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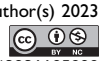
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‘One always looks for a compromise…’: Senior prison managers’ views of law, human rights and prisoner complaints in Germany

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Abstract

German prison legislation is based on a fundamental rights approach but there has been little examination of how those who should be instantiating a culture of rights in penal regimes – prison staff – view such laws and rights. This question is of cross-national importance. Holding considerable power over people in custody, examining the ways in which prison staff see and act on obligations to protect these individuals provides useful insights into how a culture of human rights in detention exists, or otherwise. In this article, we seek to contribute to the literature on human rights in the context of punishment by examining how senior staff in German prisons view legal regulation, prisoners’ rights, and the mechanism designed to protect them: complaints. Drawing on 24 interviews conducted in four prisons across two Federal States, we find that the principle of resocialisation, considered to be a core feature of German prison law, is influential on prison managers. German prison legislation links this principle to prisoners’ rights, including the right to complain. Managers valued the law as a form of guidance though were more positive about legal regulation when it was used by them rather than against them or the prison system. Some saw legal precepts as useful ways of defending themselves against threats of litigation or blame. While the study finds that law is highly present in prison manager culture in Germany, the principle of resocialisation in prison management practice may have created a view of prisoners as people to be in need, rather than worthy of rights.

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Introduction

Human rights are vulnerable in prisons. Over recent years, international human rights law has placed emphasis on mechanisms to protect human rights in prison, with governance by the rule of law and legal regulation and the use of complaints procedures. The UN Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules oblige states to use legal regulation to guide many aspects of prison life, and specifically recognise complaints mechanisms as a key way to reduce the risk of human rights violations. Human rights over the years have become a focus within penological scholarship (Bergmann, 2003; Müller-Dietz, 2005; Van Zyl Smit and Snacken, 2009; Van Zyl Smit, 2010). Some of the more recent work, however, questions the fundamental ability of human rights structures to diminish the use and pains of imprisonment (Armstrong, 2018, 2020; Snacken, 2015; Xenakis and Cheliotis, 2018) and argues that penology must examine the lived experience of rights critically.

Such exploration is indispensable given the sharp effects imprisonment have on the rights of those in detention. We argue that it is also valuable to study the ways in which prison managers implement and respond to the demands of human rights norms and legal governance, as this has the potential to shape the experience of punishment profoundly (Bennett, 2016a, 2016b; Crewe and Liebling 2015, Murphy and Whitty, 2007). While it has been established in the prior literature that prison managers are a heterogenous group (Crewe, et al., 2011; Bennett, 2016a, 2016b), a central common feature of their work is the need to navigate legal regulation. They are, as Bennett puts it, 'micro-actors entangled within and attempting to make sense of the dialectical relationship between structures and agencies' (Bennett 2016b: 138).

In this article, we examine specific aspects of prison staff culture in Germany: how prison managers experience legal regulation (as structural aspect), how they individually and collectively respond to accountability demands and what they find acceptable and helpful to do their work (agency). We also look at prison managers' views of the rights of people in prison, in particular their right to complain – a subject which has important implications for how we understand the manifestation of human rights standards in detention. As Calavita and Jeness (2014) described in a Californian study, the attitude of staff members to complaining and legal cases is enmeshed with their views of people in prison as 'people', with the right to complain and self-advocate. We lack, however, sustained examination of how prison managers, especially in Europe, view the human rights frameworks which should govern their work.

Our starting point is that all prisons must operate within an ethical framework (Coyle and Fair, 2018), and that residing at the core of this framework should be respect for prisoners as human beings and as holders of rights. Our examination of how prison managers respond to regulation and right-based accountability demands is based on a confluence of perspectives from the existing literature. First, the literature on prison managers and staff culture more generally notes the centrality of accountability demands in such work, and, in particular, the rise of performance indicators (Behan and Kirkham, 2016; Bennett 2014, 2016a, 2016b; Bryans, 2008). Here, we seek to extend this literature by looking more directly at responses to legal regulation through complaints and right-based oversight. Secondly, human rights-based oversight and legal frameworks are potential bulwarks against the imposition of unalloyed power in prison. These tools must, however, be

combined with the 'banality of the good', namely the power of human agents (Cheliotis 2006: 330) to be effective. In sum, this article explores how these human agents, the prison managers, navigate, use, view and experience rights-protecting structures, providing insight into both the ways in which human rights-based regulation actually operates in prison, but also how this regulation shapes and is shaped by prison manager culture.

