



## STATEMENT ON THE DRAFT BILL BY JUSTICE MINISTER MARCO BUSCHMANN ON THE ALTERNATIVE CUSTODIAL SENTENCE

(translated to English by [DeepL](#))

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Justice Minister Marco Buschmann has presented a draft bill for Section 43 of the Criminal Code.<sup>i</sup> This states that people who cannot pay fines in criminal proceedings should be imprisoned (the so-called "substitute custodial sentence").<sup>ii</sup> As a result, about 56,000 people are imprisoned each year.<sup>iii</sup> The central reform proposal in the draft bill is that the duration of the alternative custodial sentence should be cut in half.

The Coalition for the Abolition of Substitute Imprisonment (hereinafter "the Coalition" or "we") rejects Justice Minister Bushman's proposal. **His proposal makes little substantive change to the current state of the law. Instead, we call for the immediate abolition of the alternative custodial sentence.**

Substitute imprisonment is the last and harshest consequence of a criminal justice system that punishes poverty, burdens people with large debts, and results in incarceration far too often.

In recent years, many academics, social workers, activists, and affected persons have called for the abolition of the alternative custodial sentence or published research supporting this call, and have introduced other important amendments.<sup>iv</sup> Justice Minister Bushman's proposal rejects this expertise and instead settles for minor changes. The Justice Department's proposals address only the "back end" of the process, when a person is facing or has already faced imprisonment, rather than addressing the structural problems of overcriminalization and large fines. The proposals also fall short of substantive reform of this "back end," as they merely shorten the length of the prison sentence rather than abolishing the alternative term of imprisonment altogether.

**Our view differs from the draft bill in one essential point: The federal government seems to be of the opinion that alternative custodial sentences are not a consequence of poverty and racism.**

However, this does not correspond to reality. Rather, the federal government's view demonstrates an alienation between the state and the people - an alienation that is only becoming more apparent in the current inflation crisis.

In this briefing, we present our assessment of the proposal and outline our demands. We also attach an FAQ that provides background on fines and alternative sentences and explains our position on other reform proposals (including unpaid work and payment plans).

### What does the proposal provide for?

Under the central proposal of Justice Minister Bushman's reform, persons incarcerated for substitute prison sentences would spend only half as many days in prison as under current law. The number of unpaid hours a person must serve to avoid imprisonment (an option provided for in the law) would also be reduced. The reforms also call for individuals to be better informed that they can perform unpaid work or establish a payment plan before the substitute term of imprisonment is enforced.<sup>v</sup>

### What are the weaknesses of the proposal?

The proposal will not achieve the Department's stated goal of reducing the number of individuals incarcerated for alternative sanctions: The proposal will only reduce the length of incarceration. This means that even after the long-awaited change to the current system, more than 50,000 people in Germany will continue to be imprisoned each year because they cannot pay their fines. This is unacceptable: time in prison is harmful, and even short prison sentences throw a person's life out of balance.<sup>vi</sup> Justice Minister Bushman's proposal does not put an end to this injustice - it does not even substantially reduce it.

The reform proposal argues that the number of substitute prison sentences will decline because more people will be able to perform unpaid work as fewer hours are required. However, this is unlikely to happen. Reducing the number of hours required may help people who are already able to do unpaid work to complete it more easily. However, many people simply cannot complete unpaid work due to their other commitments, mental health, substance use, etc. In recent years, the percentage of people doing so-called "community service" has decreased significantly, even though the number of hours required by the state has not increased.<sup>vii</sup>

The proposed changes to the notice period also started too late, after conviction, and do not address the larger problem that individuals do not always learn of the charges against them and the penalty in time to challenge their conviction or the amount of the fine.<sup>viii</sup> Therefore, at best, those enhancements would give these people more time to pay, or make them aware of the alternative of unpaid work. Neither, however, will be feasible for many facing large fines.

How does the state justify not doing more? It simply denies the fact that people do not pay the fine because they cannot afford it.<sup>ix</sup> At the same time, the proposal specifically mentions that the public supports reform because the current system is obviously harming poor people.<sup>x</sup> So why not do more to address this reality? The state has shown little political will to change our systems to address poverty and inequality, despite the current situation. This has been demonstrated by recent proposals for the Citizen's Income and the Relief Package, both of which have been criticized for reducing the burden of rising

Do not sufficiently reduce energy costs for low-income people.

## OUR DEMANDS

We demand:

- **The abolition of substitute imprisonment.** Simply put, prison does not solve problems and causes harm. **Yet every year, some 56,000 people are sent to prison for failing to pay a fine.** Just one night in jail puts people at risk of losing their homes and jobs, and causes emotional and psychological damage. Many suicides in prisons occur in the first days and weeks after incarceration.<sup>xi</sup> People also return home from prison in poorer health, additionally traumatized and needing to make a fresh start.

