National Report on prison remedies

Germany

by Pascal Décarpes (12.2015)

Introduction

One of the major challenges in current prison system is the unbalanced consideration between the reintegrative and the security aspects. § 2 of the 1977 German federal prison act stated clearly that the objective of prison is to enable prisoners to live a future, socially responsible life free of offence. Then, and only then shall imprisonment protect the society from further crime (Rdn. 12 ff, Rdn. 17 f), clearly as a secondary objective (see *Kudlich* JA 2003, 704). Since 1977, security has become predominant in many prison areas and has a dramatic impact on prisoners´ rights. The swing of legal and legislative competences on prison from the federal State to the regional states (Länder) in 2006 has strengthened this movement, so that all new 16 regional prison acts prise security as one of their main duties, and not as secondary one as mentioned above.

Over the last decades, the judicial control over prisons has been dominated by national jurisprudence. The German Federal Constitutional Court (FCC) has played an important role that influenced prison law and prison practice in several matters. The FCC requested among others the creation of a prison act for adults in 1977 and a special prison act for Juveniles in 2006. The FFC continuously states that the principle of the State of Law (*Rechtsstaat*), according to which fundamental rights can only be restricted by law and applies to every citizen – prisoners included. The Court decided in 1973 that prisoners shall be rehabilitated as to the respect of their human dignity and other constitutional principles, insuring thus both prisoners´ and society´ interests. As such, this decision formalised a right to rehabilitation that is constitutionally guaranteed.

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In October 2013, a case came was dealt at the regional Court (LG Augsburg) and made some media headlines. The prisoner complained about the psychological consequences of 15 months of **isolation**. He spend his daily yard walk of one hour separated from other prisoners and had to take off his clothes each time he came back to his cell. It was a similar regime as to family visits during which he was handcuffed and separated from his visitors through a glass wall. If the notion of "isolation" doesn´t appear in prison rules, there is the notion "particular safety measures" (§§ 88 ff. Federal prison act), among which the separation from other prisoners, without time limits. If cases like *Günther Finneisen* who was 16 years isolated in the prison of Celle, the National agency for the prevention of torture estimated in its 2012 report that 1.41 case out of 100 prisoners is in isolation. The National agency recommended monthly evaluation of the prisoner´s isolation and external counselling to find alternatives, which is currently not the case. There are still too many rules allocated with discretionary power that prevent effective remedies and protection of prisoners´ rights. In one judgement against Germany, the ECtHR has only condemned naked isolation in a security cell, but not the linked lacks of legal protection (07.07.2011, No 20999/05).

- **One progress:**

There is since 2013 the possibility to oblige prison authorities to execute a court decision by imposing them for instance penalty payment (§ 172 VwGO). Even if it seems that such penalties haven´t been imposed so far, prison experts consider that these possibility constitutes an effective mean of pressure against prison authorities, so that they prefer to execute the court decision rather than being imposed with such payments.

Main problems remaining[1]:

- Meetings deciding on further developments of the prison sentence plan can be held without the presence of the prisoner or his lawyer.

- Some rights are still not clearly defined, such as the right to prison leaves

[1] *Wolfgang Lesting*, speech at the 2012 Conference of Criminal lawyers.

- Cases in front if the local court can be held without oral hearing of the prisoner (only written statements)

- There is only one regional (and not independent) prison Ombudsman

- There is no obligation of mandatory lawyer in execution of prison measures

- There is no mandatory legal aid for prisoners

- Prison remedies are weakened because of jurisdictional fees

I. The ECtHR jurisprudence pronounced against Germany

During decades, German courts didn´t pay much attention at the jurisprudence of the European Court of Human Rights. The 2009 case M vs. Germany has shifted this resistance. After German legislation allowed courts to retrospectively order indeterminate preventive detention, the ECtHR considered it as a violation of Article 7 ECHR, despite a contrary opinion of the German FCC. This ECtHR decision had important consequences on legal and practical aspects as to preventive detention in Germany. Even if there are still some conflicts between both courts regarding dissenting judgments, the FCC tends to integrate more and more European jurisprudence and other types of soft law such as recommendations of the Council of Europe – e.g. the European Prison Rules.