Human rights protections in prison, the law and the role of prison managers

The monitoring of human rights protection in prisons requires independent bodies and adequate procedures. While in jurisdictions like Ireland (Curristan and Rogan, 2022) and England and Wales (Hardwick, 2016) prison inspectors are entrusted with this task, other systems focus stronger on specialised courts, among them Germany (see below for details). Doing such work has, however, much wider relevance. International human rights law has increasingly turned its attention to prisons, setting minimum (though non-binding) standards for many aspects of prison life, including material conditions, contact with the outside world and release procedures. This activity has generally been viewed positively, with European human rights norms and practices considered to have led to important improvements in how prisons are run (Simon, 2021; Van Zyl Smit and Snacken, 2009). How these standards have been implemented on the ground has, however, received much less attention. Increasingly, we see the analysis of the impact of European human rights structures on national prison regimes (Daems and Robert, 2017; Morgenstern and Dünkel, 2018). It is only very recently that the interaction of these norms and bodies with the experience of punishment has come in for academic attention (Van der Valk and Rogan, 2020; O'Connell and Rogan, 2022), following calls for greater criminological assessment of human rights (Armstrong 2018; Snacken, 2015).

Much of our understanding of how senior prison staff experience measurement of performance against the benchmark of human rights standards comes from Bennett (2016a, 2016b), who argues that managerialist approaches to prison, emphasising 'efficiency, and value-for-money, performance targets and auditing' (Loader and Sparks, 2002: 88) have become dominant in the lives of prison managers in England and Wales.

While accountability demands, and, with them, oversight, judicial control and individual prisoner's complaints can be seen as useful monitoring against the benchmark of human rights standards (Cheliotis, 2006, Crewe and Liebling, 2015, Coyle and Fair, 2018), in a performance culture these demands may rather be perceived as adding up to never-ending reporting duties, with a multiplicity of sources seeking to hold prison staff to account, usually through the means of paperwork (Curristan and Rogan, 2022). Owers (2007) has cautioned that because of this, managers could focus on the 'virtual prison', and not how imprisonment is experienced in daily life and Murphy and Whitty (2007) show that, in such a context, human rights compliance can become formalised and divorced from the purpose and spirit of such norms. Hardwick has echoed this and concedes that prison inspection in England and Wales using inspection scores 'might feel like a tick-box exercise' (2016: 650) although the inspector's aim remains to see the concern resolved, not to control if a recommendation has been followed formally. We also see increasing interest within criminology on the regulation of prisons, the latter being characterised as steering or checking prison practice (Braithwaite, 2003; Tomczak, 2022). In this article, we focus on two aspects of such regulation: the restraint or guidance offered by prison law, and the specific instance of complaints structures for prisoners as bearers of rights.

Literature on staff culture suggests that regulation by law and scrutiny from outside bodies is, in general, resisted. As Barry (2020) notes, prison staff culture can view demands for account as opportunities to assign blame, and, as such, these opportunities can be seen in highly negative terms. Other literature has assessed the ways in which legal regulation affects the use of discretion (Feest and Lesting, 2009, Haggerty and Bucerius, 2020), how oversight and performance cultures have had influence on the work of senior staff (Bryans, 2008; Liebling and Crewe, 2012) or looked at the limited and sometimes counterproductive function of courts in penal oversight (Behan and Kirkham, 2016; Bergmann, 2003). This scholarship suggests that human rights-based demands for account may be subject to considerable push-back, or at least suspicion.

Prison managers are confronted with complex accountability demands, ranging from fundamental questions about dignified treatment of prisoners to the exigencies of a modern administration that is cost and resource effective. This study explores how managers in prisons in Germany respond to these demands how they view legal regulation, how they make use of discretion, how they conceive of the human rights of people in prison, and how they experience a particular form of human rights-based oversight, the complaints systems. We also offer a much-needed (Tomczak, 2022) empirical base for understanding the potential of prison oversight, effected by law in this case, to shape prison practice.

In this context, some features of the German context (that will be further outlined below) are of importance: First, prison governors have been traditionally much more independent from prison administration bodies, in Germany situated in the Federal State's Ministries of Justice, than this is the case for example in England Wales: one prison director in our study talked about "all us prison directors who have their little kingdoms" (interview 21); thus proving a strong feeling of agency (Bennett, 2016a) and making a strong 'jurisdictional claim' (Dubois, 2018). Second, there is a distinction to be made between Prison Acts as parliamentary laws with a much greater authority, both legally and in practice (as we will see) and other prescriptions, such as ministerial orders. Thirdly, prison staff hardly has been in the focus of scientific interest, and no literature exists on their working experience from a human rights point of view. We therefore must rely predominantly on the literature on other jurisdictions and explore in how far these approaches developed fit in the German context.

