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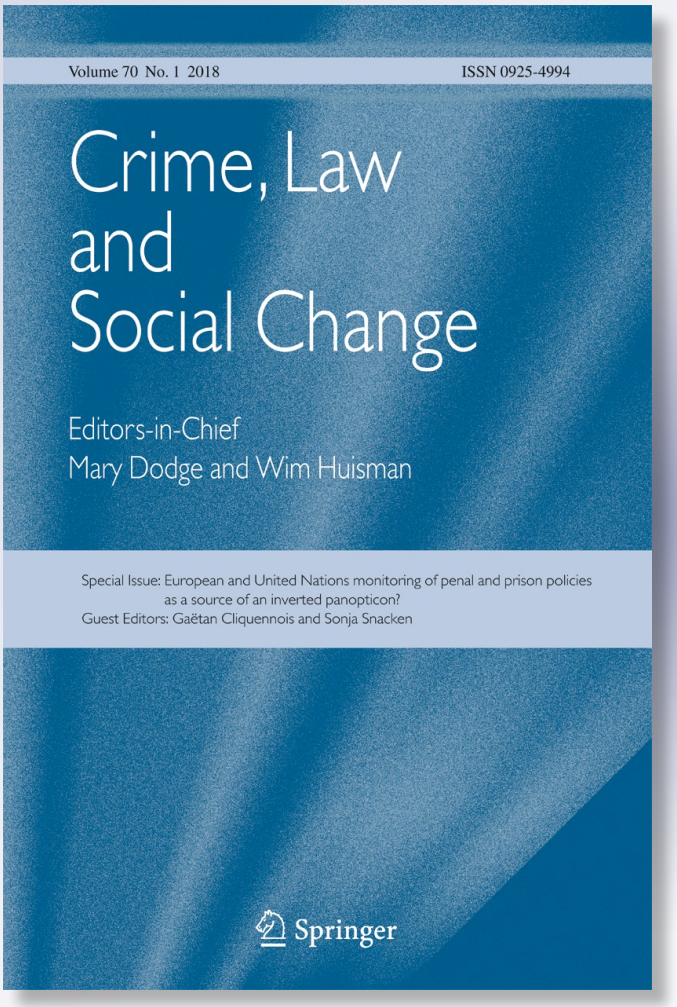

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Introduction

Monitoring of prisons is a multifaceted issue. On the one hand it means the internal control of prisons by the prison administration (Ministries of Justice), on the other hand the external control by independent agencies or – and this is one of the most important and influential forms – the individual complaints procedures of prisoners (see II.2.-4.). One can also differentiate according to the preventive nature of control forms such as the work of the Committee for the Prevention of Torture (CPT) on behalf of the Council of Europe (see under IV. below) from control forms that aim to redress a violation of international human rights or to review prison decisions that curtail national prisoners' rights. The preventive mechanisms recently have been extended in Germany by creating a National Agency for the Prevention of Torture (under the Optional Protocol to the United Nations Convention against Torture, see IV.3 below) and, additionally, an ombudsman for prisons in the largest federal state, North Rhine-Westphalia (*Strafvollzugsbeauftragter des Landes NRW*, see III.1 below).

In order to understand the legal position of prisoners and their possibilities of complaints as the most important form of prison control we will start with a short look on the prison legislation at present and in a historical review. Germany (officially: The Federal Republic of Germany, FRG) is a federation with 16 states. The competence for legislation until 2006 was at the federal level. Therefore, one uniform Prison Act dating from 1976 (in force since 1 January 1977) was relevant for all 16 federal states (the so-called *Länder*). In September 2006 a major Constitutional Law Reform was enacted that redistributed the legislative competences by transferring the competences to the

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Länder, which meant that the 16 federal states had now to create their own prison legislation. The changes of legislative competences did not touch the penal and criminal procedural law and likewise not the competences for complaints procedures in prison law. So, there is still a uniform Federal Criminal Code (CC), the Criminal Procedure Act (CPA) and that part of the 1977 Prison Act, that deals with complaints procedures for prisoners (§§ 109 ff. PA).

The history of judicial control of prisons in Germany – National beginnings and the procedure according to §§ 109 ff. Prison Act

Historical aspects of complaints procedures in the 1977 Prison Act

Judicial control of prisons has a quite short history in Germany. Before the Prison Act of 1977 came into force, prisoners had only marginal rights to appeal against decisions of the prison administration. One reason for that was the legal conception of restrictions of legal rights because of the special status of being a prisoner, thus creating a special power relationship between citizen and state (*besonderes Gewaltverhältnis*). Under this concept, restrictions of basic rights were justified without having a statutory basis and could only be based on administrative regulations, as they were used with the 1961 *Dienst- und Vollzugsordnung* (a body of rather vague administrative rules). In 1972 the Federal Constitutional Court (in its landmark decision BVerfGE 33, 1 ff.) outlawed this practice and ruled that prisoners, as any other citizen, have and retain all rights unless they are restricted by statutory law. This decision was a landmark in German prison history as it forced the legislator to pass a statutory Prison Law. It took 4 more years and a decision of the Constitutional Court setting a further time limit (see BVerfGE 45, 187 ff.) to bring about the enactment of the Prison Act on 1 January 1977. The Prison Act regulates rights and duties of prisoners and contains a comprehensive system of complaints procedures and judicial review. This general right for a judicial review against decisions of state authorities is guaranteed by the Constitution, see Art. 19 (4) *Grundgesetz*, Basic Law. The §§ 109 ff. PA thus are a concretisation of this constitutional right in the area of prison law and administration. This includes the possibility of appealing against prison administration decisions to a specialized chamber of the district court (*Strafvollstreckungskammer*, see §§ 462 ff. CPA).[1] Any decision and even simple actions of prison guards such as not knocking at the prisoner's cell door can be made subject of a formal complaints procedure.[2] The idea behind creating a special chamber in the district court was to establish the jurisprudence of specialized judges who know the situation in the prisons located near to the court.

[1] The competence of this chamber apart from decisions on complaints according to §§ 109 ff. Prison Act is the decision on conditional early release according to §§ 57, 57a Criminal Code. It is a constitutional obligation that a judge or court has to decide on conditional release, see Art. 104 (2) of the Federal Constitution (*Grundgesetz* = Basic Law). Parole boards with other members than judges therefore are not allowed in German legislation.

