections 34 and 46 of the Federal Central Criminal Register Act). New convictions lead to suspension of time limits or may lead to the consideration also of minor crimes. As already mentioned above, certain privileges apply to juveniles and drug addicts. On the other hand , stricter rules apply for those convicted for sexual offences.

Automatic measures
According to Art. 24 BZRG, all entries will be removed from the register three years after the official notification of the death of a person. The same applies to entries for persons of 90 years of age. Entries that relate to the fact that a person was not convicted because he or she is not criminally responsible due to a mental disorder, are removed automatically after 10 or – in cases of felonies – 20 years.

Automatic measures based on the mere absence of further reconviction
No further inclusion in the certificate of conduct
According to Art. 33 BZRG, convictions shall no longer be included in the certificate of conduct on expiry of specific deadlines. This, however, is not the case when life

[24] It was also part of a transnational network (consisting of a German, an English, a Dutch and a Hungarian project) with similar aims and approaches. Evaluation results with regard to employers attitudes were, apart from the German results, only obtained in England (but with a different question). Here, the vast majority of employers in the sample would consider a job applicant with a criminal record for employment, but the type of their offence was seen as crucial. The relevance of the offence to the job was also seen as pivotal by most employers. A 'hierarchy' of offence types existed, whereby the majority of employers would never consider for employment those with convictions for sexual offences and arson. The most important factors that would dissuade an employer from employing an ex-offender was the risk to customers and to staff. The least important factors were lack of motivation to work hard and ex-offenders not deserving to be in employment (only two percent found these very important). Also in this sample, more than 40% have had experiences with employing ex-offenders (Langenhoff et al., 2007).

imprisonment has been imposed if (after 15 years or more), no parole or pardon has been granted; or when preventive detention has been ordered, or, in certain cases of mental hospital orders. The length of the period before the expiration of which a conviction will no longer be included in the certificate differ (Art. 34 BZRG). It is

- three years after convictions for offences that are punished with a suspended sentence of less than one year;
- five years for most other convictions;
- except convictions for sexual offences with a punishment of more than one year, the period here will be ten years.

The period starts with the day of the final judgment and is extended by the length of the respective prison sentence; in cases of life sentences where parole is granted this extension is at least 20 years. The effect of the expiry only occurs when no other entry can be found; no reconviction has been recorded and all sentences have been fully executed. Whenever more than one conviction is recorded in the register, the latest conviction overrides and defines the expiring date. This means nevertheless that an average criminal act may disappear from the certificate of conduct five years after the full execution of a sentence.

Redemption of convictions

Full redemption (with the effect that the convictions may not be used against a person in legal matters any longer) can be achieved after longer periods, usually three times as long as the periods just mentioned. More specifically, these periods are

- five years for all convictions that result in a penalty of less than 90 day fine units (as long as no sentence of imprisonment exists in the register; several smaller day fines are irrelevant); of penalties of imprisonment of less than three months or, for juveniles, of less than one year (or two, if suspended);
- ten years for convictions that result in a punishment of less than one year of imprisonment, if suspended (certain restrictions apply); in cases of juveniles all other convictions;
- 15 years in most other cases;
- with the exception of 20 years in cases of sexual offences that result in a punishment of more than one year of imprisonment.

Measures requiring some form of merit

It is possible for the ex-offender to apply for an earlier ban from inclusion in the certificate of conduct (Art. 39 BZRG) or an earlier deletion (Art. 49 BZRG) of convictions in the register. Assuming that the law always has an average case in mind, these legal possibilities are mainly hardship regulations to avoid in rare cases additional discrimination of the person concerned that is contrary to the legal aim as long as this does not affect public interests. In the most comprehensive handbook on the Federal Central Criminal Register Act (Götz & Tolzmann, 2000: Art. 39), only very few examples are mentioned; e. g. when foreign convictions are included in the criminal records which seem to be comparatively (too) harsh; when a rare chance of finding a job will otherwise be lost and the expiry period is almost over etc.

Both privileges are not granted by a court but by the Federal Office of Justice which administers the registry. In our context, the procedure following such a request is interesting: A hearing of the judge of first instance or other authorities concerned is possible, but not always required. It is assumed that the applicant himself will not be heard – the chance to acknowledge positive developments and thus to encourage ongoing desistance in a formal hearing is therefore not taken into account at all. The cases mentioned in the handbook clearly show that not so much the question ‘does the claimant deserve it?’ (thus: merit), is relevant; but unintended additional disadvantage as a consequence of the conviction

(Rebmann, 1983: 1513). Only the consideration of restorative justice elements (cf. full and speedy compensation for the victim which may represent a good reason for earlier removal of entries [Götz &Tolzmann, 2000: Art. 49]) involves the aspect of merit.