One difficulty with domestic jurisprudence is that it often does not refer to the Convention rights but rather to the fundamental rights imbedded in the German constitution (*Grundgesetz*). Most ECtHR cases v. Germany as to criminal law are linked to fair trial aspects and/or the length of proceedings (see *Mooren* v. Germany), but also a few decisions found violations of Article 3 such as in *Jalloh* v. Germany (2006) or *Hellig* v. Germany (2011).[2]

[2] Thanks to Prof. Dünkel and Dr. Morgenstern (University of Greifswald, Germany) for their advice on these cases.

Since the legal status of the ECHR is considered in Germany as ordinary primary legislation, the German constitution remains prevailing, although German courts shall interpret legislation in accordance with the international legal commitments taken by the German State, which means the ECHR included (Federal constitutional court, BVerfGE 111, 317–319).

Considering the above mentioned decision of the *Jalloh* v. Germany (ECtHR No. 54810/00), the Court stated that "the applicant complained that he had been administered an emetic by force and that the evidence thereby obtained – in his view, illegally – had been used against him at his trial. He further complained that his right not to incriminate himself had been violated. He relied on Articles 3, 6 and 8 of the Convention. The Court found that the German authorities had subjected the applicant to a grave interference with his physical and mental integrity against his will. They had forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out had been liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure had entailed risks to the applicant's health, not least because of the failure to obtain a proper anamnesis beforehand. Although this had not been the intention, the measure was implemented in a way which had caused the applicant both physical pain and mental suffering. He had therefore been subjected to inhuman and degrading treatment contrary to Article 3 (additionally violation of Article 6)

In the other mentioned decision *Hellig* v. Deutschland (ECtHR No. 20999/05), the Court faced the case of a seven-day placement of a prisoner in a security cell in order to prevent him from attacking prison staff. The cell had a surface of approximately 8.46 square meters and was equipped with a mattress and a squat toilet and was, therefore, not suited for long-term accommodation. But the prison authorities did not consider the applicant's placement in this cell as a long-term measure. From the circumstances of the case and the general practice, the Court concluded that there are sufficiently strong, clear and concordant indications that the applicant had been naked during the entire period of his stay in the security cell. The domestic authorities had knowledge of these indications. The Court considered that "to deprive an inmate of clothing is capable of arousing feelings of fear, anguish and inferiority capable of humiliating and debasing him." While, as a rule, inmates were placed without clothes in the security cell in order to prevent them from inflicting harm on themselves, a German court examining the facts of the case at an earlier stage by hearing witnesses could not establish for certain whether there was a serious danger of self-injury or suicide during the time of the applicant's placement in the cell. Furthermore, there was no indication that

the prison authorities had considered the use of less intrusive means, such as providing the applicant with tear-proof clothing, as recommended by the European Committee for the Prevention of Torture. Thus, the Court held that, as the government failed to submit sufficient reasons which could justify such harsh treatment as to deprive the applicant of his clothes during his entire stay, the applicant has been subjected to inhuman and degrading treatment contrary to Article 3.

- The ECtHR case-law is still unknown (or less known) to domestic courts. Even if the Strasbourg Court has a good reputation in German courts, only the Federal constitutional court (and few Higher regional courts) refer to European jurisprudence.

- Different level of interaction between the ECtHR and the German Federal Constitutional Court (FCC)[3].

Competing court decisions – FCC v. ECtHR

The case of M. v. Germany (17. 12.2009) tackles the issue of retroactive preventive detention. The FCC first decided in 2004 that retroactive implementation is possible since preventive detention is a measure, not a 'penalty'. Answering to this, the ECtHR decided in M. v. Germany that due to the manner of its enforcement, preventive detention combines many aspects of a penalty and should therefore be considered as such – which means in that case a violation of Article 5 and Article 7 of the Convention. Even if the FCC still plead for its own competences and reasons, it acknowledged a more "Europe-friendly" legal interpretation in text and practice, as it resulted in its decision on preventive detention of 2011, 4th of May, considering the German legislation on preventive detention as unconstitutional and requesting major reform.[4]