[2] See BVerfG NStZ 1996, 511; and BVerfG, decision of 4 July 2006–2 BvR 460/01.

The 1977 Prison Act and the complaints procedure for adult prisoners, §§ 109 ff. Prison Act

The 1977 Prison Act (PA) was the first statutory law regulating rights and duties of prisoners. It is applicable to adult sentenced offenders (18 years and older).[3]

Most rights for prisoners depend on the discretionary power of the prison administration, such as the right for prison leave and for regular visits. For example, there is a guarantee for at least one hour visit per month,[4] but more visits may be granted according to the discretion of the prison administration. It is important to note that discretion does not mean arbitrariness: The prison administration must base its decision on well-founded arguments which are subject to judicial review. Often the PA also provides rights that depend on the interpretation of indeterminate law terms. Prison leave, for example, may be granted if there is no "risk of abuse" such as trying to escape or reoffending during the inmate's absence from prison (see § 11 (2) 1977 PA). As the jurisprudence has clarified, the risk level which can be tolerated with regard to public safety depends on the specific circumstances and the nature of the crime for which the inmate was sentenced. The longer the sentence, which a prisoner has served, the less discretion, is given to the prison administration to deny a prison leave, which is seen as an essential part of the reintegration process and also has the function of countering the negative effects of imprisonment.[5] This applies also to prisoners serving a life or other very long sentences.[6]

Each and every decision or action of the prison administration can be subject to judicial review. The jurisprudence of the courts often relates to questions such as which personal belongings the prisoner may have in his cell (television set, radio, cd-player and other electronic devices); if the denial of prison leave, the transfer to an open prison or other relaxations of the regime are justified (see for the details of practice of prison leaves etc. [16]); if a disciplinary punishment was just and proportionate etc.

The complaints procedure is written, and oral hearings are not obligatory (see § 115 (1) PA), but they can be organized if the judge considers it appropriate. The Judge may also have a video-conference with the inmate (see § 115 (2) PA). The subject of the complaint is defined by the prisoners' written request, which first goes to the prison director who will present his or her views and the reasons for the decision in a written statement. The prisoner does not have to prove the facts; the inquisitorial principle obliges the judge to investigate the facts. If the prisoner's rights have been violated by the prison administration's decision or action, the court may declare the wrongfulness of the decision and remedy the situation as far as possible. However, if the law gives the prison administration discretionary power the court regularly cannot overrule the prison governor's decision, but will refer the case back to the prison governor with attaching the condition that he must release a new decision under observation of the legal

[3] In most cases older than 24, as youth prisons regularly deal with 14- to 24-years-old offenders, see [12, 13]).
[4] The one hour (and further visits) can be split if appropriate. The new legislation of some federal states provides 4 h per month, and additional visits by children, husbands or relevant relatives, see for a summary [29].
[5] See e.g. BVerfG, decision of 23 May 2013–2 BvR 2129/11; BVerfG, decision of 19 January 2016–2 BvR 3030/14).
[6] See BVerfGE 45, 187 ff., 238; 64, 261 ff., 277; 98, 169 ff., 200; 109, 133 ff., 150 f.

arguments given by the court. In certain circumstances, the court may also definitely accept the prisoner's claim and grant the required prison leave or visit etc.

The complaints *procedure* is a mixture of elements of civil, administrative and criminal procedural law. The inquisitorial principle stems from criminal procedure. But with regard to prison complaints the judge is not restricted to a certain body of evidence (as in criminal proceedings), and can use any evidence to ascertain the facts. The prisoner can choose a lawyer in any stage of the complaints procedure. The judge will appoint a lawyer at the state's expense if the appellant is indigent and the case is likely to be successful (thus following the rules of civil procedural law, see § 120 (2) PA). The rules on reappraising indefinite legal terms ("unbestimmter Rechtsbegriff")[7] or discretionary decisions follow the administrative procedural law. Although the capacity of a prisoner to have discretionary decisions of the prison administration reviewed is not very strong (the court has only a restricted power to change the decision), courts often have annulled a governor's decision because of arbitrary or not well-founded arguments.

A prisoner can appeal to the High Court of the federal state (*Oberlandesgericht*) if a complaint to the district court was not successful (see § 116 PA). The High Court will only review questions of law, not questions of facts.

If the prisoner claims there has been a violation of constitutional rights, an appeal can be made to the Federal Constitutional Court (FCC, *Bundesverfassungsgericht, abbreviated as BVerfG*), which is the court of last resort on the national level (see Art. 93 Abs. 1 Nr. 4a FC).[8] Having the right to make an individual constitutional complaint puts the prisoner a rather strong position.[9] Additionally, such cases have set important standards for prison practice as a whole. The most important jurisprudence concerning German Prison Law originates from the FCC, including the principle of social reintegration or rehabilitation (*Resozialisierungsgrundsatz,* see [26]) as a fundamental constitutional principle based on the constitutional right to protect human dignity (Art. 1 *Grundgesetz*, literally Basic Law, BL) and the constitutional principle of the social welfare state (Art. 20 BL): The FCC obliges the state to develop a prison regime which focusses primarily and effectively on the social reintegration of offenders.[10] Accordingly § 2 (1) of the 1977 PA states that the sole aim of the execution of prison sentences is the reintegration of offenders. The protection of the society plays a subordinate role and is best guaranteed by the social reintegration of the offender.[11] While other aims of punishment such as general deterrence and retribution play a certain role in the sentencing stage, they are

[7] For example, prisoners are only allowed to have personal belongings in their cell room to an "adequate amount" ("*angemessener Umfang*"). This is considered to be an indefinite legal term.

[8] As a very last resort a complaint to the European Court on Human Rights (ECtHR) is possible, see Art. 34 ECHR.

[9] This is in contrast to many other European countries who do not provide complaints against individual decisions, but only complaints against laws as a whole and sometimes not in individual cases at all. According to the comparative study of Koeppel [21] an individual complaint to the Constitutional Court was possible in Germany and Poland, whereas such a complaints procedure did not exist in England/Wales, France, and the Netherlands. However, the ordinary complaints procedures in the Netherlands imply the power of the deciding authorities to fully control and - if needed - change the decision of the prison administration even in discretionary cases, see [21], p. 69 ff. For a broader overview over individual constitutional complaints that meanwhile exist in several eastern European states and aim, inter alia, at alleviating the case load for individual human rigths complaints brought to the ECtHR see [19].

[10] See e.g. BVerfGE 116, 69, 85 f. with further references.

