

## National Report on prison remedies

### Austria

by Pascal Décarpes (12.2015)

The legal basis of the Austrian penal system in Austria is the prison law from 1969 (*Strafvollzugsgesetz, StVG*). Among general regulations referring to it, the prison order for penitentiaries (*Vollzugsordnung für Justizanstalten*) plays also an important role.

As to the purpose of the execution of sentences, the execution of a prison sentence should “help the convicted criminal to develop attitudes towards life in a way that they are adjusted to community’s needs and should prevent them from following their criminal preponderance. In addition, the execution should show the worthlessness of the criminal behaviour” (§ 20 Prison law).

The responsible public authority for the prison system is the Federal Ministry of Justice. Since 2007, managerial functions are assigned to the prison headquarters (*Vollzugsdirektion*). It supervises all 27 prisons in Austria as well as the training academy (*Strafvollzugsakademie*).

Around 4,000 staff members work in correctional institutions and over 3,000 as prison warden.

Austrian prison system consists of 27 establishments, among them:

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- 7 penal institutions for sentenced men (Stein, Graz-Karlau, Garsten, Suben, Sonnberg, Hirtenberg, Vienna-Simmering)
- 1 for adolescents (Gerasdorf)
- 1 for women (Schwarzau)
- 3 institutions for psychiatric detention (*Maßnahmenvollzug*; Göllersdorf, Vienna-Mittersteig, Vienna-Favoriten)
- 15 for remand and short-term prisoners.

*Maßnahmenvollzug* is a prison sentence for mentally disordered lawbreakers with diminished Responsibility (§21 al. 1 or §21 al. 2, §23 criminal code).

The prison population on the 1<sup>st</sup> of January 2015 is 8,692 (504 persons on electronic surveillance outside the prisons who are included in the official prison population total). 22% are remand prisoners, 51% are foreign nationals, 1% are juveniles and 6% are female prisoners.

There is a strong increase of the prison population since 2000 (+ 26%), especially due to the increase of prisoners in psychiatric detention.

## **Introduction**

Apart from the prison director, who is the first instance authority for the enforcement of punitive sanctions, the following authorities and/or institutions play a role in the prison system.<sup>1</sup>

### Enforcement Agency

This agency has the responsibility to perform the operations required for the enforcement of custodial sanctions and special measures, including the construction, management, refurbishing of prisons, staff management, controlling of operations. It also has the responsibility to enter into agreements with the individual prisons on their objectives and performance and to monitor the entire penitentiary system.

### Federal Ministry of Justice

The primary responsibility of this ministry is to take strategic decisions and to set strategic targets. Furthermore the ministry has various specific competences such as approval of forced treatments and entering into agreements with post-treatment institutions. Personnel management is a general responsibility of the ministry.

### Enforcement Commission

In every federal province an Enforcement Commission has been set up which is responsible for collecting material on the full compliance with requirements, especially concerning the treatment of prison inmates. A commission consists of seven persons appointed by the Federal Ministry of Justice, partly on the basis of proposals (by the federal provinces or by the federal ministries). The commissions must visit prisons without advance notice and report and make proposals to the Federal Ministry of Justice.

### Enforcement Panels

Enforcement Panels have been set up with the higher regional courts (tribunals, as defined in article 6 ECHR) to handle complaints concerning legal issues. Appeals against their decisions can be filed with the Administrative Court.

### Enforcement Courts

The first instance court for penal matters is the Enforcement Court for measures involving deprivation of liberty or for specific measures. Enforcement Court has in particular the competences to:

- forfeit money and objects;

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<sup>1</sup> Issued from Wolfgang Gratz “The enforcement of deprivation of liberty in Austria”.

- suspend measures involving deprivation of liberty;
- uphold security measures;
- decide on detention in solitary confinement for more than four weeks;
- subsequent postpone the enforcement of a punitive sanction; and
- release on probation.

**As to international compliance, Austria has ratified the following international instruments:**

- (a) The International Convention for the Protection of All Persons from Enforced Disappearance, on 7 June 2012;
- (b) The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on 4 December 2012;
- (c) The Council of Europe Convention on preventing and combating violence against women and domestic violence, on 14 November 2013.

**I. The ECtHR jurisprudence pronounced against Austria**

As far as prison litigation issues are concerned, there is no specific, relevant ECtHR jurisprudence pronounced against Austria.<sup>2</sup>

At the same time, there has been so far no comprehensive analysis of the ECtHR jurisprudence related to Articles 3 and 8 of the Convention.<sup>3</sup>

**II. National legal systems for prisoners' rights protection**

Prison inmates may file complaints concerning any decision affecting their rights in connection with applications or punitive sanctions, concerning orders relating to them or with regard to any behaviour of prison staff affecting their rights.