In 2004, M. challenged before the FCC the constitutionality of the amendment that allowed his preventive detention to be extended beyond the maximum of 10 years that applied when he was initially sentenced. M. argued that this violated the prohibition of retroactive punishment in the German Constitution (Article103 (2) Fundamental Law). This extension had been imposed several

[3] Based on the presentation made by Prof. Dünkel and Dr. Morgenstern (University of Greifswald, Germany) at the 2014 ESC Conference in Prague.
[4] See Drenkhahn, Morgenstern & van Zyl Smit (2012): What is in a name? Preventive Detention in Germany in the Shadow of European Human Rights Law. *Criminal Law Review*, 3, 167-187.

years after the initial sentence by a court that decided that there was a severe danger that M. would reoffend as soon as he would be released. M´s claim wasn´t successful. The FCC confirmed the doctrinal position that preventive detention wasn´t to be considered as a punishment.

Complementing effect: Taking soft law into account … with regard to the detention of juveniles

"It could be an indication that insufficient attention has been paid to the constitutional requirements of taking into account current knowledge and giving appropriate weight to the interests of the inmates if the requirements of international law or of international standards with human rights implications, such as the guidelines or recommendations adopted by the organs of the United Nations or the Council of Europe are not taken into account or if the legislation falls below these requirements." (BVerfG NJW 2006: 2093, 2097).

Complementing effect: Taking soft law into account (2) … with regard to the pre-trial detention

Similar line of reasoning in a decision on occupational activities, out-of-cell time and general living conditions of remand prisoners (FCC uses the same quote as above). Additionally, the FCC draws on CPT standards that 8 hours per day should be spent outside the cell (§ 47), even if it acknowledges that they have an even ‚softer' status than the Recommendations

An early account to soft law recommendations can be found in a FCC decision of 1965 in which pre-trial detention based solely on the gravity of the crime (e.g. multiple murder by a representative of the Nazi-regime) was declared unconstitutional. The FCC argues that according to „new legal developments" - represented by the Universal Declaration on Human Rights, the ECHR and the Council of Europe's resolution (1965) 11 on remand in custody - pre-trial detention must remain an „exceptional measure" (BVerfGE 19, 342 - 15.12.1965, 1 BvR 513/65).

II. National legal systems for prisoners' rights protection

- Before presenting the different domestic systems protecting prisoners´ rights, it is to mention that prisoners have rarely access to legal aid (*Prozesskostenhilfe*) in order to cover the financial costs of remedies. Indeed, the court decides to provide this aid only when the complaint presents a concrete, importance perspective of success. In practice, prisoners either don´t even try to lodge a complaint or the court denies the possibility of success.

- Since 2006, there are a multitude of regional prison acts – in each region one act for detention centers, one for remand prison and one for juvenile prison. Before that, there were already regional and cultural differences in court jurisprudence. The latest development is thus to lose more and more jurisprudence coherence regarding the judicial protection of prisoners´ rights.

1. Judicial remedies

The federal prison act foresees in § 109 the possibility to lodge judicial remedy in case of any measure (or act) violating a prisoner´s rights, as it is guaranteed for all types of administrative measures (or acts) by Article 19,4 of the Fundamental law. The competent authority is the **Court for the execution of prison sentences** ("prison court", *Strafvollstreckungskammer*) based at the local Court (§ 110) and the appeal is made in front of the criminal chamber of the Higher regional court (*Oberlandesgerichte*, § 116). The Court for the execution of prison sentences is composed of a sole judge in most cases, and with three judges while deciding on lifers or psychiatric imprisonment. Although the geographical competence of courts is defined, there is still the possibility that judicial control of prison measures can be delegated to a local Court that has experience and contact with prison issues (BT-Drucks. 7/918, 84; *Doller* 1987, 264; *Laubenthal* 2007, 326; *Voigtel* 1998, 27 ff).

The judicial review has to be made by the prisoner within two weeks following the practical or written notification of the measure. Although a remedy has no postpone effect on the measure, there is still the possibility for the court to do so in cases where prisoners´ rights are acutely in danger. However, this is almost never used by courts (*Laubenthal*, 2015)

Two main critical points are that the court decides **without oral hearing** of the prisoner (§ 115 federal prison act), and that the court can assess the legality of the **discretionary power** (mis)used by prison authorities, but it won´t be evaluated in its practical content.