Rehabilitation rituals: desistance acknowledgement measures

Apart from the possibility of introducing a formal hearing of the applicant in the procedure mentioned above, one more possible option – that of introducing a formal rehabilitation ritual that 'celebrates full desistance' (Herzog-Evans, 2011b) - can be found in the Juvenile Justice System. Here, in addition to the register privileges for juveniles I have mentioned already, a so-called 'elimination of the penal blemish' (Beseitigung des Strafmakels) can be declared by the judge of a juvenile court (Art. 97 Youth Justice Act). This declaration is possible for juveniles under 18 and young offenders up to 21 as long as they have been treated as juveniles in the criminal procedure. It requires a request by the young person concerned, his or her counsel, legal representative etc. or the public prosecutor or can be declared by the court ex officio. This can be done (usually) not earlier than two years after full enforcement or remittal of the remainder of a sentence. With regard to our topic, the procedure and the material requirements are more interesting: According to the law, the juvenile has to prove that he or she is (now) an 'integrated personality', is 'righteous' and has shown 'impeccable conduct'. Sometimes it is argued that simply leading a law-abiding life complies with these requirements (Ostendorf, 2009, § 97 marg. note 7). In my opinion, the wording of the laws has to be understood in a way that it requires 'more', e.g. unpaid work for voluntary organizations etc. In cases where such a request is made, the law provides that the (ex-)convict, parents or legal representatives, the competent youth authority and, if applicable, a school representative are heard. This provision would enable the judge to create a form of roundtable that may acknowledge desistance and thus strengthen the ex-offender in his ongoing desistance process. It seems, however, that this is not the case: statistics or empirical findings with regard to that kind of procedure are not available, nor is jurisprudence. The relevant commentaries or handbooks (Ostendorf, 2009; Eisenberg, 2009) only provide general considerations of a formal kind, usually only referring to a certain risk of stigmatization when the school is involved or the court gathers information from third parties. As far as can be seen, the chance of encouraging the young offender is never discussed.

The German system, in short, does not leave much leeway for ceremonies that would formally acknowledge desistance. The ex-offender does not even receive a notice once his or her record has been cleared. As indicated above, an official court ceremony seems to be an idea that appears very strange to the German system and judicial (self-)concept.[25] When Maruna (2001: 161) describes occasions where quite powerful 'redemption rituals' (rather accidentally) took place in a courtroom, he writes, from the viewpoint of the offender, 'Suddenly and unexpectedly, …, there is justice.'. This, in my view, is a crucial point: It appears to be more a question of procedural fairness (or procedural justice [Tyler, 1990/2006: 115; Tyler, 2008]) than of redemption when positive developments are acknowledged within the criminal procedure. There are several stages where – to come back to the German system – the court is obliged to take into account any step towards desistance. When determining a sentence (which is done in the same hearing in which guilt is established and, at least in adult cases, without the involvement of pre-sentence reports and court social workers) it must take

[25] Maybe this skepticism also stems from the 1920s: Kurt Tucholsky, one of Germany´s most brilliant journalists and poets during the Weimar Republic, still very popular today, who happened to be a lawyer (and who worked as defense counsel), harshly criticized judges (and prosecutors). They - in his view – patronized the accused by granting all sorts of deserved or undeserved mitigations instead of impartially acknowledging the relevant facts for sentencing. In his essay, he calls the judges and prosecutors 'Their lordships: the rewarders' – 'Die Herren Belohner' (Tucholsky, 1952: 84).

into account all relevant circumstances 'in favour of and against the offender' (Art. 46 Criminal Code, Principles of sentencing), and it has to do this explicitly in the hearing. Among these circumstances is 'the conduct after the offence', the law mentions particularly restorative efforts. Another opportunity where a court has to acknowledge positive developments is the hearing before deciding on early (conditional) release (Art. 57 Criminal Code; Art. 454 Code of Criminal Procedure).