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<sup>2</sup> <http://www.bundeskanzleramt.at/site/3465/default.aspx>

<sup>3</sup> Enengel P., Exposé für das Dissertationsvorhaben, 2013.

The EPS Act offers two types of complaints: complaints concerning a legal issue and complaints on supervision issues. A complaint concerning a legal issue will be filed whenever a prison inmate is affected by a decision/order, whenever he at least alleges to have suffered a violation of his personal rights and requires a decision on the matter in his complaint. The decisive point is whether the statutory provisions are only mandatory and/or binding upon the enforcing authority or also grant the prisoner a right to their compliance. This must be determined by way of interpreting every individual provision. In case of doubt it must be assumed that the rules of objective law also grant a personal right.

The independent Enforcement Panels, set up with the higher regional courts, decide on complaints on legal issues. The panels are collegiate judge-like bodies, which meet the criteria of tribunals (as defined in art. 6 ECHR). Enforcement Panels consist of three persons (judges and prison officers). A judge must chair the panel.

Complaints on supervision issues serve to challenge the right of supervision of the penitentiary authorities. They do not trigger a formal procedure, and there is no formal claim to a decision. It is common enforcement practice to inform the inmate briefly in writing about the outcome of his complaint. Complaints about the type of medical treatment are only possible in the form of complaints on supervision issues, but not as complaints on legal issues. Complaints do not have a suspensive effect. However, in theory they may be attributed such an effect. In practice, though, this is not the case. It is inadmissible for several inmates to file collective complaints. An appeal to the Administrative Court is possible against the decisions of the Enforcement Panels.

The Constitutional Court may also be seized with cases of alleged violations of rights that are guaranteed by the constitution.

## **1. Judicial remedies**

The federal prison act foresees in § 119 ff. the possibility to lodge judicial remedy in case of any measure (or act) violating a prisoner's rights.

The Prison law (*Strafvollzugsgesetz*, StVG) differentiates between two types of complaint. There are complaints because of violation of subjective public rights (§§ 120ff) and complaints with reference to the regulatory law of the prison authorities (§ 122).

### **1.1 Complaint as to § 120 StVG**

The complaint as to § 120 Prison law concerns all decisions, orders and behaviour of prison staff members. The complaint is as such only possible under the presumption of violation of subjective public rights. Such rights might be found in each paragraph of the prison law, depending how the prison law is interpreted, for instance with the formulation “a prisoner shall have the right to...”<sup>4</sup>.

A complaint is thus possible against: a rejected request of prison leave; a decision of disciplinary sanction; the use of force; humiliating speaking of prison staff that infringes the principle of prisoners’ treatment (§ 22 StVG).

#### **(i) Formalities**

The complaint must provide a reason for the complaint if such is not obvious. One lawyer indicates possible reasons that can be listed: „incompetence, wrong case-management, defective consideration of evidence and of circumstances of the case, procedural error, false legal interpretation, inappropriate execution of discretionary power“<sup>5</sup>. As to the notoriousness (when it’s obvious), it shall be no doubt on the complainant’s reasons, especially when s/he is not qualified in legal matters or when s/he doesn’t speak well German<sup>6</sup>.

#### **(ii) Effect and time-limit**

There is no postponing effect of the complaint. When the complaint is against a decision, it can be lodged at the earliest one day after the decision was communicate to the complainant and at the latest fourteen days after communication.

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<sup>4</sup> Such subjective public rights are for instance under § 43 StVG concerning the free time outside the buildings and the authorisation of sport activities, under § 85 StVG concerning the meeting with a pastor/priest, under § 89 StVG concerning the right to write letters during work time, or under §§ 93f StVG concerning visits.

<sup>5</sup> Pieber, WK StVG<sup>2</sup> § 120, Rz 3.

<sup>6</sup> Pieber, WK StVG<sup>2</sup> § 120, Rz 3.

**(iii) Decision about complaint**

The prison director decides about the complaint against the behaviour or the order of a prison staff member (§ 121 al. 1 StVG). As to complaints against the decision, the order or the behaviour of the prison director, the decision is taken by the prison court (Vollzugsgericht) located at the Regional court (§ 121 with § 16 al. 3 StVG).

a) decision of prison director and remedies

The decision of the prison director is orally communicated to the complainant, as well as the possibility to lodge further complaints. A written copy of the decision is made only under the request of the complainant (§ 121 al. 4 StVG).