- The idea to have courts close to prisons was based on the theoretical assumption that judges would be thus more familiar with prison life and prison issues. Practically, judges of the prison courts rarely go into the prison, and the close relationship between judges and prison directors (sharing similar academic background) prevents prisoners´ requests from being impartially and comprehensively examined.

As mentioned above, the discretionary power of prison authorities is quite broad and applies also to **evaluation and prognostic** of the prisoner´s personality and sentence plan (BGH NStZ 1982, 173; NJW 1982, 1057; ZfStrVo 1982, 181; BGHSt 30, 320; see also *Beaucamp* 2012, 194). In these cases, the court only controls if the prison authorities has respected the formal rules as to the decision frame, but the **vague legal notions** are as less controlled as discretionary power (OLG Frankfurt ZfStrVo 1982, 309; OLG Karlsruhe ZfStrVo 2002, 377; NStZ 2002, 614; KG ZfStrVo 2003, 181; *Kopp / Schenke* 2012 § 114 Rdn. 23 ff; *Laubenthal* 2011 Rdn. 813; *Treptow* 1978, 2227). For instance, the notions of "flight risk" and "risk of breach" regarding prison leaves included in prognostic assessments are such vague legal notions that are mostly not possible to be controlled by the court (OLG München FS 2011, 53; BVerfG NStZ 1998, 430; very critical on this: *Schneider* 1999, 140).

- Many of these vague legal notions and discretionary power have been kept in the new 16 regional prison acts.

Appeal can be made under § 116 (et sqq.) of the Federal prison act, also with postponing effect, in front of the Higher regional court.

Another issue is the **length of proceedings** (*Althammer / Schäuble* (2012): Effektiver Rechtsschutz bei überlanger Verfahrensdauer, in: NJW 2012, 1; *Baier* (2001): Grundzüge des gerichtlichen Verfahrens in Strafvollzugssachen, in: JA, 582). According to the German constitution and its Article 2, courts are obliged to deal with a case within an appropriate delay, as stated by Article 6 of the ECtHR (*Schenke* 2012, 257). There is even the possibility to lodge an application for failure to act (§ 116, 1 Prison act) when the „Prison court" hasn´t started any procedure after a complaint based on § 109 Prison act (BVerfG ZfStrVo 2003, 58). This shall avoid severe violations of prisoners´ rights because of overlong time lapse (OLG Hamburg 4.11.2002 – 3 Vollz [Ws] 100/02; OLG Frankfurt ZfStrVo 2002, 370, NStZ-RR 2002, 188; OLG Stuttgart NStZ-RR 2003, 284), joining there the right to a fair trial as to Article 6 ECtHR (OLG Celle StV 2008, 92).
Unfortunately, German domestic courts don´t provide effective remedies to this regard as they legally could (OLG Celle StV 2008, 93), also the ECtHR has regularly stated that Article 6 and 13 are violated when procedures are overlong (EGMR NJW 2001, 2694; EGMR NJW 2007, 1259).

- In its decision ***Uzun* v. Germany** from 2nd of September 2010 (NJW 2010, 3355), the ECtHR has condemned the German legislator to create a remedy which will take into account the requirements of Article 6 and 13 ECHR. This was followed by a law passed on the 3rd of December 2011 with the title „**Law on legal remedies** regarding on overlong court proceedings and criminal investigation" (*Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren* ; BGBl. I 2011, 2302).

- There has been then a new way to claim for compensation (*Link / van Dorp* 2012, 11) with the introduction of § 198 of the Law on Court proceedings (*Gerichtsverfassungsgesetz*). However, the applicant must first lodge a complaint with the Prison court – where actually the problem has occurred – before s/he can apply to the High regional court. Moreover, the result would be just a reprimand from one court to another, and not a mandatory right for the applicant. If nothing has been done by the Prison court after 6 months, there is a new reprimand (§ 198 Abs. 3 Satz 2 2. Halbs. GVG). **It is rather a preventive measure than a protective remedy** (*Link / van Dorp* 2012, 16) and it is not very useful for prisoners (OLG Hamburg StraFo 2012, 160; also OLG Mecklenburg-Vorpommern, Beschl. vom 23.1.2012 – 1 O 4/12).