[11] See e.g. BVerfGE 109, 133; 116, 69.

explicitly excluded from influencing the execution of sentences (including decisions on conditional/early release, see §§ 57, 57a CC).

Particularities of complaints procedures for offenders in youth prisons, § 92 Juvenile Justice Act (JJA)

The procedure for young offenders serving a youth prison sentence[12] is generally based on the same rules as for adults, as the §§ 109 ff. PA apply as well. But the Juvenile Justice Act (JJA) since 2008 provides for a few particularities which improve the situation of young prisoners considerably (at least in theory, see [11, 17], § 92 notes 161 ff., 170 f., 174a). Decisions on complaints are taken by the youth chamber of the district court (*Jugendkammer*). It is composed of one judge, although in some more difficult cases three judges sit (see § 92 (2) (4) JJA).

An important difference with adult proceedings is that the young prisoner has a right to request an oral hearing (and must be informed of this right, see § 92 (3) JJA). Furthermore, the young prisoner has a right to a lawyer appointed and paid for by the state, if the case is complicated or if the prisoner lacks knowledge of the legal questions concerned (see § 92 (5) JJA in combination with § 140 (2) Criminal Procedure Act). The CPA is more favorable for young offenders than for adults, who only get a lawyer according to civil procedural law "if a success of the complaint is verisimilar" (§ 120 (2) PA, see above).

Efficiency of individual complaints procedures (the role of the Federal Constitutional Court (FCC) and of the jurisprudence of high courts

The efficiency of complaints is often characterized as being very modest, as probably less than 5% of the complaints are successful. This does not necessarily mean that the complaints mechanisms are ineffective, but could be because prison administrations base their decisions in most cases on well-founded arguments.[13] One reason for low success rates could be that the PA often gives room for discretion, which limits the possibilities for a judicial review (see above). On the other hand, successful complaints in particular decided by the FCC have had a major impact on general practice, e.g. concerning prison leave and other forms of relaxation of the prison regime. All in all, the complaints procedure mechanisms in Germany can be seen as a success, as every decision or action taken by the prison authorities can be made subject to a judicial review, which has a moderating effect in and of itself since the prison authorities must always explain prisoners about their actions and decisions by legal arguments.

Although court decisions bind prison authorities, there have been reports of cases where the prison administration did not follow the court decision and e.g. continued to deny prison leave or other measures for the reintegration of offenders. In order to cope with defiant or refractory prison administrations, in 2013 an amendment of § 120 (1)

[12] The German Juvenile Justice Act (JJA) provides primarily the application of educational measures to 14- to 17-years-old juveniles, but also to young adults (age 18 to 20). Youth prison sentences are seen as a last resort and in practice only about 2% of all juvenile and young adult offenders prosecuted receive a youth prison sentence (between 6 months and 5, exceptionally 10 or in serious murder cases 15 years, §§ 18, 105 JJA, see in detail) [12–14].

[13] See [24], P, § 109 note 18 with further references.

PA established the possibility of imposing a financial penalty (*Zwangsgeld*) of up to 10,000 € in order to enforce a court decision, e.g. if the court has set a deadline for a specific measure in favour of the prisoner to be implemented.[14]

National Monitoring Institutions and mechanisms

Specific national mechanisms of controlling prisons and preventing inhuman or degrading punishments include the Ombudsman in the federal state of North-Rhine-Westfalia, and, − nationwide − "boards of advisors", parliamentary inquiries and to some extend empirical research on prison conditions and practice. The "National Preventive Mechanism" that operates under the Anti-Torture regulations by the United Nations is described below.

The ombudsman for prisons in the federal state of North-Rhine-Westphalia

North-Rhine-Westphalia is the only federal state that (in 2010) has assigned an Ombudsman for prisons in the respective federal state. North-Rhine Westphalia is the largest and most populous of the 16 federal states in the German Federal Republic and also has about 25% of all prisoners and 37 out of 183 prisons in Germany (20%).[15] The tasks of the Ombudsman are collecting information and complaints from individual prisoners, executing regular prison visits and preparing an annual report to the Ministry of Justice with proposals for the further development of prison regimes. The reports for 2011, 2012 and 2013–2014 contain a full variety of comments concerning reform projects, legislative amendments and for the conflict management in different areas.

The 2012 report dealt in particular with the concept of a "victim oriented prison regime" (a rather unique way of considering victims' interests concerning reparation, restitution and mediation in German prison legislation), the reform of staff training for prison officers, recommendations for the members of the boards of advisers, better registration of prisoners' complaints to the Ombudsman, and other specific problems concerning living conditions (accommodation in single cells as a principle to be achieved, more therapeutic units, etc) and groups of vulnerable offenders (elderly prisoners, prisoners in youth prisons, etc), health care and providing a family friendly prison environment (family, conjugal visits, etc.).[16]

The third report for 2013 and 2014 by the current Ombudsman Kubink (published in 2015) follows the tradition of proposing amendments to the daily routines of administrating prisons in North-Rhine-Westphalia, in particular as regards problems of health care, taking care of prisoners with mental/psychiatric problems, isolation as security measure, family visits (improving the visitors'

[14] See [24], P, § 109 note 129, 130. So far, however, no relevant case law has been published, which may be seen as an indicator for the preventive effectiveness of this rule.

[15] Computed on the base of Statistisches Bundesamt (Ed.): Rechtspflege. Bestand der Gefangenen und Verwahrten in den deutschen Justizvollzugsanstalten nach ihrer Unterbringung auf Haftplätzen des geschlossenen und offenen Vollzugs jeweils zu den Stichtagen 31. März, 31. August und 30. November eines Jahres. Stichtag 31. März 2016. Wiesbaden 2016, 6.

