



In summer 2012, as part of the Poverty is Not a Crime campaign, Housing Rights Watch conducted a survey of national laws that penalise or criminalise the behaviour of people who are homeless. Legal experts prepared country reports that describe the nature of anti-social behaviour laws, as well as other regulations or ordinances that affect homeless people.

The information in these reports was gathered from as many sources as available at the time they were prepared with publically available information only; some sections are incomplete due to the inaccessibility of the required data or lack thereof.

Germany

1. Introduction

In Germany, homeless people will rarely have to fear criminal prosecution. There are no criminal offences pertaining to homelessness as such. Even though homeless people are more likely to commit offences such as trespass, prosecution will only become a possibility where there is a complaint and the accused will not face severe punishment, but instead moderate fines.

The general activities of homeless people are no reason for administrative measures and do not result in regulatory fines either. Only special activities like aggressive begging, public nuisance and defecation in public will lead to police action, whereas silent begging, mere drinking in public and being homeless in general does not entitle the authorities to intervene.

2. Criminal Offences

In Germany, homeless people are less confronted with criminal sanctions, but rather with regulatory fines and with other administrative measures for the protection of public security and order. To provide a better understanding of the differences between these measures, the main principles of German criminal law (section 3) as opposed to the law on regulatory offences (section 4) and police and security law (section 5) shall be described briefly.

The main sources of criminal law in Germany are the German Criminal Code (*Strafgesetzbuch*) and the German Code of Criminal Procedure (*Strafprozessordnung*).

German criminal procedure is divided into several phases: the public prosecution and the police are responsible for the initial investigation of potential criminal offences (*Ermittlungsverfahren*). Whereas most offences have to be prosecuted *ex officio*, prosecution of some less severe offences, which frequently are the relevant types of offences for homeless people, such as insult, trespass, damage to property, theft of objects of minor value, is only possible if the aggrieved party files a complaint.

Even if the aggrieved party files a complaint, the public prosecution may decide not to pursue the case, but may instead ask the aggrieved party to appear as a prosecutor in court (*Privatklage*), e.g.

in case of trespass and insult.¹ Considering the fact that German law requires an attempt at amicable settlement between the aggrieved party and the accused (*Sühneversuch*) before the aggrieved party can initiate criminal proceedings,² it is not very likely in practice that these sorts of offences will be brought before a criminal court.

Once the public prosecution has collected sufficient evidence, it will file an indictment with the competent court.³ In cases of minor importance, however, it is common practice that even where there is sufficient evidence, the public prosecutors do not pursue the case further.⁴ Instead, the public prosecution might impose mild conditions and sanctions. According to statistics, of all the cases brought to the attention of the public prosecution (not restricted to homelessness), only *ca.* 12% result in an order of summary punishment, *ca.* 11% result in an indictment, and even fewer cases finally result in a criminal conviction.⁵ Thus, even when a homeless person commits a criminal offence, this does not imply that he or she will be convicted before a criminal court as due to the minor character of these sorts of offences it is quite likely that an indictment will not be filed.

Should the public prosecution decide to file an indictment, the trial court will independently assess whether there is sufficient evidence to start criminal proceedings (*Zwischenverfahren*). The criminal court proceedings will then take place before a judge or (in the case of higher courts) a panel of judges. There are no juries in criminal law proceedings in Germany. Criminal court proceedings follow strict constitutional principles to protect the accused, including the presumption of innocence, the right to a fair trial, the guarantee of an independent judge and the right to be heard.

Offences directly affecting homeless people

Sleeping rough and being homeless in general

There are no special criminal offences pertaining to homelessness. The former section 361 of the German Criminal Code, which criminalised vagrancy and begging as misdemeanours under threat of a fine of up to 500 German Marks or up to six weeks' imprisonment was abolished in 1974.

Although homeless people are not prosecuted as such any more, they are still under threat of punishment for the offence of trespass. Upon complaint, trespass is a criminal offence in Germany (section 123 German Criminal Code). Under this provision it is forbidden to unlawfully enter into the dwelling, business premises or other enclosed property of another, or into closed premises designated for public service or transportation without authorisation. Homeless people may commit the criminal offence of trespass if they stay in empty buildings, stations, shopping centres *etc.* without the consent of the owner, if the owner files a complaint with the public prosecution. Along with the privatisation of public places such as railway stations and shopping arcades, owners often deny access to vagrants and beggars, with the aim of avoiding annoying the sense of decency of others. Trespass in order to obtain shelter in inclement weather is the most relevant offence for homeless people in Germany.

