

Equality Before the Law? How Germany Discriminates Against “Undesired” Foreigners and Violates Fundamental Principles of Its Own Law



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The concept of statehood implies a classification of persons as citizens on the one hand and “foreigners” on the other hand. In the context of law in Germany, for example, “foreigners”

are further sub-classified into persons that do not need a residence permit (like citizens of EU member states), [persons with a residence permit](#), [asylum seekers](#), and those without a residence permit. Within the residence law, norms are explicitly formulated for anyone who is part of the last two groups. Violations of aforesaid norms, like the violation of [mandatory residence](#) or simply staying in Germany without a residence permit, [can result in a prison sentence](#) of up to one year. “Foreigners” that the German state plans to deport also [face incarceration](#).

The German state’s legal dichotomization of “citizens” and “foreigners” creates certain laws with specific, negative consequences that apply only to foreigners. In addition, the categorization of “German citizens” vs. “foreigners” implies that identical acts can have different legal consequences, depending on their legal status. While German citizens are able to travel from one state to the other within Germany any time they want, for some “foreigners” such a journey could end in prison ([Asylgesetz](#)).

It is thus legitimate to say that “undesired foreigners” constantly face a potential prison sentence. For example, in 2013 in Germany 4309 “foreigners” were held in special deportation custody. Until the [European Court of Justice’s decision](#) from 2014, deportees were held in regular German prisons alongside regular prisoners. Further, as of 31st March 2016, 512 “foreigners” were imprisoned in regular German prisons because they infringed on residence related laws.

[In the U.S.](#), one-third of all the people sent to federal jails each year are undocumented people, and [in 2016 more than half of all federal criminal prosecutions](#) involved immigration-related offenses. The demarcation between “Germans” and “foreigners” is not only an issue concerning social control, it also affects the use of penal law, it affects the prison sentence.

According to German law, the main objective of a prison sentence is to [enable prisoners to live a socially responsible, future life](#) without committing further crimes. In other words, social rehabilitation has replaced retaliation as the principal purpose of punishment. A prisoner’s right to social rehabilitation through support and advice (“Hilfe und Angebote”) is derived from the constitutional rights expressed in article [2 I GG in conjunction with article 1 GG](#). From a community perspective, the principle of the welfare state regulates care and precaution for social groups whose personal fulfillment and development is endangered.

This includes prisoners. From a legal perspective, imprisoned “foreigners” also have a right to social rehabilitation because basic rights also apply to them.

There are different treatment approaches that try to answer the question of how successful social rehabilitation can be achieved in prison. The “Good Lives Model” (Ward et al.) is a particularly influential rehabilitation theory, according to which every human strives to gain experiences and resources required for a “good” or liveable life. Criminal acts are understood as products of the lack of internal and external resources necessary to live this “good life” in a prosocial manner. Thus, prisoners should be supported in acquiring these resources, or “primary goods”, such as health, competence, self-determination, inner peace, knowledge, and learning.

Contrary to German citizens, “foreigners” who have committed crimes within German borders – e.g. by violating residence laws – can be deported after the prison sentence, “if their stay would threaten public safety and order, the free democratic ground order or other considerable interests of the German state.” Similarly, some politicians advocate for [withdrawing German citizenship](#) from former “foreigners” if they commit certain crimes. Presumably, many “foreigners” come to Germany in search of a better life. The deportation of “foreign” prisoners means that their vision of a good life after prison is taken away from them. In many countries of origin, the acquisition of primary goods like nutrition, self-determination, and relief from stress and concerns is not possible. As the perspective of a good life after prison breaks away, supportive measures in prison that are aimed at living a “good life” become obsolete. Consequently, successful social rehabilitation has become impossible, and the objective and legal legitimation of a prison sentence cannot be ensured.

The legal demarcation between German citizens and “foreigners” therefore yields imbalanced results. While on the one hand both “Germans” and “foreigners” will be jailed for committing crimes, the German state only allows “Germans” or “desired foreigners” to re-enter society. But to some “foreigners”, the possibility of a return to society is denied. At the same time, the German state intervenes into basic rights of “foreigners” through incarceration “to protect society from them”, without ensuring to keep its end of the bargain, and in turn providing *them* with the individual right of rehabilitation. It seems that in the above-mentioned cases of criminality, principles of modern rule of law apply to German citizens only. But the discrimination is not only a German problem. In the U.S. for example, the Federal Bureau of Prisons [discriminates against undocumented people](#) by

denying them access to essential drug counseling and job training in prison.

The concept of state territories and the legal dichotomy of “citizens” vs. “foreigners” bears a broad range of legal, social, political, and cultural ramifications for modern society. As this article has illustrated, borders and the concept of territoriality are entrenched in laws. Who is affected by these laws and in which way depends on a legal subject’s citizenship. The same action within the same geographical location may lead to different treatment before the law. Moreover, the German state punishes “undesired foreigners” as if they were part of Germany’s (territorially confined) society, yet it denies them the rights granted to “undesired citizens” – the right to social rehabilitation.

The reproduction of exclusionary territorial borders in legal texts translates into the unequal, or asymmetrical implementation and execution of laws. At the same time, we perceive equality before the law as a fundamental condition of just and open societies. Borders and conceptions of citizenship based on the territoriality of the nation-state stand in stark contrast to a modern and equal society.

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