[16] See [30], I ff.

rooms in a family friendly manner), developing new forms of open regimes for young offenders, etc.[17] The report also recognises the improvements in the practice based on the old legislation even before the enactment of a new Prison Act for adult offenders in early 2015 in North Rhine-Westphalia. This new legislation focusses on the encouragement of offenders to participate in re-integrative activities, enlarges the therapeutic approach in so-called socio-therapeutic units, incorporates the concept of victim orientation, and improves the possibilities of visits, especially of family members (children, partners), including long-term visits. Health care includes also psychological problems with regard to the health definition of the WHO. Disciplinary measures are restricted and restorative elements as an alternative are given priority. The new legislation improves the transition management by prison leaves and other measures for the preparation of release in a modern way.[18] North Rhine-Westphalia has a long tradition of developing transitional structures of preparing (conditional) release, reintegrating offenders in working places after release and aftercare.[19]

Boards of visitors (*Anstaltsbeiräte*), parliamentary inquiries, and the role of empirical research

The 1977 PA provided so-called *Anstaltsbeiräte* (literally translated as "advisers to the prison"), comparable to boards of visitors, i. e. independent individuals who have free access to prisoners and who will forward complaints to the prison governor in order to achieve a mutual agreement with the complaining prisoner (see §§ 162 ff. PA). The members of the *Anstaltsbeirat* are obliged to work confidentially and therefore cannot publish their requests or complaints on prison conditions and do not work with the media. The "advisers" are composed of members of political parties in the regional parliament, by persons who are working in the third sector or other volunteers. They are not payed for their work, but receive a small expense allowance. The federal states in their new prison acts after 2006 have passed more or less identical legislation concerning such boards of advisers, with about the same rights and duties, regulated in more detail by guidelines of the ministries of justice.[20]

A further form of control over prisons are parliamentary inquiries and the activities carried out by special representatives of the regional parliaments (each party nominates one person) of the federal state (*Strafvollzugsbeauftragte*). Such inquiries often oblige the prison administrations and Ministries of Justice to present data on the situation and living conditions in prisons that have not been published before. The German data reporting on prison issues is of limited use as the official prison statistics (*Strafvollzugsstatistik*) only include data concerning the prison population, but not on the different prisons, living conditions, treatment programmes, staffing etc. Some of these data are sometimes published on the websites of the ministries of justice of the federal states, but a comparison between the states is difficult. Therefore, empirical research collecting statistical

[17] See [22], 166 ff., 171 ff.
[18] See the positive comments of [22], 13–18.
[19] See e.g. [31, 32].
[20] See in summary [24], N, 1104 ff.

data[21] is more important than in other countries which dispose of a well-functioning system of annual reports, such as in Scandinavian countries, France or the UK. The German data collections, in particular the publications of the Department of Criminology in Greifswald, have greatly contributed to a form of comparative bench-marking between the federal states and contribute to "prison monitoring" in a wider sense, because they are often used as evidence of bad conditions e.g. in Bavaria compared to other federal states. Equally, the CPT has used this data when preparing its visits to Germany and in the latest report deplores the restrictive Bavarian regime.

International monitoring of prisons in Germany

European Convention on Human Rights

Despite the comprehensive and effective national monitoring framework, European standards and norms have been and remain important for German prison law and practice. This is particularly true as regards the European Convention on Human Rights (ECHR) and the jurisprudence of its enforcement mechanism, the European Court of Human Rights (ECtHR).

The ECHR of 1950 entered into force in 1953, and Germany was among the first states to ratify it. The legal status of the Convention in Germany formally is the status of an ordinary statute, and in the legal hierarchy it stands below the German constitution (*Grundgesetz*). Nevertheless, not only scholars but also the FCC grant it a special intermediate position. While the constitution itself has not „taken the greatest possible steps in opening itself to international law connections"[22],

> "[…], the provisions of the Basic Law are to be interpreted in a manner that is open to international law. At the level of constitutional law, the text of the Convention and the case-law of the European Court of Human Rights function as interpretation aids to determine the contents and scope of fundamental rights and of rule-of-law principles of the Basic Law."[23]

This means – in short – that while national courts and authorities in principle must implement the ECHR this is not necessarily the case when duties resulting from the Convention are (or seem to be) in conflict with those resulting from the

[21] Such studies were developed since the early 1980s and continued since then, see e.g. [10]; with regards to prison leaves, transfers to open prisons [16].

[22] Decision of October 14, 2004, reg. nr. 2 BvR 1481/04 (so-called Görgülü-decision), http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html; in print: BVerfGE 111, 307 et seq. All published decisions of the German Federal Constitutional Court (from 1998 onwards), are available on the Court's website: www.bverfg.de. Some important decisions, including those mentioned here, are available there also in English and French language.

[23] Decision of the FCC (official collection) BVerfGE 128, 326 (headnote 2a) citing earlier decisions as established case-law.

German Basic law. This also means that in cases of dissent between the FCC and the ECtHR the latter claims to have the final say, or, in the FCC's own, somewhat euphemistic, words, there is no need to enforce ECtHR judgements in a "schematic" way.[24] This insistence on sovereignty, in particular in questions of penal law, can also be seen in relation to the European Union.[25] Since there is a high degree of congruence between the rights enshrined in the ECHR and those in the Basic Law, this stance usually does not lead to great difficulties. It did, however, in a specific question concerning the penal system – and divergent decisions on preventive detention by the two Courts will be considered below.

The Convention's safeguards are regularly applied by German courts, including in prison cases – for example, by the German Supreme Court, which argued that the covert surveillance of talks between spouses during a visit in remand detention violated Art. 6 (1) ECHR (fair trial).[26] Most prison cases, however, are solved within the German system of prisoner rights as described above. Notwithstanding, the traditional German assumption that these standards are higher than the European standards has been shattered at least to a certain extent, for example by a series of judgments by the ECtHR concerning excessive periods of remand detention or because of restrictions on the possibility of offenders appealing against their detention and accessing files [25].

In two prison cases (yet), the ECtHR even found violations of Art. 3 ECHR by German authorities:[27] The appellant had been complaining about his prison conditions and fought with prison staff. He was then taken to a security cell, where he was strip-searched and apparently left naked for seven days. Even if placement for several days in the security cell might have been justified initially because of the danger to himself or others, depriving him of his clothes during his entire stay there constituted inhuman and degrading treatment.

More recently, the Court stated that Art. 3 ECHR includes an obligation on prison authorities to seek independent medical advice on the appropriate treatment for a drug-addicted prisoner – the German authorities failed to do so in the case of *Wenner*,[28] this failure constituted a violation of Art. 3 ECHR. Concerning medical issues, currently also a violation of Art. 8 ECHR, the right to privacy, is examined by the Court. The appellant, who was detained for several months and suffered severe medical problems, argues that the authorities' and later the domestic courts' refusal to provide him with a copy of his entire prison medical records violated his right to private life.[29]

[24] BVerfGE 128, 326, §§ 35, 46 et seq.