As a résumé, the decision on a prisoner´s application at the High regional court works as follows (§ 119 Prison act):

- The Court decides with oral hearing
- The court examines only elements produced by the applicant
- The court can refuse an application without giving any reason when its decision is supported by all three judges.
- The court can decide if its positive decision for the applicant is the last resort and thus to be enforced / implemented. Otherwise, the court can ask for a new decision before the Prison court.

As to **urgent procedure** (*Eilverfahren*), there are usually not very effective because courts will still wait to examine the case during the main process. To this regard, prisoners are often disappointed of its inefficiency since they put hope in urgent procedure.

- As to the **burden of proof**, it´s all on the claimant´s shoulders and it has to be done on a written form. Given the acknowledged difficulties in reading and writing of many prisoners, this constitutes a major hurdle for the prisoner to testify about the violation of his/her rights.

1.1. Constitutional Court

As it has been recently reformed in France (*question prioritaire de constitutionnalité*) and some few European countries, German citizens have the possibility to apply before the Federal constitutional court (FCC) in case of violation of their fundamental rights. As a result, the FCC has produced an important constitutional jurisprudence on issues that are linked with the European Convention of Human Rights.

As in other countries (e.g. Italy, Spain), the right to rehabilitation (also said reintegration or resocialisation) is considered as a primary goal of the execution of a prison sentence and has a constitutional value. The FCC derives this right from the fundamental principle of protection of human dignity and from the principle of the social welfare state, see Article 2 (1) in connection with Article 1 (1) and Article 20 (3) Fundamental Law: “From the point of view of the offender, this interest in resocialisation grows out of his constitutional rights in terms of Article 2 (1) in conjunction with Article 1 of the Fundamental Law [that is, the right to develop one's personality

freely in conjunction with the protection of human dignity]. 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 retarded in their social development": prisoners and ex-prisoners also belong to this group. (BVerfGE 35, 202: 235-236).

Many decisions of the FCC are related to prisoners´ rights, such as the protection of human dignity and the right to rehabilitation (BVerfG, 27.02.2002, 2 BvR 553/01, BVerfGE, 105; BVerfG, 13.03.2002, 2 BvR 261/01, BVerfGE, 105; BVerfG, NStZ, 1993, p. 404).

- The protection of human dignity

The issue of overcrowding is to be found in several federal states, particularly in closed prisons and pre-trial detention. One case before the FCC was regarding the confinement of two prisoners during 48 hours in a cell of about 8 sqm. The toilets were not separated from the rest of the cell and there was thus no view protection from the co-inmate. The FCC considered this type of accommodation as a violation of human dignity. The FCC decided also on similar cases, e.g. accommodating 3 prisoners in a cell of 11.5 sqm violates human dignity (see decision of 22nd of February 2011). Moreover, the FCC stated that group accommodation may be an infringement of human dignity.

> "The principle to provide appropriate accommodation does not only mean that the prisoner has a right to be placed in an appropriate room with enough space. A longer lasting accommodation in a group cell against the will of the prisoner may be seen as a violation of the principle of human dignity that implies the right to privacy." (BVerfG 27: 1, 6).

As a consequence, prisoners applying for single accommodation shall be granted for it.

As to compensation, the FCC has recognized its pertinence, even if it deals only with a compensation of 2,300 € for nine months of inhuman detention (FCC, 11th of March 2010).

- The principle of rehabilitation

One major element of rehabilitation principles is prison leaves in order to prepare the reintegration into society. Many FCC decisions deal with the refusal of prison leaves. German law provides for such measures in cases of low/no risk of abuse, reoffending or escaping.

The discretion of the prison administration has been restricted by the jurisprudence of higher courts and the FCC in several aspects, always by interpreting such leaves in the light of the constitutional right to rehabilitation.

> "The prison administration shall not reject such leaves – that regularly precede the decision on parole (conditional release) – without concrete and sufficient grounds, e.g. with solely abstract arguments on the risk of escape (BVerfG NStZ 1998: 373). In the interest of a better preparation for release and later re-integration, society has to accept a certain risk (*verantwortbares Risiko*)".

The longer the execution of the prison sentence lasts, the stronger the right of the prisoner increases to be granted day leaves and similar measures.