¹ Sec. 374 German Code of Criminal Procedure.

² Sec. 380 German Code of Criminal Procedure.

³ Sec. 151 German Code of Criminal Procedure.

⁴ Sec. 153 et seq. German Code of Criminal Procedure.

⁵ Statistisches Bundesamt, Fachserie 10, Reihe 2.6, Rechtspflege, Staatsanwaltschaften, 2011, sec. 2.2.1.2.

Even if the aggrieved party files a criminal complaint, the prosecutor may choose not to pursue insignificant cases further, as has already been explained in the context of the German rules on criminal procedure. Even where the criminal offence is pursued *e.g.*, because the accused homeless person has committed it several times before, the homeless person will only have to fear a moderate fine in proportion to his or her income. The range of a first conviction would be in the region of 10 - 20 daily units. The fine will gradually increase in cases of recurrence.

Begging

Begging has not constituted a criminal misdemeanour in Germany since 1974. "Silent begging" does not constitute a regulatory offence either and does not entitle the police or the authorities to take any administrative measures.⁶ "Aggressive begging," on the other hand, may be an offence or may at least lead to administrative measures by the security authorities (*i.e.* the police and municipalities). Begging is aggressive if beggars address passers-by in a very obtrusive way, for example if beggars follow passers-by for several metres begging, pleading and gesticulating. Frequently this obtrusiveness is accompanied by physical contact in the form of plucking and holding the person's clothes.⁷

Aggressive begging

Aggressive begging may, if connected with physical contact or obstructing someone's path, theoretically qualify as coercion under section 240 of the German Criminal Code. Even aggressive begging will only constitute a criminal offence under qualified circumstances, though - it must be impossible for the victim to follow his true will, *e.g.* because the beggar obstructs his way or grabs the victim in a manner that he or she cannot easily sidestep and either forces him to give something or to take another, substantially different route. As this will only very rarely be the case, however, there is no case law on the criminal relevance of this behaviour,⁸ so this potential criminal offence is rather a theoretical possibility.

Offences indirectly affecting the homeless

Under German civil law, the owner of a property may prohibit a homeless person from entering his property even though the property is open to the public generally (a violation may then result in the criminal offence of trespass, as described above). As regards railway stations in particular, however, the railway company may not prohibit a homeless person from entering the premises, if he or she intends make use of the transportation services.⁹

Whereas German and European citizens are free to choose to live without a roof over their heads, foreign homeless people from outside the European Union may be expelled from Germany under sec. 55 of the German Residence Act. The police and other competent authorities are obliged to inform the public authority responsible for aliens when they learn of the prolonged homelessness of a foreigner.¹⁰

⁶ Higher Administrative Court (*VGH*) Mannheim, NVwZ 1999, 560.

⁷ Holzkämper, NVwZ 1994, 146.

⁸ The Higher Administrative Court (*VGH*) of Baden-Württemberg left the question open: Higher Administrative Court (*VGH*) Mannheim, NVwZ 1999, 560, 561.

⁹ Supreme Court of Bavaria (*BayObLG*) BayObLGSt 1976, 102.

¹⁰ Sec. 87(2) No. 3 German Residence Act.

Drinking Alcohol

Although drinking alcohol is not a criminal offence under German law, total intoxication may constitute a criminal offence under section 323a of the German Criminal Code. If the drunken person commits a criminal offence and cannot be punished for this crime because his drunkenness excludes his criminal responsibility, he may be held criminally liable for causing his total intoxication.

Public drinking as an illegal use of the road

In recent years, many municipalities have enacted local bye-laws on special uses of roads, declaring that settling for prolonged periods to consume alcohol or beg are impermissible special uses of the public roads. Several administrative courts have however held that these bye-laws are illegal.¹¹

In the state of Berlin, the Road Act provided that settling to consume alcohol is a special use of roads. Under this law, it would have been necessary to apply for a special permit which would not have been granted often because of the conflicting public interest. However this regulation was abolished in 2006 for reasons of deregulation.

“Dumpster diving” and theft

Aside from shoplifting, a homeless person might also commit the criminal offence of theft under section 242 of the German Criminal Code in the case of “dumpster diving” – foraging in rubbish bins for food or other items – provided that the owner of the rubbish has not yet given up his ownership. Homeless people would therefore regularly commit theft when they search the waste-bins of supermarkets for products that have just exceeded the “best-before” date but which are deliberately not given away for free.