[25] For example in the recent judgement of the FCC, 15.12.2015–2 BvR 2735/14 on an Italian European Arrest Warrant, and in the so-called Lisbon-decision, FCC, 22.9.2009–2 BvR 2136/09.

[26] Bundesgerichtshof (German Supreme Court), Neue Juristische Wochenschrift 2009, 2463.

[27] Hellig v. Germany - 20999/05, Judgment 7.7.2011 [Section V].

[28] Wenner v. Germany - 62303/13; Judgement of 1 September 2016. The domestic authorities had not examined the necessity of drug substitution treatment with regard to the criteria set by the relevant domestic legislation and medical guidelines, nor accessed the help of expert medical advice. Despite the applicant's previous medical treatment with drug substitution therapy for seventeen years, no follow-up had been given to the opinions expressed by external doctors on the necessity to consider providing the applicant with that treatment again.

[29] Sokolow v. Germany, 11642/11, lodged on 17 February 2011. At the time of writing (24 November 2016) the case was communicated to the German authorities.

CPT

The second pillar of the protection of prisoner's interests and to prevent violations of Art. 3 ECHR in Europe is the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,* adopted in 1989, with its control organ, the *European Committee for the Prevention of Torture* (in short: CPT). Its influence in Germany can be described as discreet but noticeable, at least in some areas [1]. Germany ratified the Convention in 1990 and has received visits from the CPT eight times.[30] Two of the visits have been so-called "ad-hoc" visits, connected to reports of maltreatment of foreigners awaiting deportation at Frankfurt/Airport and to problematic conditions for prisoners in preventive detention (see the case study below for more details).

The decentralised organisation of prisons on the state (*Länder*) level is reflected in the agenda of the CPT. In 2015 the CPT visited 15 places of deprivation of liberty in six different *Länder*. As regards prisons, the areas of concern have only partly changed between 1991 and 2016. A comprehensive analysis of the first five visits of the CPT (including that of 2005) shows that most of the standard issues raised during CPT visits (as reflected for example in the CPT-standards, last updated 2015) can be found in Germany as well, with the noticeable exception of practices like slopping-out, multi-occupancy dormitory-style cells or the need for individual beds and blankets ([1]: 318 et sequ.). On the other hand, typical problems reported from many other European and Non-European countries are, in contrast to the perception of the German system as being of a particularly high standards, also found repeatedly –the lack of suitable out of cell activities being just one example (for example CPT 2012: 28).

At the time of the first visits overcrowding and infrastructural problems, and, in Eastern Germany, staff training and attitudes came under scrutiny (CPT 1993, 1997 for example with regard to Waldheim Prison, Saxony; Bützow Prison, Mecklenburg-Vorpommern but also in Western Germany Hamburg Remand Prison). That these problems have been overcome largely because of refurbishment programmes, a better single-occupancy policy and ultimately because of a sharp decline in prisoner numbers is acknowledged by the Committee in later reports (for example CPT 2012: 27 et sequ.).

In addition to the still unsolved problem of insufficient activities in many prisons, the lack of suitable information provided after arrest is a recurring theme in the CPT reports. This relates to information concerning access to a lawyer and the right to notify relatives, in particular with regard to foreigners. Another point of concern are certain coercive measures used in prisons and psychiatric institutions. The possibility of withholding the right of all access to outdoor exercise is criticised sharply by the committee, despite its very rare use. The same is true for the use of corporal restraints. In particular the practice of "fixations" (immobilisation of agitated prisoners that pose a risk for others or themselves) led to so-called immediate observations by the committee during the visits in 2000 and 2005 (CPT: [3]: 13; [4]: 13) and these were followed-up during the visits in 2010 and 2012 (CPT 2012: 9 and [6]: 19). The CPT acknowledged

[30] All visits, also the last one are fully documented on the website of the CPT (http://www.cpt.coe.int/en/states/deu.htm), including press releases, the CPT reports, the government's responses and translation into German. The last visit took place only in November 2015, the report has been published in 2017, see CPT/Inf (2017) 13.

that there had been some improvement insofar as these measures are now used rarely and controlled better, but it remained concerned about their use and the lack of sufficient and adequate record-keeping related to such incidents.

The National Preventive Mechanism under OPCAT and other UN bodies

Germany also ratified the Optional Protocol to the United Nations Convention against Torture (OPCAT) on 4 December 2008 and set up a National Preventive Mechanism (NPM) in the same legislation. This agency consists of two bodies, the Federal Agency for the Prevention of Torture, which has the power to visit places of deprivation of liberty under federal jurisdiction (Federal Police, Defence Forces and Customs) and the Joint Commission of the Länder, which is entitled to visit all establishments under the authority of the Länder (i.e. police establishments, detention centres for foreigners, prisons, psychiatric hospitals and social welfare establishments). The annual reports published by the Federal Agency present a compilation of all activities and since 2009/2010 are published online in German and English.[31] The range of issues raised is broad and certain standards emerge that further develop the standards by the CPT with a special national focus. Recurring themes are (the lack of) sufficient information and instruction concerning rights given to detainees after arrest in police stations; prevention of police misconduct and a suitable complaints procedure for alleged victims of such misconduct; privacy issues in prisons (for example the use of peep-holes); restrictions of the use of solitary confinement and sufficient care for those affected (National Agency for the Prevention of Torture 2016 with reference to earlier editions). Targeted visits in recent years were paid to various institutions for juveniles with several positive findings as regards the general social climate in the institutions, but also problems such as (the lack of) communication with prisoners who speak a foreign language (in particular during health care); strip searches and other interferences with the prisoners' right to privacy.

Additionally, the UN Sub-Committee for the Prevention of Torture (SPT) as monitoring body of the United Nations Convention against Torture, may pay visits to the Member States. The SPT has done so in 2013, mainly to monitor the setting up and funding of the national agency and to foster cooperation between the different bodies. Both the SPT and the CPT have been very critical about the resources in terms of staff and budget of the National Agency for the Prevention of Torture (CPT 2012: 12). Even if the resources have been augmented from 3,5 full time positions to 10, regular visits in over 13.000 different places of detention, in particular given the federal structure, may prove difficult (France, for example, has 44 staff working in its national preventive mechanism).

Visits by a further expert body, the UN-Working Group on Arbitrary Detention, operating as "special procedure" established by the Human Rights Council were paid to Germany twice (2011 and 2014). While the Working Group noted that the reduction of the prison population was a major achievement for Germany, that the concept of proportionality of measures limiting the liberty of individuals was well-respected, and that the development of preventive detention seemed to be a positive one, certain practices nevertheless were criticised as unsatisfactory, in particular with regard to the detention of illegal foreigners to be deported [20].