To put it less technically: It is part of a judges' 'job description' to assess positive developments – if this is not done, it is a lack of fairness and a lack of professionalism. Of course, reality may look different and often does, which may partly be explained by the heavily theory-oriented education of German lawyers and judges. As far as can be seen, in Germany no empirical research has been conducted that addresses this question so far. This perception of procedural fairness by young persistent offenders and its impact on desistance and recidivism will, however, be included in future research by Boers and colleagues (2010).

Conclusion

To summarize: An ex-offender in Germany has a relatively strong formal legal position - the constitutionally guaranteed right to re-socialization with a strong emphasis on his personality right. This includes the right to be left alone once the sentence is executed and has implications less for the establishment of the criminal record as such than on the question of who can access the information recorded. Here, the possibilities for private parties, in particular private employers, are (still) rather limited. A problem however arises from the fact that the Federal Criminal Register is accessible by several State authorities who themselves keep other registers, namely the federal register for foreign nationals, and may crosslink this information – this situation will be aggravated with intensified crosslinking and exchange of register information within the EU. Another problem is that the system of keeping and removing entries in the register has been changed: Since 1998 not only the length of the sentence (and thus the gravity of the offence) but the character of the offence may be decisive; sexual offenders clearly being the target group of much harsher provisions. This is even more pronounced since the 2009 reform that created the 'extended certificate of conduct' and allows far-reaching access of employers to criminal records concerning anybody who might be involved in working with children. Criticism that refers to this as a populist measure that creates a general climate of mistrust seems to be justified.

The impact of criminal records on the chances of ex-offenders to gain ground in the (regular) labour market is significant because several important job sectors may be blocked depending on the nature of the offence that is included in the certificate of conduct. Nevertheless, at least with regard to the process of transition between prison and re-entry into the job market, other problems relating to the lack of professional qualification or social skills seem to be in the foreground. The situation for this target group can be influenced favorably by combining professional qualification measures in prison with practical support in the re-entry phase that includes help with employment agencies and possible employers. A strategy that appeals to the 'social responsibility' of employers and involves umbrella organizations of employers during the set-up and implementation of re-entry programs is promising.

With regard to 'legal re-biographing' (Maruna 2001) the German system provides for different steps. The periods before entries will be blocked from being included in a certificate of conduct and particularly before they are deleted, are quite lengthy. Nevertheless the system as a whole, including special rules for juveniles and different possibilities to shorten these periods, is adequate. The German system, however, does not leave much leeway for ceremonies that would formally acknowledge desistance. It nevertheless obliges the judge or a court on various occasions during the criminal procedure to acknowledge positive developments of an offender that might at least mark important steps on his way to desistance; not as a matter of redemption, but as a matter of procedural fairness.

References

Becker, H. (1963/1997) *Outsiders. Studies in the sociology of deviance.* New York, NY: Free Press.

Bex, H., Grosch, B., Wirth, W. (2010): ‚Integrationsplanung – Netzwerkbildung – Arbeitsmarktintegration' In: Kerner, H.-J., Marks, E. (Eds.), Internetdokumentation des Deutschen Präventionstages. Hannover 2010, www.praeventionstag.de/Dokumentation.cms/1275 (last retrieved 28 September 2010). Boers, K. (2010) ‚Delinquenz im Lebensverlauf.' Paper presented at the Conference „Kriminologie und Strafrechtswissenschaft zwischen 1950 und 2010', Greifswald 13-15 May 2010.

Boone, M 'Judicial Rehabilitation in the Netherlands: Balancing between safety and privacy' European Journal of Probation 3(1): 63-78

Cornel, H. (2009) ‚Zum Begriff der Resozialisierung' In: H. Cornel et al. (Eds.): *Handbuch der Resozialisierung.* 3rd ed. Baden-Baden: Nomos.

Derleder, P.; Pellegrino, D.(1998) ‚Die Anbahnung des Mietverhältnisses' Neue Zeitschrift für Mietrecht 1: 550-554.

Eisenberg, U. (2009) *Jugendgerichtsgesetz*. 14th ed. München: Beck.

Götz, A., Tolzmann, G. (2000): *Bundeszentralregistergesetz. Kommentar*. 4th ed. Stuttgart: Kohlhammer.

Hassemer, W.; Starzacher, K. (Eds.) (1995): *Datenschutz - auch für Ausländer?* Baden-Baden: Nomos.

Heinz, W. (2008): *Das strafrechtliche Sanktionensystem und die Sanktionierungspraxis in Deutschland 1882 - 2006. Stand: Berichtsjahr 2006 Version: 1/2008*. http://www.uni-konstanz.de/rtf/kis/Sanktionierungspraxis-in-Deutschland-Stand-2006.pdf (last retrieved 29 September 2010).