However, under section 248a of the German Criminal Code theft of objects of minor value (*ca.* €50) is generally only prosecuted following a complaint by the aggrieved owner.

3. Administrative Offences

Besides criminal offences, German law provides for regulatory offences, which may play a more significant role than criminal offences with regard to homeless people. Regulatory offences are minor violations of the law that do not have the same moral stigma as criminal offences, although certain legal values have been violated and therefore this merits the imposition of a fine on the perpetrator. The most important legislation in this field is the Regulatory Offences Act (*Ordnungswidrigkeitengesetz*). Aside from this, local authorities (the municipalities) are empowered to decree local bye-laws to prevent danger to public security and order and on the use of the public streets and roads, and may declare infringements as regulatory offences.

Unlike criminal offences, administrative authorities will pursue these kinds of offences and the public prosecution will not be involved under regular circumstances. It is at the discretion of the administrative authority whether to pursue an offence; it may choose not to pursue it, even where there is evidence that the offence has been committed.

¹¹ Higher Administrative Court (*OVG*) Saarbrücken, NJW 1998, 251; Higher Administrative Court (*OVG*) Schleswig, NordÖR 1999, 381.

Homeless people might also face measures other than fines in Germany on the basis of the administrative law on police and security. If certain behaviour endangers public security or order, the competent security authorities may take the necessary measures to prevent a violation of public security or order. Public security and order comprise of life, health and property. Based on police and security laws, the competent authorities might, for example, prohibit the homeless person from entering certain premises. In contrast to criminal law and the law on regulatory offences, the purpose of these administrative measures is not to sanction a person's behaviour, but to protect public order and security.

The administrative law of police and security is within the competence of the German states (*Bundesländer*) and although there are similarities between the various police and security laws, the legal situation for homeless people might not be identical in all states.

Offences directly affecting homeless people

Sleeping Rough

Camping in forests and public places may constitute a regulatory offence under the state forest laws or the state laws on roads and streets and respective bye-laws. Many municipalities prohibit sleeping in parks and public places.

After the abolition of the criminal misdemeanour of vagrancy, municipalities in the 1970s made the attempt to prohibit vagrancy by police bye-laws. Such attempts were nullified by the administrative courts.¹²

Begging

In general, aggressive begging will not qualify as a public nuisance under section 118 of the German Act on Regulatory Offences. The offence of public nuisance is directed at gross contraventions of the acknowledged norms of decency and order. The threshold for infringement is high and German courts have held that apart from especially excessive cases aggressive begging generally will not qualify as public nuisance.¹³

Aggressive begging might be subject to administrative measures under the police and security laws of the states, if the public security or order is endangered.¹⁴ Homeless people could expect a ban from premises; if not obeyed the police might even take the person to the city limits. Aggressive begging might violate public security or order in several respects. Aggressive begging endangers public order, as it contravenes commonly accepted social norms.¹⁵ The police and security laws of most German states (*Bundesländer*) allow the authorities to take measures in case of an endangerment of public order. Such states include Bavaria, Baden-Württemberg and Rhineland-Palatinate, Lower Saxony (since 2003), Saarland and North Rhine-Westphalia (since 2010), whereas Bremen and Schleswig-Holstein do not allow measures in case of an endangerment of public order. Bremen, whose police

¹² Sec. 3(2) of the nullified bye-law of Baden-Baden of January 19, 1978, Higher Administrative Court (*VGH*) Mannheim, NJW 1984, 507: "It is forbidden on public streets, in public sites and institutions ... to roam in the manner of a vagrant".

¹³ Higher Administrative Court (*VGH*) Mannheim, NVwZ 1999, 560.

¹⁴ Holzkämper, NVwZ 1994, 146, 147.

¹⁵ Holzkämper, NVwZ 1994, 146, 149.

and security laws do not protect public order, enacted laws which entitle the municipalities to pass bye-laws on certain nuisances, including aggressive begging, in 1994.¹⁶ On this basis, the cities of Bremen and Bremerhaven have enacted bye-laws on public order which forbid aggressive begging under the threat of a fine of up to €500 / €2,500, especially if people are being hassled, held on to or touched.¹⁷

Offences indirectly affecting the homeless

The competent authorities may take measures to protect the homeless person, if he or she is homeless involuntarily, *e.g.* by providing shelter. In Germany, involuntary homelessness is regarded as dangerous for the person's health and life and therefore a danger to public security and order.¹⁸