[31] http://www.nationale-stelle.de/index.php?id=74&L=1.

Impact, implementation and mutual effects

Preventive detention as a case study

The landmark decision of M v Germany (Dec. 2009)

By far the most significant impact on German law and practice in prison matters concerns preventive detention. The relevant jurisprudence and policy for this sanction therefore can serve as a case study for the interplay between national and international – in this case European control mechanisms.

German sanctions law has adopted a dual track approach; the Penal Code provides not only for penal sentences, but also for "measures of correction and prevention". The use of such measures permit those who pose a long-term danger to society to be securely detained and thus removed from society while being treated. Prominent amongst these measures is preventive detention (*Sicherungsverwahrung*) for long or even indefinite periods after the completion of an initial sentence. In German legal doctrine such preventive detention is not regarded as punishment, or a 'penalty', in the sense the term is used in Art. 7 ECHR. It is therefore not subject to the same constraints of sentence proportionality and the prohibition of retrospective imposition as are penalties imposed for criminal offences.

The potential threat posed by the use of preventive detention to fundamental liberties was recognised, but for a long time such measures were used relatively rarely. However, as in several other European countries (see [8, 9]), a reaction to some serious sexual offences resulted in a tightening of the criminal law in the late 1990s: The 1998 reform of the Penal Code not only saw less restrictions placed on the use of preventive detention, but also the absolute limit of ten years on the length of the first term of preventive detention was replaced by a provision that allowed for its indefinite extension. This could even happen retrospectively. Several aspects of these changes were brought before the Federal Constitutional Court (FCC), but it took the view that because preventive detention was not a punishment but a "measure", the strict prohibition of retroactivity set out in the German Basic Law was not applicable.[32] One of the appellants in that case sought a remedy before the ECtHR. In a series of about a dozen cases, including the (leading) case of *M v Germany* (ECtHR, 17 December 2009, App. No. 19359/04) and the latest (and probably concluding) case of *Bergmann v Germany* (7 January 2016, App. No. 23279/14), the ECtHR has tried to clarify the prerequisites of preventive detention in conformity with the human rights standards of the Convention.[33]

The relevant provisions are Art. 5 ECHR (Right to liberty) and Art. 7 ECHR (No punishment without law). Art. 5 ECHR guarantees the right to liberty, but includes a closed list of exceptions to this right. Preventive detention – just as any other deprivation of liberty ordered by state institutions – therefore needs to be justified on the basis of one of the exceptions set out in that list. Art. 5 (1) (a) ECHR allows for deprivation

[32] BVerfGE 109, 133, 167, 5 February 2004, App. No. 2 BvR 2029/01; BVerfGE 128, 326, 364 f., 4 May 2011, App. No. 2 BvR 2365/09 et al. Art. 104 (2) GG reads: An act may be punished only if it was defined by a law as a criminal offence before the act was committed.

[33] All decisions can be found in the databank of the ECtHR (http://hudoc.echr.coe.int), some German cases in matters of preventive detention are still pending.

of liberty following a conviction by a competent court and this is in principle accepted by the ECtHR as a legitimate basis for most cases of preventive detention.[34] This is, on the contrary, not the case for Art. 5 (1) (c) ECHR: This permits the arrest or detain of persons for preventive reasons, but only in situations where a concrete and specific potential offence can be identified and the aim of the arrest or preliminary detention is to bring the detained person before a judge for trial (typically at the pre-trial stage). Whether preventive detention can be justified under a third provision, Art. 5 (1) (e) ECHR, is a matter of dispute, depending on whether the person affected can be considered to be "of unsound mind".

Since the applicant in *M.* was affected by the above-mentioned criminal law reform, the ECtHR had to decide whether the connection between the original conviction in which preventive detention had been ordered and the prolonged preventive detention based on the new law was strong enough – that is, whether it had a "sufficient causal link" in the sense of Art. 5 (1) (a) ECHR. This, according to the court, was not the case: the new retroactive legislation was a new element between the initial decision and the ongoing detention. Therefore, preventive detention of more than ten years was not covered by Art. 5 (1) (a) ECHR in these cases which predated the reform (M. v Germany, 17 December 2009, App. No. 19359/04, § 96 ff.; [9], 170–173).

A second problem became obvious when the ECtHR had to decide on the conformity of the German practice of preventive detention with Art. 7 ECHR. The ECtHR interprets the concept of 'penalty' autonomously and independently, and is thus not bound by the domestic concept and doctrine concerning penalties. When assessing the legal quality of the sanction, it placed great emphasis on the empirical reality of how preventive detention was implemented in Germany. In 2009, it noted that persons who were subject to it were held in prison, albeit in separate wings. The Court stated that

> "minor alterations to the detention regime compared to that of an ordinary prisoner serving his sentence, including privileges such as detainees' right to wear their own clothes and to further equip their more comfortable prison cells, cannot mask the fact that there is no substantial difference between the execution of a prison sentence and that of a preventive detention order" (M. v Germany, 17 December 2009, App. No. 19359/04, § 127).

According to the ECtHR (and supported by many German scholars and practicioners (cf. for example [15] with an account in English language, [8]) this was also true for the psychological care and support. In making this assessment, the ECtHR relied on findings of the Council of Europe's Commissioner for Human Rights and the CPT to hold that there was very limited treatment, additional to that offered to prisoners serving long prison sentences, available to those in preventive detention (see above).

The ECtHR accordingly found violations of Art. 5 (1) (a) and Art. 7 ECHR. As a result, German legislation and practice changed drastically (as will be described below),

[34] All decisions can be found in the databank of the ECtHR (http://hudoc.echr.coe.int), some German cases in matters of preventive detention are still pending.

ECtHR, 24 June 1982, App. No. 7906/77, van Droogenbroeck *v* Belgium; Weeks *v* United Kingdom (1988) 10 E.H.R.R. 293; Stafford *v* United Kingdom (2002) 35 E.H.R.R. 32; M. *v* Germany, 17 December 2009, App. No. 19359/04; Grosskopf *v* Germany, 21 October 2010, App. No. 24478/03; Kallweit *v* Germany, 13 January 2011, App. No. 17792/07.

even if – from a doctrinal point of view – there still is a disagreement between the German FCC and the ECtHR. Despite these considerable reforms, the European Court in 2016 confirmed its stance, this time concluding that

> "[…] the more preventive nature and purpose of the revised form of preventive detention do not suffice to eclipse the fact that the measure, which entails a deprivation of liberty without a maximum duration, was imposed following conviction for a criminal offense and it is still determined by courts belonging to the criminal justice system" (Bergmann v Germany, 7 January 2016, App. No. 23279/14, § 181).