Herzog-Evans, M. (20011a) 'Editorial' *European Journal of Probation* 3(1): 1-3

Herzog-Evans, M (2011b) 'Judicial rehabilitation in France: Helping with the desisting process and acknowledging achieved desistance' *European Journal of Probation* 3(1): 4-19

Hohenstatt, K.-S.; Stamer, K.; Hinrichs, L. (2006) 'Background Checks von Bewerbern in Deutschland': Was ist erlaubt?', *Neue Zeitschrift für Arbeitsrecht 23*: 1065-1069.

Jescheck, H.-H., Weigend, T. (1996): *Lehrbuch des Strafrechts. Allgemeiner Teil.* 5th ed. Berlin: Duncker&Humblodt.

Langenhoff, G.; Haslewood, I., Hégely, P.; Wolters, R. (2007): 'Transitions in prison (TIP): Involvement of Employers. Final report', http://docs.minszw.nl/pdf//4/2008/4_2008_1_19928.pdf (last retrieved 30 September 2010).

Maruna, S. (2001): *Making good: How ex-convicts reform and rebuild their lives.* Washington, D.C.: American Psychological Association.

Maruna, S. (2011). 'Reentry as a rite of passage', *Punishment and Society 13*: 1-27.

Ostendorf, H. (2009): *Jugendgerichtsgesetz.* 8th ed. Köln: Heymanns.

Pfeiffer, J. (2000) 'Die unbeschränkte Auskunft aus dem Bundeszentralregister und das Führungszeugnis', Neue Zeitschrift für Strafrecht 20: 402-405.

Pfeiffer, J. (2010) 'Schutz von Kindern und Jugendlichen durch ein neues „erweitertes Führungszeugnis'', Neue Juristische Wochenschrift 63: 1190-1110.

Priestley, P., Vanstone, M. (2010): *Offenders or Citizens? Readings in Rehabilitation.* Cullompton: Willan.

Rebmann, K. (1983) 'Einhundert Jahre Strafregisterwesen in Deutschland', Neue Juristische Wochenschrift 46: 1513-1517.

Richardi, R. (2005) '§ 611 BGB', In G. Annuß et al. *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch. Buch 2: Recht der Schuldverhältnisse.* Berlin: Sellier - de Gruyter.

Schmitz, B., Langenhoff, G., Rohlmann, J. (2009) 'Übergangsmanagement mit Zeitarbeitsunternehmen' Bewährungshilfe 56: 165-178.

Sonnen, Bernd-Rüdiger (2008) 'Rechtsfolgen nach dem Registerrecht', In H. Cornel et al. (Eds.): *Resozialisierung.* 3rd ed. Baden-Baden: Nomos.

Tucholsky, K. (1952) *Zwischen gestern und morgen. Eine Auswahl aus seinen Schriften und Gedichten. Herausgegeben von Mary Gerold Tucholsky*. Hamburg: Rororo.

Tyler, T. (1990/2006) *Why people obey the law (With a new afterword by the author).* Princeton: Princeton University Press.

Tyler, T. (2008) 'Procedural Justice and the courts', *American Judges Association Court Review 44*: 26-31.

Uggen, C., Manza, J., Behrens, A (2004) 'Less than the average citizen: stigma, role transition and the civic reintegration of convicted felons' In: S. Maruna, R. Immarigeon (Eds.) *After Crime and Punishment: Pathways to Offender Reintegration.* Cullompton: Willan.

Veith, H.-M. (1999). 'Das Bundeszentralregister', Bewährungshilfe 46: 111- 133.

Wirth, W. (2006) 'Arbeitslose Haftentlassene: Multiple Problemlagen und vernetzte Wiedereingliederungshilfen', *Bewährungshilfe 53*: 137-152.

Wirth, W. (2007) 'From Prison to working life. Networking for a successful transition. EQUAL initiative', http://ec.europa.eu/employment_social/equal/data/document/etg1-exa2-zubilis.pdf (last retrieved 29 September 2010).

Wirth, W. (2009) 'Aus der Haft in Arbeit und Ausbildung', *Bewährungshilfe 56*: 156-164.

Zyl Smit, D., Snacken, S. (2009) *Principles of European Prison Law and Policy.* New York: OUP.