Otherwise, if the person is homeless voluntarily, homelessness and vagrancy as such do not endanger public security or order and do not entitle the administrative authorities or the police to take any administrative measures.¹⁹ It would be unconstitutional in Germany to introduce police and security legislation that prohibits vagrancy.²⁰ The German Federal Constitutional Court has held that it is not for the state to change its citizens for the better and it does therefore not have the right to deprive them of personal freedom as long as they do not endanger themselves or others.²¹

Under qualified circumstances, the police can ban homeless people from premises to maintain public security. Such qualified circumstances might occur when the homeless person hassles by-passers and hinders them in their movement to force an expression of opinion on them.²²

Drinking Alcohol

Many municipalities try to ban the homeless from the inner cities indirectly by banning alcohol. The widespread consumption of alcohol is often seen as a catalyst for vandalism and violence. Recently it has become increasingly common for municipalities to prohibit the consumption of alcohol in their bye-laws, especially in pedestrian zones and public places. This is not specifically targeted at homeless people.

Standard clauses in bye-laws

Many cities and municipalities have prohibited settling or staying for a long time on public streets, sidewalks, green areas and recreation spaces for the purpose of consuming alcohol if third parties are considerably

¹⁶ Bremen Act on Legislative Powers of Municipalities (*Bremisches Gesetz über Rechtsetzungsbefugnisse der Gemeinden*).

¹⁷ Sec. 1 of the Local Law on Public Order of the City of Bremen; Sec. 10 of the Local Law on Public Order of the City of Bremerhaven.

¹⁸ Higher Administrative Court (*VGH*) Mannheim, NVwZ-RR 1996, 439.

¹⁹ Higher Administrative Court (*VGH*) Mannheim, NJW 1984, 507, 508.

²⁰ Cf. Kohl, NVwZ 1991, 620, 623.

²¹ German Constitutional Court (*BVerfG*) BVerfGE 22, 180, 219.

²² Cf. Higher Regional Court (*OLG*) Köln, NVwZ 2000, 350.

molested.²³ The police and security authorities may however only intervene using bans from premises or residence bans when the behaviour impairs public security, *e.g.* because the drunken (homeless) person commits a regulatory offence. The mere fact of being in such a location for a prolonged period of time in a drunken state is generally tolerated by the German legal order, as drinking constitutes the exercise of fundamental right of personal freedom.

However, the Higher Administrative Court (*VGH*) of Baden-Württemberg annulled such a bye-law of the city of Freiburg in the Breisgau in 2009 by for lack of certainty.²⁴

Bye-laws on public drinking in specific public places

Some municipalities have tried to decree a general ban on alcohol in their bye-laws in relation to specific locations and specific times. For example, the municipality of Freiburg in the Breisgau prohibited public drinking in the inner city with a localised and temporary ban on alcohol consumption in 2008. However, the Higher Administrative Court (*VGH*) of Baden-Württemberg declared this bye-law invalid in 2009, stating that it was not covered by the authorisation of the applicable police and security laws because the prohibited behaviour did not regularly and typically result in assaults.²⁵ The Higher Administrative Court (*OVG*) of Saxony-Anhalt annulled a similar bye-law in 2010.²⁶

Thus, courts meet local bans on alcohol in public with reserve. They seek to prevent the use of the police and security law for measures outside its remit.²⁷

Bye-law authorisations against public drinking

Because of this attitude of the German courts, it would be necessary for state laws to specifically authorise the municipalities to regulate alcohol consumption in bye-laws for this to become law. Such a provision exists in the state of Bremen, which authorises its municipalities to decree bye-laws against nuisance.²⁸ Accordingly, since 2006 staying for prolonged periods in public spaces to consume alcohol may be prohibited if other users of those public places are unacceptably impaired.²⁹ The cities of Bremen and Bremerhaven made use of this authorisation in the same year by imposing fines of up to €500 / €2,500 for violations.³⁰ In 2011, the Free State of Saxony also introduced a new section 9a to the

²³ Cf. recommendations of the Council of municipalities of Baden-Württemberg for the formulation of a respective bye-law, BWGZ 2007, 54; *cf.* also Higher Administrative Court (*VGH*) Mannheim, VBIBW 1999, 101.

²⁴ Higher Administrative Court (*VGH*) Mannheim, July 28, 2009 – 1 S 2340/08.

²⁵ Higher Administrative Court (*VGH*) Mannheim, NVwZ-RR 2010, 55.