**Substitute imprisonment ensures that people without financial means are more likely to be imprisoned.** Those who have money simply pay up and go on living, while those who cannot pay go to prison. **It is hardly surprising, then, that poverty offenses are more likely to result in substitute prison sentences:** According to one study, about 25 percent of substitute prison sentences were for driving without a ticket, and about 33 percent were for minor property offenses.<sup>xii</sup>

The abolition of substitute imprisonment is not an outlandish proposal: all over the world there are models for solving social issues through social policy; Germany did not enforce substitute imprisonment during the pandemic without any negative consequences;<sup>xiii</sup> and in other justice systems around the world, people are not imprisoned for unpaid fines.<sup>xiv</sup> Germany has supposedly always pursued the goal of abolishing prison sentences for minor cases.<sup>xv</sup> The state must now realize this political goal.

- **The complete decriminalization of petty offenses: We call for the complete decriminalization of petty offenses, starting with the most common ones, including the criminalization of driving without a ticket, petty theft, fraud offenses, drug offenses, and crimes related to migration status.** We believe that all petty crimes can be better addressed through legalization or other social policies rather than criminalization. **These offenses should not become misdemeanors because misdemeanors are still a form of punishment** and because as long as these behaviors are still prosecuted as felonies, the police can continue to use them as a pretext for surveillance and stops, thereby perpetuating racial profiling.

Mere procedural changes (earlier notice, additional hearings, documents in other languages) will make little difference because the problems are more fundamental. System outcomes are the result not only of laws, but also of practice and court culture.<sup>xvi</sup> Therefore, incremental and small changes in the law often do not result in real change because the

Courts always retain discretion to revert to their prior behaviors, which often depend on the socioeconomic status and other life experiences of the decision-makers.<sup>xvii</sup> Research in Germany shows that fines are often set too high because judges do not fully understand the reality of life of the person they are sentencing.<sup>xviii</sup> Therefore, in addition to our core demands for abolition and decriminalization, we would prioritize the following reforms:

- **Changes in the calculation of the daily sentence with clear guidelines on ability to pay: The calculation of daily sentences should take into account the cost of living of the person concerned, in line with current law, which prescribes a subsistence level.<sup>xix</sup> Since it is well known that people with low incomes are most often punished, there should be a rebuttable presumption that the person sentenced to a fine is living at or below the subsistence level, unless an investigation reveals clear evidence of a higher income. Accordingly, daily rates should be around 0-3 euros per unit, depending on the situation and as**

long as the person still has sufficient money after reasonable living expenses. Anything above 0 euros/unit would require fundamental reforms of current benefit amounts for many people.<sup>xx</sup>

- **The possibility of subsequent modification and cancellation of fines, including by judicial officers, and on the basis of changed circumstances and/or other evidence:** Courts and administrative agencies should reduce fines if they learn that they were set too high or that the person's financial circumstances have changed for the worse after the conviction, necessitating a lower fine.
- **Abolition of penalty proceedings:** People should not be sentenced in proceedings that can result in a penalty by mail. Penalty orders are problematic in many ways: the people involved are often unaware of the proceedings, are unable to cope with the process, do not have a lawyer, etc. In some cases, a penalty order procedure may be in the best interest of the accused person, but that is the exception, and much would have to be changed about the procedure to make it fair.

## CONCLUSION

Putting people in prison to serve a fine is wrong. And the fact that this punishment is reserved for debtors:inside is cruel. Instead of punishing, we should eliminate socioeconomic inequalities. Government funds spent on the penal and prison systems could accordingly be used for more meaningful measures such as providing public transportation for all.

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i "An irrecoverable fine shall be replaced by a term of imprisonment. One day's sentence shall be equivalent to one day's imprisonment. The minimum substitute term of imprisonment shall be one day." StGB §43.

ii Draft bill of the Federal Ministry of Justice, *Entwurf eines Gesetzes zur Überarbeitung des Sanktionenrechts - Ersatzfreiheitsstrafe, Strafzumessung, Auflagen und Weisungen sowie Unterbringung in einer Entzehrungsanstalt*, available at [https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE\\_Ueberarbeitung\\_Sanktionsrecht.pdf?\\_\\_blob=publicationFile&v=2#:~:text=The%20draft%20proposes%203A,daily%20sentences%20corresponding%20to%20one%20day%20of%20substitute%20custodial%20sentences.](https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Ueberarbeitung_Sanktionsrecht.pdf?__blob=publicationFile&v=2#:~:text=The%20draft%20proposes%203A,daily%20sentences%20corresponding%20to%20one%20day%20of%20substitute%20custodial%20sentences.) (hereinafter "draft bill"). The proposal also includes proposals for the Code of Criminal Procedure, which we also discuss here.

iii This figure comes from the last census on this subject, conducted in 2003. For more details on substitute prison sentences by state, see Bögelein, N., Glaubitz, C., Neumann, M., & Kamieth, J., (*Inventory of substitute prison sentences in Mecklenburg-Vorpommern*. Monatsschrift für Kriminologie und Strafrechtsreform, 102(4), 282-296 (2019) (In Mecklenburg-Vorpommern the rate is 10.2% of cases, in North Rhine-Westphalia about 8.3%).