German prisons

Law, policy and practice

Germany provides a useful context in which to study the interaction of prison manager culture and human rights because it is well recognised as having a legal culture which embraces a strong rights-based approach (Lazarus, 2004; Van Zyl Smit and Snacken, 2009). The German *Grundgesetz* (Basic Law, BL) of 1949 includes a charter of individual human rights (Articles 1–19 BL) and is the constitutional basis for all legislation, the execution of state decisions and jurisprudence. Being aware of the weaknesses of its predecessor, the Weimar Constitution of 1919, the protection of human dignity was foregrounded, but also strong mechanisms were put in place to control that the executive respects fundamental rights. For this article, the guarantee of effective legal protection in Article 19 (4) BL is of importance that states that any person has recourse to the courts when her or his rights 'should be violated by public authority'.

Despite this approach, effective and independent oversight over prisons was not effectuated until the 1970s. One important facilitator was the Federal Constitutional Court (FCC), who in 1973

argued that every offender has a right to resocialization that accrues from his or her constitutional rights to personal liberty and respect for human dignity (Morgenstern, 2015).[1] 'Human dignity' itself is a multifaceted concept (Badura, 1964; Snacken, 2015) – these facets include freedom from humiliation, the acknowledgement of a person's vulnerability and social needs and importantly also autonomy and self-determination (Snacken, 2015, FCC in BVerfGE 33,1).

The FCC also outlawed the controversial concept of a special – lesser – legal status of prisoners that had created a so-called 'special power relationship' between them and the state (*besonderes Gewaltverhältnis*). Under this concept, restrictions of fundamental rights were justified as such by the objectives of punishment and the 'nature of the institutionalised relationship'.[2] The FCC 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 ultimately forced the legislator to pass a statutory Prison Law in 1977.[3] In September 2006, a major Constitutional Law Reform was enacted that redistributed the legislative competences for prison legislation to the Federal States (*Länder*). Based on the substance of the 1977 Act, 16 new Prison Acts were adopted.

Complaints and accountability structures in the German prison system

A key aspect of German prison law concerns the regulation of complaints by people in prison. The Prison Act 1977 introduced a comprehensive system of complaints, procedures and judicial review in a dedicated chapter on 'legal remedies'.[4] In addition to an internal complaints procedure, according to which every prisoner can directly 'apply to the head of the institution with requests, suggestions and complaints on matters concerning himself', a judicial complaint was introduced and a designated chamber of the Regional Court was created (*Strafvollstreckungskammer*). Following the basic approach of Art. 19 (4) BL each and every decision taken in prison and even simple actions of prison guards such as not knocking at the prisoner's cell door can be made subject of a formal judicial complaint procedure. The decision can be appealed to the Higher Regional Court, the possibility of appeal exists for prisoner and prison. With it, Germany has an unusually strong role for judges in dealing with prisoner complaints. This includes the FCC to which prisoners can turn with a so-called constitutional complaint (*Verfassungsbeschwerde*) once all other judicial remedies have been exhausted. The court has issued several decisions which impact on practical aspects of prison life, for example, the costs of telephone calls, prison leave or other prison release measures. While practitioners and politicians sometimes have been critical of this far-reaching jurisprudence, scholars have considered the impact of cases taken by prisoners on prison practice to have been considerable (Morgenstern and Dünkel, 2018; Müller-Dietz, 2005). Nevertheless, this high court jurisprudence rather is an accountability mechanism that helps to shape a human rights compatible prison practice gradually and in the long run than an effective remedy for the individual prisoner.

German prisons thus can be 'characterised by a highly legalised culture' (Van Zyl Smit, 2010: 503). German scholars in the 1980s saw German prison legislation as an example of the 'worldwide tendency to humanisation and juridification' of prisons (Kaiser and Schöch, 1987: V). Social theorists tend to be more sober and understand 'juridification' (*Verrechtlichung*) as an ambiguous development. They critique the proliferation of law colonising the modern lifeworld (Habermas, 2011; Teubner, 1987). As well as statutory law, scholars have highlighted a concomitant increase in the administrative and bureaucratic regulation of prisons, and 'judicialisation', or the creation of norms by the judiciary (Papendorf, 2012: 290).

This tightly regulated nature of the governance of prisons in Germany has also been explored by penologists (Bergmann, 2003; Diepenbruck, 1981). Bergmann described its effect on the relationships between staff and people in prison as a form of 'conflict expropriation' (2003: 145, drawing on Christie, 1977), with staff losing discretion and focusing more on making decisions 'courtproof' or invulnerable to litigation by prisoners instead of trying to resolve a particular issue (Böhm, 1992; Müller-Dietz, 2005). The move towards legal regulation of prison management in Germany has, on the contrary, also been considered to have done too little to reduce unpredictable and unfair uses of discretion (Feest and Lesting, 2009), with some deference by the courts to prison authorities still in evidence.