²⁶ Higher Administrative Court (*OVG*) Magdeburg, March 17, 2010 – 3 K 319/09.

²⁷ Faßbender, NVwZ 2009, 563, 568; Finger, *Die offenen Szenen der Städte*, 2006, p. 214 *et seq.* and *passim*; Höfling, *Die Verwaltung* 33 (2000), 207 *et seqq.*; Volkmann, NVwZ 2000, 361 *et seqq.*; each citing relevant case law.

²⁸ Sec. 3a Bremen Act on Legislative Powers of the Municipalities (*BremGemRechtsG*).

²⁹ Sec. 3a No. 8 BremGemRechtsG.

³⁰ Sec. 3 of the Local Law on Public Order of the City of Bremen; Sec. 13 of the Local Law on Public Order of the City of Bremerhaven.

Saxon Police Law which authorises the local security authorities to enact localised and temporary bans on alcohol.

Fare evasion

Homeless people might use the public transport system without buying a ticket. This constitutes a criminal offence under section 265a of the German Criminal Code but is only prosecuted following a complaint by the aggrieved transport company in the case of transportation fares of minor value. The first complaint is normally not pursued. The second or third instance is likely to be punished by an order of summary punishment imposing a fine of 20-30 daily units.

Urination and defecation in public

Urination and defecation in public do not qualify as criminal offences, but regularly violate public order and constitute a public nuisance. In the cities of Bremen and Bremerhaven it is a regulatory offence to urinate or defecate in public.³¹ Similar provisions can be found in many other municipalities. Fines would regularly be in the range of €20-€100.

Miscellaneous ordinances and decrees

Homeless people might also be more likely, due to their situation in life, to commit other criminal and regulatory offences. If homeless people insult passers-by they commit the criminal offence of insult under Sec. 185 of the German Criminal Code. An insult may only be prosecuted upon complaint of the aggrieved person and even after a complaint the public prosecution will rarely file an indictment.

Homeless people might also be likely to commit a criminal offence by resisting enforcement officers under section 113 of the German Criminal Code, *e.g.* when police officers have to enforce a ban from premises.

3.3.1. Decriminalisation of the everyday activities of homeless people

The former criminal misdemeanours of vagrancy, begging and voluntary homelessness were abolished in 1974. Only some activities of homeless may meet the requirements of criminal offences, but in practice there will rarely be prosecuted. Moreover, these criminal offences are not specifically targeted at homeless people. Recently, municipalities have enacted bye-laws which might particularly affect homeless people. So far as bye-laws could have a discriminatory character they have been nullified by the competent administrative courts.

Repression of offences

Criminal penalties

Criminal sanctions stretch from fines to life imprisonment. Considering that homeless people will only face criminal offences of minor importance in Germany, imprisonment is of hardly any relevance. Criminal fines are imposed in daily units. The minimum amount is five days; the maximum is usually 360 daily units, depending

³¹ Sec. 3 of the Local Law on Public Order of the City of Bremen; Sec. 13 of the Local Law on Public Order of the City of Bremerhaven.

on the gravity of the criminal offence.³² The amount per day ranges from €1 to €30,000 depending on the income of the convicted person.³³ This system ensures that the fines have the same impact on offenders who committed comparable criminal offences, but have different financial situations. The convicted person is not expected to pay the fine immediately; payments may also be deferred or paid in instalments.³⁴ If the fine is not willingly paid, and cannot be enforced, imprisonment is imposed as a substitute for the fine. One daily unit is equal to one day in prison.³⁵ If the convicted person agrees, he can do charitable work to erase the imprisonment.³⁶

Administrative sanctions

The sanction for a breach of an administrative regulation is a non-criminal fine. The minimum amount is €5 and the maximum amount is €1,000, unless otherwise provided by statute.³⁷ Minor breaches of the law will be sanctioned with a warning (*Verwarnung*) of up to €35.³⁸ Following payment of the imposed fine the individual will not have a criminal record.

4. **Appeals procedure**
5. **National Case Law**
6. **International Case Law**
7. **Additional Information**

³² Sec. 40(1) German Criminal Code.

³³ Sec. 40(2) German Criminal Code.

³⁴ Sec. 42 German Criminal Code.

³⁵ Sec. 43 German Criminal Code.

³⁶ Art. 293 Introductory Act to the German Criminal Code; the amount of hours to be worked for varies from state to state.

³⁷ Sec. 17 para. 1 Regulatory Offences Act.

³⁸ Sec. 56 para. 1 Regulatory Offences Act.