When the prison director has decided on the behaviour or the order of a prison staff member, a further complaint is possible before the prison court (§ 16 al. 3 StVG).

b) decision of the prison court located at the High regional court (OLG) and remedies

The prison court located at one of the four High regional courts<sup>7</sup> is represented by a “prison council” (*Vollzugssenat*) – sort of Higher prison court – made of two professional judges and one lay judge (§ 18 StVG). The lay judges must be issued from the corps of prison directors or experienced prison staff members, and they are appointed for a duration of six years. The decision of the prison council is taken with a simple majority of two voices.

Prison councils are responsible for decisions on complaints against the decision/order of the prison director, against the violation of a subjective right through the behaviour of the prison director, and against the violation of the decision mandate through the prison director.<sup>8</sup>

Decisions of the prison council are autonomous, independent, and must entitle the reasons and the instructions on the right to appeal (§ 121b StVG). A written copy of the decision must be communicated to the complainant, his/her lawyer and the concerned prison.

**(iv) Prison council of Vienna**

The prison council of Vienna plays a special role (§ 16a StVG): it decides on complaints in all Austria against decisions of local prison courts and other prison councils, against decisions of the Ministry of Justice and on complaints against the violation of the decision mandate through the Ministry of Justice. Such a complaint must be lodged within six weeks.

Such a complaint is possible for prisoners and for the Ministry of Justice (§ 121 al. 5 StVG). The admissibility of the complaint is restricted: the complaint is admissible only “when the decision is dependent of the solution about a legal issue, which represents an important value in terms of legal unity, legal safety and legal development regarding jurisprudence. It is important when the prison court differs from the highest jurisprudence, or when such a jurisprudence is missing or not united“ (§ 16a al. 3 StVG).

The decisions of the Prison council of Vienna are the last and final instance for complaint proceedings, and they cannot be challenged before any Highest national courts.<sup>9</sup>

**1.2 Complaints with reference to the regulatory law of the prison authorities (§ 122 StVG)**

A prison can lodge complaints with reference to the regulatory law of the prison authorities (§ 122 StVG) for any reason – and not only because of decision, order or behaviour of a prison member staff, also when no subjective public right has been violated.<sup>10</sup>

The complaint by the prison authorities has no time limit and no formalities to comply with.

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<sup>7</sup> These are based in Vienna, Graz, Linz and Innsbruck, see Pieber, WK<sup>2</sup> StVG § 16 Rz 4a.

<sup>8</sup> See also Enengel 2014, *Grundrechtsschutz im Strafvollzug*, 147.

<sup>9</sup> Pieber, WK<sup>2</sup> StVG § 16a Rz 1

<sup>10</sup> See Drexler StVG<sup>3</sup> § 122, Rz 1.



Prison authorities are the prison director and the prison headquarters in the Ministry of Justice. The decisions of the prison authorities in this matter are not binding, as well as the complaint doesn't oblige prison authorities to take a decision (§ 122 al. 2 StVG).<sup>11</sup>

➤ **Complaints on medical care**

Complaints on medical care are issues dealt by the prison authorities, and not the judiciary. As such, prisoners don't have any right to request a formal solving of their complaint. It concerns: the placement in a medical service; exoneration from compulsory work; exceptions to normal food; necessary and professional medical examination and treatment.<sup>12</sup>

### **1.3 Constitutional Court**

One of the few decisions of the Constitutional court on prison issues has rejected the prisoner's complaint. The complaint dealt with the regulations described above about complaints on medical care. The Constitutional court decided that there is no problem that complaints on medical care depend on the administrative jurisdiction and not on the judicial one.<sup>13</sup>

## **III. Soft law and National Human Rights and non-jurisdictional Structures and authorities**

### *3.1 Ombudsman*

The Austrian Ombudsman Board (*Volksanwaltschaft*) is considered as a parliamentary Ombudsman with the aim to control public services and institutions. It exists since 1977 as a pilot project and

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<sup>11</sup> See Drexler StVG 3 § 122, Rz 1.

<sup>12</sup> VwGH 14.12.2000, 2000/20/0293.

<sup>13</sup> Verfassungsgerichtshof, 20.09.2010, 291/09\_19139

<http://gesetzblatt.austria.globe24h.com/0/0/vfgh/2010/09/20/g291-09-straftvollzug-beschwerderecht-vfgh-individualantrag.shtml>

since 1981 in the Austrian Fundamental Law. Each citizen can contact them, for free, when there is a conflict with public authorities and all legal remedies are exhausted.

The *Volksanwaltschaft* is also in charge since 2012 of the role of National mechanism of prevention for the sake and the development of human rights in Austria. It is also the Secretary General of the "International Ombudsman Institute" since 2009.

The Ombudsman board is constituted of three members who are appointed for a period of six years and who can't be removed during this period and who can be appointed only for a second mandate. The actual members have been nominated in July 2013 until June 2019.