iv See, e.g., "Manifesto for the Abolition of Penal Institutions and Other Prisons," Network Abolitionism (2020), available at <https://strafvollzugsarchiv.de/abolitionismus/manifest>; Bögelein, N., Wilde, F., and Holmgren, A., Geldstrafe und Ersatzfreiheitsstrafe in Schweden-Ein Vergleich mit dem deutschen System. Monatsschrift für Kriminologie und Strafrechtsreform (2022); The substitute prison sentence-Reform or abolition? Friedrich Ebert Stiftung, available at <https://library.fes.de/pdf-files/a-p-b/19368-20220727.pdf>; Zur Abschaffung der Ersatzfreiheitsstrafe Offener Brief an die Justizministerkonferenz, available at <https://humanistisch.de/sites/humanistisch.de/files/drehscheibe-alter/docs/2019/06/offener-brief-zur-abschaffung-der-esf.pdf> (Open letter signed by over a dozen civil society organizations, including Naturfreundejugend Berlin, Humanistische Union e.V., RAV e.V., Humanistischer Verband, GG-BO, etc.).

v The amended text reads: "Prior to the order, the sentenced person shall be informed that he or she may be granted payment facilities pursuant to section 459a and may be permitted pursuant to a statutory order under article 293 of the Introductory Act to the Criminal Code to avert the execution of the alternative custodial sentence by performing unpaid work; if there is reason to believe that the sentenced person does not have sufficient proficiency in the German language, the information shall be provided in a language that he or she understands." Draft bill, p. 7.

vi *Statement of the Sozialdienst katholischer Frauen e.V. on the draft of a law to revise the law on sanctions-substitute imprisonment, sentencing, conditions and directives, and placement in a rehab facility*, Sozialdienst katholischer Frauen Gesamtverein e.V. (Aug. 22, 2022), pp. 3-4, available at [https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2022/Downloads/0822\\_Stellungnahme\\_SKF\\_Ueberarbeitung\\_Sanktionsrecht.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2022/Downloads/0822_Stellungnahme_SKF_Ueberarbeitung_Sanktionsrecht.pdf?__blob=publicationFile&v=2).

vii Final Report: Examination of Alternative Sanction Options - Avoidance of Substitute Prison Terms gemäß, Federal-Länder Working Group, Federal Ministry of Justice and Consumer Protection (hereinafter "JuMiKo Report").

viii For a detailed description of the problems with notification of the trial, see, *Statement of the Criminal Defense Lawyers' Associations on the Justice Department's Draft Bill for an Act to Revise the Law on Sanctions-Substitute Imprisonment, Sentencing, Conditions and Instructions, and Placement in a Rehab Facility*, Organizational Office of the Criminal Defense Lawyers' Associations GbR (September 2022), available at <https://strafverteidigertag.de/3d-flip-book/stellungnahme/> (hereinafter "Criminal Defense Lawyers Associations Report").

ix In the draft bill, for example, it is stated, ""Therefore, genuine inability to pay is by no means a regular cause for serving a substitute custodial sentence, especially since recipients of transfer payments also generally receive income above the subsistence minimum." p. 9.

x Draft bill p. 43

xi *Faktz: Suicides in Prison*, Crime Scene Future, <https://tatort-zukunft.org/fakten/suicide-im-gefaengnis/>.

xix Wilde, F., *The fine - an antisocial legal institution?*, 98 *Monatsschrift für Kriminologie und Strafrechtsreform* 348 (2015).

xvi Lautmann, R., *Justice the silent force: participant observation and decision sociological analysis* (2011 [1972]). (2011 [1972]); Nagrecha, M. Brett S., and Doyle C., *Court culture and criminal law reform*, *Duke LJ Online* 69 (2019): 84.

xv See Nagrecha, M., *The limits of fairer fines: lessons from Germany*, Criminal Justice Policy Program, Harvard Law School (2020).

xiv See, e.g., Bögelein, N., Wilde, F., and Holmgren, A., *Geldstrafe und Ersatzfreiheitsstrafe in Schweden-Ein Vergleich mit dem deutschen System. Monatsschrift für Kriminologie und Strafrechtsreform* (2022).

xiii For more background information on substitute prison enforcement during the COVID pandemic, see <https://www.justice-collective.org/de/justice-collective-blog/berlin-clemency>.

xii Strafverteidigervereinigungen Report, citing Lobitz & Wirth, *Der Vollzug der Ersatzfreiheitsstrafe in Nordrhein-Westfalen, Eine empirische Aktenanalyse*, *KrimD NRW* (2018). Another 10% were originally charged with narcotics offenses and 2% due to laws that criminalize people based on their migration status.

xx Wilde, F., *Reformen für eine gerechtere Sanktionspraxis im Bereich Geld- und Ersatzfreiheitsstrafe* (October 2021). See also Wilde, F., *Die Geldstrafe - ein unsoziales Rechtsinstitut?*, 98 *Monatsschrift für Kriminologie und Strafrechtsreform* 348 (2015).