German reception of this decision in preventive detention and beyond

The decision in the case of M had a tremendous effect. Because of the visible disagreement between the German FCC and the ECtHR, the German courts were unsure how to react. Some ruled that persons in the situation of M. should be freed immediately (for details [9]); others opposed this view and denied in the "most serious cases" an automatic release. The legislator sought to clarify the situation with a transitional act, but in May 2011, the German FCC declared all provisions dealing with preventive detention unconstitutional.[35] However, the Court held on to the two-track system which it considered to be deeply rooted in German penal culture, and did not nullify the existing provisions, but gave the legislator two years to produce amendments to the law. These developments on the level of European human rights law and German constitutional law thus ultimately required a whole new concept of preventive detention. In the leading judgment of May 2011,[36] the FCC emphasised that the constitution (and, implicitly, the ECHR) contains an "*Abstandsgebot*", literally a requirement of interspace (or difference) that should be maintained between the two forms of deprivation of liberty for dangerous offenders – imprisonment and preventive detention. As a "measure of correction and prevention" (and thus something different from a punishment), it only qualifies if there is a visible difference between the way the measure and a prison sentence are enforced.

The resulting seven requirements by the FCC concern the court order, the regime (consequently orientated towards rehabilitation and treatment) and the judicial review. According to the ultima ratio principle, preventive detention must only be used as a last resort and subject to strict limitations, and during the execution of the preceding prison sentence measures should be taken to reduce the dangerousness of offender to a degree that means that further detention is not required. Taking a multidisciplinary approach, all therapeutic possibilities should be exhausted and even new individualized treatment should be developed if standardized therapies are shown to be ineffective. High costs and intensive efforts may not be used as arguments to deny treatment – here, the FCC is in line with the European Prison Rules and requests by the CPT [33]. Another principle calls for separation of persons in preventive detention from the general prison

[35] BVerfGE 128, 326, 4 May 2011, App. No. 2 BvR 2333/08 and others.

[36] This was already spelled out seven years earlier (FCC 5 February 2004, App. No. 2 BvR 2029/01, cf. [15]) but not adequately implemented.

population with regard to both accommodation and regime activities. A further "minimization requirement" means that it has to be borne in mind at all times that preventive detention should be oriented towards ultimately enabling freedom. The regime should be relaxed in various ways, by allowing furloughs or other forms of temporary release from detention wherever possible.

The Court considered both Federal and State legislation against this background. Both fulfilled their obligations in time as a result of an amendment to the Penal Code (s. 66c), provisions for specialized judicial review and various State Acts on the execution of preventive detention. Still, the whole construct is not entirely consistent because every single one of these requirements is also a principle of German *prison* law with the overall purpose of social reintegration ([7], 320; [27], para. 35). It remains to be seen whether a discernible difference between preventive detention and imprisonment as a punishment is established by withdrawing resources from normal prisoners and allotting them to those in preventive detention. The somewhat surprising new enthusiasm for therapeutic approaches towards offending shown by the Federal Constitutional Court has in any case already leveraged the principles of appropriate treatment and brought an allocation of resources for these purposes ([27], para. 32; [28], 48 f.).

As mentioned above, the ECtHR in contrast still considers preventive detention to be a punishment ("penalty"), because it is imposed and enforced within the Criminal Justice System. The Court only makes an exception when the detainee is of "unsound mind" and thus falls under Art. 5 (1) (e) ECHR. According to the Court, however, the term "unsound mind" "does not lend itself to precise definition since its meaning is continually evolving as research in psychiatry progresses".[37] Therefore, it only points to three basic criteria as minimum conditions and grants a certain discretion to national authorities in determining when a person is of unsound mind (Winterwerp v Netherlands, 24 October 1979, App. No. 6301/73, § 39). Firstly, it has to be established that the detainee has a true mental disorder by a competent authority on the basis of objective medical expertise, secondly, the mental disorder must be of a nature which warrants compulsory confinement, and thirdly, the validity of continued confinement depends upon the persistence of such a disorder.

As regards the German situation, it is of particular importance that detaining a person as a mental-health patient is only "'lawful' for the purposes of sub-paragraph (e) of Article 5 § 1 of the ECHR if it is effected in a hospital, clinic or other appropriate institution" (Bergmann v Germany, 7 January 2016, App. No. 23279/14, § 99 with further references). When these conditions are fulfilled, the Court is ready to accept preventive detention, even in cases where it was prolonged retroactively. It did so in the *Bergmann* case, which is similar to that of M.

In particular, the Court regarded the newly constructed preventive detention centre, a separate building on the premises of a prison (several of which now exist in Germany), as a suitable institution to treat mental disorders properly, because psychiatric, psychotherapeutic or socio-therapeutic treatment are provided to reduce the risk the detainees pose to the public. In general, the Court welcomes "the extensive measures which have been taken in [Germany] on judicial, legislative and executive levels with a view to adapting preventive detention to the requirements, in particular, of the fundamental right to liberty" (Bergmann v Germany, 7 January 2016, App. No. 23279/14, § 123). In

[37] Bergmann v Germany, 7 January 2016, App. No. 23279/14, § 96 ff.

the case under review, it therefore accepted the legitimacy of the detention under Art. 5 (1) (e) ECHR.

In our opinion (see also [8]), this decision blurs the line between psychiatric institutional treatment (such as in mental health clinics under s. 63 of the German Penal Code) and preventive detention centers that still are part of the prison system. It does so by accepting the "trick" of the Federal Constitutional Court that persons who were considered as still dangerous were re-labelled from being "bad criminals" into being "mad patients" that need therapy in a closed setting (see also [7]). On the other hand it pacifies the heated discussions on how to solve the problem of retroactive preventive detention and bridges the gap between the different stances of the two courts.