As mentioned above, the Ombudsman board is since the 1<sup>st</sup> of July 2012 responsible for the preventive control of human rights in public and private institutions where there might be any form of privation of liberty. It is also in charge of institutions dealing with disable people. Six regional commissions installed by the Ombudsman board and composed of experts have unrestricted access to all institutions and establishments (N = 4,000) as well as to information and documents.

The Ombudsman board and its experts control also the exercise of orders and constraint made by the Executive, following and implementing the OPCAT rules.

The UN Committee against Torture (CAT) has expressed some critics in its last 2015 report, in particular as to “the limited scope of the Austrian Ombudsman Board’s mandate and functions with regard to allegations of abuse by law-enforcement officials. It also expresses concern that the appointment process of the Board members, which is based on the nominations by the three strongest political parties in the Parliament, does not allow for formal public consultation and participation of all civil society components. The State party should take appropriate legal measures to expand and strengthen the mandate of the Austrian Ombudsman Board and ensure that the appointment process of its members is in full line with the Principles relating to the Status of National Institutions (Paris Principles, General Assembly resolution 48/134)”.

## **IV. Other sources**

### **3.1 CPT reports**

The last CPT visit in Austria took place in 2014 and made some comparison with its former visit in 2009.

If some areas have improved over the 5-year-period (as to juveniles for instance), the CPT regrets that as to “the staffing situation in Austrian prisons [...], no progress had been made. Once again, staff shortages – notably of those in charge of the custody of inmates – were observed in all the prisons visited, which inevitably had a negative impact, inter alia, on prisoners’ access to out-of-cell activities. The situation was further exacerbated by the existing staff shift system: it was still the case that the “night shift” of prison officers usually started at around 3 p.m. (and even at noon on Fridays and weekends), with the result that most prisoners remained locked up in their cells until the following morning. Such a state of affairs is unacceptable” (Paragraph 59).

As to ill-treatment, the CPT’s delegation “received hardly any allegations of physical ill-treatment of prisoners by staff in the prisons visited. Indeed, the majority of the inmates interviewed gave a positive assessment of their treatment by custodial staff, and the delegation observed that relations between staff and prisoners were generally relaxed” (Paragraph 60).

### **3.2 CAT reports**

The UN Committee against Torture (CAT) has adopted several concluding observations at its 1388<sup>th</sup> meeting, held on 1 December 2015 (CAT/C/SR.1388) – one related to the Ombudsman (see above).

As to legal aid, the Committee” takes note of the explanation by the delegation that convicted legally-aided defendants may be required to pay a flat fee as long as it does not affect their basic needs or those of their immediate family. It is, however, concerned that **free legal assistance is not provided by law in proceedings before an administrative court**, although it values that the

Constitutional Court has recently ruled to the contrary in a decision that has yet to be implemented (arts. 2 and 11)”.

Furthermore, Austria “should **ensure that all detainees**, including those kept in any form of administrative detention, are afforded, by law and in practice, all fundamental legal safeguards from the very outset of their deprivation of liberty, including the right to be assisted by a lawyer without delay”.

As to **healthcare in prisons**, the Committee “is concerned at reports of inadequate medical and mental health care provided to mentally ill inmates, including a recent highly publicized case of grave neglect of a 74-year-old detainee hospitalized, according to the information provided by the delegation, under a “forensic commitment” regime. It also notes that, despite the request made to the State party’s delegation to provide information on the measures envisaged in response to the recent findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in the area of healthcare in prisons, no concrete information has been received yet on this subject, in particular with regard to medical confidentiality in detention facilities, the practice of involving prison officers in the performance of health-care duties and the need to improve medical screenings on admission (CPT/Inf(2015)34, paras. 77-84) (arts. 11 and 16).

Consequently, Austria should:

- (a) Provide adequate medical and mental health care for all persons deprived of their liberty, especially those with mental health conditions;
- (b) Ensure that all instances of ill-treatment or neglect are promptly and impartially investigated and, if substantiated, the perpetrators should be prosecuted and punished with appropriate sanctions;
- (c) Ensure comprehensive medical screenings on admission and guarantee the privacy and confidentiality of medical information. Prison officers should not be present during medical examinations of persons, save at the request of the medical doctor.”

## **Conclusion**

There is too little information about prison litigation in Austria in order to conclude on the effectiveness of legal remedies.

However, there is a common opinion on the fact that Austrian prisons in general are not efficient neither effective,<sup>14</sup> and reports issued from international bodies express many concerns related to prison issues.

### Short bibliography

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<sup>14</sup> Gratz, Wolfgang: Zur Situation und Einschätzung des Justizvollzugs in Österreich. In: RZ 2006, S. 222.