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Judicial control in the German prison system: Disappointment for the individual, but progress for the system?

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Introduction

- Scope: judicial review before domestic courts in Germany
- Since 1960 possibility for judicial review
  - But rules hidden in the Introduction to the Courts Constitution Act (ss. 23 ff. EGGVG)
  - No prison law with prisoners rights until 1977
- Federal Prison Law of 1977 introduced specialised complaints procedure in prison matters (ss. 109 ff. StVollzG)
- Considered a great achievement at the time
- Reforms of the substantial prison law since 2006 → states responsible for prison law, but legal review still matter of federal legislation

Individual complaints procedure of the Prison Law

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http://www.gesetze-im-internet.de/englisch_stvollzg/index.html

Section 109 Application for a Court Ruling

(1) A measure regulating individual matters in the field of execution of imprisonment or of execution of measures of reform and prevention involving deprivation of liberty may be contested by applying for a court ruling. The application may also request imposition of the obligation to order a measure that was refused or omitted.

(2) The application for a court ruling shall be admissible only if the applicant claims that his rights were infringed by the measure or by its refusal or omission.

[(3) concerning preventive detention]

Individual complaints: key features

- Broad scope: not only formal decisions in writing, but also staff behaviour as well as refusals to grant measure
- Very short delay: within 2 weeks after measure or refusal, 3 months if prison admin does not decide a request
- No oral hearing, but fact finding as obligation of the court
- Limited possibility for appeal
- Judicial body: criminal chamber at district court as chamber for the execution of sentences
- Procedure modelled after procedure for individual complaints in administrative law

Progress for the system

Examples of Federal Constitutional Court decisions:

- Lebach decision (BVerfGE 35, 202 [1973]: resocialisation as constitutional principle and therefore primary aim of execution of imprisonment
- Religious dietary norms (BVerfG ZfStrVo 1995, 111)
- Relaxation of prison regime for prisoners service life sentences as consequence of resocialisation principle (e.g. BVerfG ZfStrVo 1998, 180)
- Wages for prisoners‘ work (BVerfGE 98, 169 [1998])

In-depth analysis in *Bachmann*, Bundesverfassungsgericht und Strafvollzug, 2015

Disappointment for the individual

- Research from 1980/90s (Feest/Lesting/Selling) shows a rate of less than 5% of cases where prisoners achieve their goal
- Legendary defiance of many prison administration to implement court decisions
- Courts either decide against complainants or hand the case back to prison admin for new decision
  – P! construction of German prison law: margin of appreciation + discretion

Section 11 Relaxation of Conditions of Imprisonment

(1) In order to relax the conditions of imprisonment the following measures may, in particular, be ordered:

1. (work release); or
2. (short leave under escort) or (short leave).

(2) Such relaxation **may be ordered** with the prisoner's consent if it is **not to be feared that he might evade** serving his prison sentence or abuse the relaxation of imprisonment to commit criminal offences.

Margin of appreciation / prognosis as part of the prerequisites

Discretion regarding the outcome

→ even if prisoner meets prerequisites, desired measure can still be denied

Disappointment for the individual

Margin of appreciation + Discretion: Courts only decide

- If prison admin established all the relevant facts for the appreciation/prognosis
- If prison admin used their discretion faulty, but there is more than one correct use of discretion
- Also leads to increased obligations of documentation for prisons and longer court decision → appeals court wants ot have all the facts in one paper

How to reconcile the two perspectives?

- No quick fixes
- In prisons:
  - Prisoners need to be aware that substantive change takes time
  - Many complaints provoked by poor prison climate: impolite behaviour by staff, no/insufficient/unempathic explanation of decisions
  - Complaints against material conditions → arguments in discussions about the justice budget

How to reconcile the two perspectives?

- Court level:
– Training of the judges! → specialised in criminal law and procedure, not administrative (prison) law
– Prisoners often formerly accused before same chamber → not considered to be truthful
– Iura novit curia: Most judges don‘t doubt their decisions → don‘t see the need for extra training or don‘t express need
- Mediation as a way to reconcile?