1.2. Administrative courts

There is a possibility for prisoners to access administrative courts since 1977. In a decision of the local administrative court of Stuttgart (13.9.1977, VRs IX 151/77), a prisoner was allowed to claim for constructional reparations since the shower room was defect (also OLG Zweibrücken NStZ 1982, 221; OVG Hamburg NJW 1993, 1153).

The FCC has decided that the issue of housing belongs to § 144 of the Prison act when it comes to human dignity (BVerfG ZfStrVo 2002, 176, 178), and the regulation of heating and temperature in the cell is also a measure in the sense of § 109 Prison act that can be challenged (OLG Nürnberg ZfStrVo 2002, 313). Measures restricting the use of letters and Post are also from the competency of administrative courts (VGH Mannheim NJW 1997, 1866).

1.3 Civil courts

Civil courts are competent for claim for compensation (§§ 13 GVG, 40 Abs. 2 Satz 1 VwGO; (OLG Celle ZfStrVo SH 1978, 73), especially in cases of breaches of duty according to Article 34 of the Fundamental Law (*Grundgesetz*) and § 839 of the civil code (OLG Brandenburg FS 2010, 1).
A civil court is competence for instance when a prisoner has been excluded from work and thus doesn´t get paid anymore: he can claim for compensation if s/he feels damaged in his/her rights (OLG Frankfurt 12.11.1979 – 3 Ws 877/79 (StVollz)).

1.4 Labour Courts

Labour courts are not competent for any issue concerning prisoner since there is no legal labour contract between a prison and a prisoner (LAG Berlin-Brandenburg, Beschl. vom 3.6.2009 – 13 Ta 1102/09).

2. Legal remedies covered by the 1977 German Prison Act and regional prison acts

There were many attempts to draft a legal act for the execution of prison sentences (1897, 1923, 1927), but only administrative regulations were passed during the Weimar Republic, After WWII, a commission for the reform of prison law was launched in 1967, introducing then in 1969 prison leaves and other similar measures. In 1972, the Federal Constitutional Court decided that primary legislation is a constitutional prerequisite, so that many drafts for a comprehensive Prison Act were proposed (1970, 1972, 1973, 1976). Because the FCC required in 1976 to pass as soon as possible a primary prison legislation, the Prison Act was shortly after that adopted and came into force on the 1st of January 1977.

Unfortunately, a political deal between the federal State and the regional states in 2006 transferred the legislative and executive competence of prison law and sentences to the regional states. Even if the core elements of the 1977 Prison act were adopted in regional prison acts, there was no clear improvement thirty years after.

The importance of administrative discretion hasn´t been reduced (see above) and it remains a source of legal uncertainty for prisoners.[5] Although the FCC decided that a prisoner is almost always eligible for prison leaves accompanied by a prison officer (Beschl. v. 29.02.2012, Az. BvR 368/10), such leaves are sometimes rejected or denied when a prisoner made a corresponding request.

[5] http://www.lto.de/recht/hintergruende/h/reform-strafvollzugsgesetz-nrw-reintegration-opferschutz/

2.1. Legal remedies: institutional and procedural aspects

The 1977 Prison act has to be conformed to the constitutional principles of the Rule of Law as mentioned in Article 20 (3) of the Fundamental Law, which comprehends also:

- the principle of legality (*Vorbehalt des Gesetzes*)
- the principle of proportionality (*Verhältnismäßigkeitsgrundsatz*).
- the specification principle (*Zitiergebot*)
- legal certainty requirement (*Rechtssicherheit*)
- the clarity principle (*Bestimmtheitsgebot*)

According to § 108 of the 1977 Prison act, the prisoner has the right to complain directly to the prison director, and some consultation hours are organised to this purpose. Parallel to it, a prisoner must have the possibility to meet a representative of the monitoring board (*Aufsichtsbehörde*) from the Ministry of Justice when the latter is visiting the prison, or to submit a complaint directly to the Ministry of Justice and thus avoid a Court procedure (*Arloth* 2011 Rdn. 1; C / MD 2008 Rdn. 3; *Laubenthal* 2011 Rdn. 755; *Litwinski / Bublies* 1989, 115; *Schuler* 1988, 256).