(Further) International monitoring activities and their influence

Apart from the remarkable development in the field of preventive detention, European influences are less visible, but nonetheless traceable. In particular the Federal Constitutional Court regularly uses international and European Human Rights standards at least as auxiliary arguments. It obviously does so when using the guarantees of the ECHR. However, it also takes into account the so-called "soft law" regulations, namely the European Prison Rules updated in 2006, and other recommendations in that field.

As early as 1965 the Federal Constitutional Court[38] drew on the relevant recommendation of the Council of Europe, when it had to decide upon the constitutionality of provisions regulating remand detention (that is, of their compatibility with the human rights as enshrined in the German Basic Law). The crucial point was the question of proportionality. To account for what it called "state-of-the art legal development", the FCC consulted the (now obsolete) Resolution (65) 11 of the Committee of Ministers on "Remand in Custody".

Some thirty years later, the FCC seems increasingly inclined to draw on the Council of Europe's soft law when needed. It has argued in a decision on juvenile prison legislation that it "may hint at a practice that does not comply with requirements of the German constitution" when "standards and requirements of international law referring to human rights as can be found in the guidelines and recommendations of the United Nations or the Council of Europe are not considered or are not met."[39] It is remarkable how the court swung the moral hammer by criticizing German practice as not conforming to European standards that typically (in Germany as elsewhere) are thought to be lower than national standards.

Another decision of the FCC referred to the conditions of remand detention, where various standards set by the CPT as well as the current recommendation on remand in custody[40] were used to show that certain practices (in this case locking-up remand prisoners most of the day in their cells while sentenced prisoners were allowed to move

[38] BVerfGE 19, 342 (345).

[39] The first was a decision of the Federal Constitutional Court relating to Juvenile Justice in 2006, BVerfGE 116, 69 (90). See also FCC, 13.11.2007–2 BvR 939/07; and the Constitutional Court of Berlin, VerfGH Berlin, Beschl. v. 03.11.2009–184/07. Other courts, however, have not adopted this view, namely the Constitutional Court of Bavaria VerfGH Bayern Vf. 3-VI-09, Vf. 3 VI/09.

[40] Recommendation (2006) 13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

relatively freely within the prison or certain areas) were incompatible with Human Rights laid down in the German Basic Law.[41] In yet another decision, CPT standards for prison cell size were used to show that in the case under consideration the human dignity of the prisoner was not violated (even if the cell only measured 6 m^2).[42]

Apart from their use in jurisprudence, CPT-standards as well as criticism from the CPT reports, but also the European Prisons Rules and other relevant recommendations, are sometimes used during the legislative reform process, for example as regards the Remand Prison Acts and the Juvenile Prison Acts of the Länder ([12, 25] with regard to ERJOSSM [18, 23]).

Mutual influences and problems

Finally, it should be mentioned that the "Europeanisation" works in two directions: In its landmark decision on "irreducible" life sentences in 2013,[43] the ECtHR relied heavily on the relevant decision of the German Constitutional Court.[44] This decision outlawed such sentences in 1977, stating that there must be a right to hope and to a chance of being reintegrated into society for all offenders. Another example is the influence of the German Prison Act (see above) on the development of the 2006 revised version of the European Prison Rules [33].

While the many layers of Human Rights based instruments found at the national, international and European level certainly have strengthened the normative basis of prisoner's rights immensely, the multitude of different instruments and controlling mechanisms also has its problems: So far, the CPT, the Mechanisms under OPCAT, the Working Group on Arbitrary Detention and additionally (and not even yet mentioned) the European Commissioner on Human Rights[45] have never complained officially that German authorities have not collaborated fully. It also seems that all reports required from them have been delivered duly (even if sometimes somewhat delayed). For the authorities involved, however, the frequency of visits, the many different monitoring institutions and the additional workload related to such visits may lead to an indifferent if not sceptical stance towards these mechanisms (see for an empirical account [1]).

Summary and conclusion

Prisoners in Germany are citizens and as such retain, in principle, all their rights unless they are explicitly restricted based on statutory law. They must always be in a position to challenge any infringement of their rights before a higher deciding authority and ultimately a court. These two requirements are the cornerstones of national legislation

[41] FCC, 17.10.2012–2 BvR 736/11 (= published in Strafverteidiger 2013, p. 521 et seq.).
[42] FCC, 7. 11. 2012–2 BvR 1567/11.
[43] Vinter et al. v. United Kingdom - 66,069/09, 130/10 and 3896, Judgment 9.7.2013 [Grand Chamber]. It remains to be seen whether this judgement will be confirmed or weakend by the decision of the Grand Chamber in the case of Hutchinson v. United Kingdom - 57,592/08 (referred in July 2015).
[44] FCC in the official collection BVerfGE 45, 187.
[45] He has visiting rights comparable to that of the CPT, during his visit 2006 his priority was to see prisons where preventive detention was executed, *Commissioner of Human Rights* [2].

to protect and monitor the rights of prisoners and have been demanded by the Federal Constitutional Court. In 1973 the Court linked the prisoner's and the society's interest that prisoners should be rehabilitated (or, in German terms, "resocialized") to their human dignity and other constitutional principles, and in that way established a constitutionally guaranteed right to (the chance of) social reintegration that includes, inter alia, the right to complain against infringements of their rights. The relevant legislation was enacted in 1977 and was updated and strengthened through a reform in 2006. Therefore, judicial control over German prisons has been dominated by national jurisprudence under the guidance of the FCC.

Consequently, for many years European influences, and in particular the jurisprudence of the European Court of Human Rights, have been of minor importance. This changed considerably in 2009 with the case of "M vs. Germany" and which has been discussed as special case study in this article. It had enormous impact on legislation and practice concerning preventive detention in Germany. The Federal Constitutional Court in recent years also not only sought to incorporate the jurisprudence of the European Court of Human Rights in its judgments concerning prison matters but also "soft law" recommendations by the Council of Europe, mainly the European Prison Rules.

Even if high court case law has an indirect preventive effect by setting precedents and shaping the overall prison culture, other preventive mechanisms that function in addition to the retrospective review of potential violations of prisoners' rights have influenced prison law and practice in Germany more recently. This is primarily the case for the work of the CPT, which is generally acknowledged by the German authorities and has impacted at least discreetly on new prison legislation, but also for preventive mechanisms under U.N. regulations and on a national basis. With a slight reservation concerning the multitude of different institutions and instruments that may lead to a certain fatigue by the prison administrations and staff, we therefore conclude that the monitoring of prisoners' rights generally works sufficiently well in Germany.

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