The right to meet prison director is important since the complaint can therefore be done in an oral manner, which facilitates the presentation of the facts by the prisoner. Even if there is no mandatory presence of a legal adviser during such a meeting, a prisoner can mandate his/her lawyer to be present (C/MD 2008 Rdn. 5; *AK-Kamann / Spaniol* 2012 Rdn. 8; *Laubenthal* 2011 Rdn. 756; a. A. OLG Nürnberg ZfStrVo SH 1979, 93; *Arloth* 2011 Rdn. 3).

The right to complain by the Ministry of Justice (*Dienstaufsichtsbeschwerde*) is open against decisions of the prison director and other prison staff members (OLG Frankfurt ZfStrVo 1987, 252). This remedy can be appealed without any formal requirements and within any delay.

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

3.1 The inspections by the Ministry of Justice made by a sort of **monitoring board** (*Aufsichtbehörde*) have different quality and effectiveness, also because they investigate and decide about internal affairs[6]. According to § 151 of the 1977 Prison act, the monitoring board "visit all prison as often as it is always fully informed about the complete prison issues". Since the justice administrations are free to organise their monitoring boards as they wish, and prisoners have no legal entitlement to impose concrete measures to the monitoring board (*Arloth* 2011 Rdn. 6 and AK- *Feest* 2012 Rdn. 15).

3.2 The boards of visitors (*Anstaltsbeiräte*, § 162 Prison act) are considered as representative of the public opinion, but have unfortunately non influence on it.[7]

Even if the capacities of influence on prison life are quite important (*Münchbach* 1973), boards of visitors arequite dependant on the good will of the prison director or prison staff, so that there are often conflicts between the board and the prison staff (K/S- *Schöch* 2002 § 4 Rdn. 43). Board members have a large access to files and can move freely in the prison, even if in practice it´s not the case because of practical reasons (AK- *Feest / Graebsch* 2012 Rdn. 1), and they can discuss with prisoners without the presence of prison staff (OLG Hamm NStZ 1981, 277 - *Wydra/Pfalzer* 1164).

At least two members of the regional Parliament must be in the board and these members are also those receiving and examining prisoners´ petitions sent to Parliaments, which could however lead in some cases to political disputes (AK- *Feest / Graebsch* 2012 § 162 Rdn. 8, 9).

The main limit of the Board is that it has no pretension to have access to prisoners´ medical files (OLG Frankfurt (NJW 1978, 2351).

[6] *Beier* (1992):Aufsicht über den Strafvollzug. Eine Quelle des Mißerfolgs, in: ZfStrVo, 147; *Koop* (2006) (Ed.): Hauptsache ist, dass nichts passiert? Selbstbild und Außendarstellung des Justizvollzugs in Deutschland, Lingen)

[7] *Dürr* (1983): Anstaltsbeiräte – Vertreter der Öffentlichkeit ohne Wirkung auf die Öffentlichkeit, in: Soziale Arbeit, 57.

3.3 Regional Ombudsman

There is only one regional Ombudsman in Germany who is in charge of prison issues. Established in 2010, he is competent for the big region North Rhine-Westphalia and receives complaints both from prisoners and from prison staff (AV des Justizministeriums NRW 13.12.2010 – 4400-IV.396; siehe ferner *Rotthaus* 2008, 373). However, the regional Ombudsman has no authority to decide, but only mediation, recommendations and reporting (*Walter* 2012, 27).

- The other limit is that the regional Ombudsman is very linked to the Ministry of Justice as to its nomination and its remuneration.

3.4 Complaints brought before the German Parliament

Article 17 of the Fundamental Law makes it possible for prisoners, beyond any Prison regulations, to submit requests and complaints to the German Parliament and other types of people´s representation, this without any formal requirements and outside judiciary remedies (*Petitionsrecht*). This right can be exercised both by individuals and by groups, without any requirement of specific contacts between prisoners (*Maunz/Dürig-Dürig* Article 17 Rdn. 32). The institution receiving this complaint must consider it as to its content. People´s representation means the German federal Parliament and the regional parliaments. Each representation creates to this purpose a complaint committee that is competent for all complaints lodged with a people´s representation.

Even if these people´s representations have no direct authority of decision, they can state that the complaint was entitled, they can ask the Government to examine the complaint a second time or they can declare that the case is closed because the prison administration hasn´t done any wrong (*Arloth* 2011, Vorbemerkungen § 108 Rdn. 4). And even if the representation is not obliged to reason its decision to the prisoner, neither is it to the Government (BayVerfGH
NVwZ 1988, 820, 821).
Finally, such type of complaint doesn´t exhaust any other type of legal remedies.
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IV. Other sources

1. CPT reports

During its last visit in 2013 and in the corresponding report of 2014, the CPT "emphasises that **unrestricted access to the personal and medical files** of detained persons in all States Parties was essential in order for the CPT to effectively carry out its work in line with the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment". Further, the Committee "urges all relevant federal and Länder authorities to resolve this issue as a matter of priority, in the light of the remarks made by the Committee in paragraphs 6 and 8 of the report on the 2010 visit."

As to **preventive detention**, the CPT "would like to be informed of the number of sentenced prisoners in Baden-Württemberg and Rhineland-Palatinate who are currently earmarked for preventive detention and of the specific treatment measures which are being provided to them".

In the report, the CPT reviewed the measures taken by the German authorities following recommendations made by the Committee after previous visits. In this connection, particular attention was paid to the treatment and conditions of detention of persons held in preventive detention (*Sicherungsverwahrung*). Further, the CPT examined in detail the procedures for the imposition of special security measures in prisons and, in particular, the use of mechanical restraint (*Fixierung*). The report also deals with the issue of surgical castration of sex offenders which was the subject of consultations with representatives of the Federal Ministry of Justice and Consumer Protection.

2. Others

- Within the ambit of the Council of Europe there is also the institution of the **European Commissioner of Human Rights**. He has rights similar to the CPT. The report of his visit in 2007 contains observations and recommendations with regard to the then ongoing drafting of the Prison Acts of the federal states – he recommends to keep the aim of resocialisation as main aim and to implement the EPR. He also reacts to concerns made known to him by experts with regard to juveniles in prison (inter-prisoner violence;

‚structural lack of personal'; too few juveniles in open regimes) and preventive detention. It is unclear how much impact these visits or reports have; at least there was one more institution to monitor critical developments.

- **NPM – OPCAT** Germany was rather late to ratify the OPCAT of 2002 (adopted in 2006, in force since 2008); the National Preventive Mechanism works since 1.5.2009 (Bundesstelle zur Verhütung von Folter; additionally there is a commission for the federal states). The **National Agency for the Prevention of Torture** is Germany's independent agency to prevent inhuman conditions and treatment at places of detention. It was established under the Optional Protocol to the UN Convention Against Torture. The National Agency shall prevent torture, abuse, and inhuman treatment at facilities where people are or can be deprived of their liberty. The National Agency is not competent to deal with individual complaints. However, information concerning conditions and treatment of persons deprived of their liberty is important to the National Agency's work. This information can influence the selection of places to visit and the focus during visits. The NPM itself is monitored by the UN-Sub-Commission for the Prevention of Torture which visits the German colleagues in 2013 and were quite critical – too few staff, not enough expertise, too much reliance on other monitoring bodies such as the CPT).

- The NGO "**Prison archive**" (*Strafvollzugsarchiv*)

This organisation has started in the 1970s at the University of Bremen (North of Germany) with the objective to document and explain prisoners´ rights and prison laws. Led by Professor Johannes Feest over the last decade, it is now legally active also since 2011 at the University of Dortmund under the direction of Professor Christine Graebsch (who is also a lawyer).

Beyond that, students go to the prisons of Bremen every week and give legal advice to prisoners. There are also between 600 and 800 prisoners who write every year to Professor Feest.

Professor Feest with his comments of prison law and Professor Graebsch with her Articles on prison remedies - among others - have strongly influenced the perception and the knowledge about prison legal issues, and certainly contributed to a stronger protection of prisoners´ rights than it would have been without their contribution to NGO Prison archive.

Conclusion

German prison law presents good legal, theoretical aspects. However, prison remedies are not effective at a macro level since there are applying only for individual cases but don´t have influence on structural issues.