It seems that managerialist approaches have not permeated German prisons to a great extent and it is debatable how far a regime of efficiency, value-for-money performance targets and auditing (Bennett, 2016a, 2020; Liebling, Price and Shefer, 2012) are accepted and implemented. In Germany, this kind of governance of 'New Public Management' (Fleck, 2004), often takes the form of ministerial orders making specific requirements for example on the issue of prison leave. While they represent the technocratic side of 'juridification' as discussed above, purely managerial techniques are only slowly introduced. We find examples such as the use of Balanced Score Cards (BSC), but the introduction of these tools happens at different places in the different states (see below).

Who are 'prison managers' in Germany? The group of senior prison staff or, translated literally, 'leading staff' (*leitende Bedienstete*) in Germany comprises of different ranks with decision-making powers; the term 'manager' is unusual. For our study, we have identified as senior prison staff all those who can issue a binding decision for example in disciplinary procedures and who are, in particular, responsible to decide upon the above-mentioned 'requests, suggestions and complaints'. With variations between the Federal States, these are prison directors (*Anstaltsleiter*) and their deputies, but also prison governors (*Vollzugsleiter, Abteilungsleiter*) responsible for overseeing the concrete, daily prison routine or parts of it (for example work, treatment or social services) and sometimes senior wing managers. Apart from the latter who a part of the uniformed staff, the others mostly hold a university degree. Prison directors traditionally have been trained lawyers, sometimes now they are psychologists or social education specialists, sometimes they are coming from a public administration background.

While there is consensus that prisons in Germany are highly regulated by law and regulation, and that much of the law on prisons tends to favour a rights-based approach which promotes reintegration (Lazarus, 2004; Morgenstern and Dünkel, 2018; Van Zyl Smit, 2010), this position has been adopted largely on the basis of analysis of its legal provisions, rather than how laws are instantiated in practice by prison staff. In particular, there has been no exploration of how managers experience complaints made by people in prison, the role of the courts or the activities of oversight bodies. For the reasons mentioned above, such a study has been overdue and with its emphasis on legal regulation of prisons, but also a strong fundamental rights approach in judicial action, Germany offers an opportunity to examine how these influences shape prison management practice.

Context, data and methods

The present study is the first empirical assessment of how human rights protections and legal regulation translate into the lives of senior prison managers in German prisons. Earlier empirical studies either focused on prisoners (Bergmann, 2003; Diepenbruck 1981) or on judicial decisions (Feest and Lesting, 2009) and their implementation. Because Germany is a federal state, with

responsibility for prisons lying in the hands of the sixteen *Länder*, it is difficult to speak of *the* German prison system. In order to gain different perspectives, we chose to conduct this research in two states with different demographic, historic and prisons contexts: Mecklenburg-Western Pomerania (MP) in the North East, once part of the German Democratic Republic, and North-Rhine Westphalia (NRW) in the West. While the first is rural, the latter as the most populous German state has a large urban population. In the first, we find relatively few non-nationals, in the latter they form a large share of the population. MP has 1.6 million inhabitants, and a prison capacity of 1.400 in three prisons for adults while NRW has a general population of ca 18 million and a prison capacity of 18,500 places in 36 prisons for adults (about 25% of all prison places in Germany). Within each Federal State, we selected two typical prisons. In MP, the prisons chosen are relatively small (200 and 290 places). They house only adult male prisoners. In NRW with mostly medium-sized prisons, we chose one prison that houses adult males only, while the other houses female adult prisoners too. Both have 550 places each.

Formal invitations to participate in interviews were issued to senior staff of four distinct levels in the upper hierarchy of a prison. In total, 24 interviews were conducted – prison directors (3), deputy directors (3), prison governors (15) and senior wing managers (3). Although the latter are uniformed staff and without formal sign off power when making decisions (unlike the other grades), they are viewed as having considerable *de facto* influence, especially for informal issues. In the first three groups, *all* senior staff in the respective prisons were interviewed except two persons who were on sick leave. The position of senior wing managers existed only in the two prisons in NRW and comprised about 20 persons of which three were interviewed. Participants were provided with information sheets and informed consent forms. Ethical approval was provided by Trinity College Dublin Research Ethics Committee and the relevant German authorities (Ministries of Justice and Data Protection Agencies of the Länder). Given the positions of the participants involved, it is acknowledged that confidentiality of the data was a particular challenge. Identities have been protected by using participant numbers and removing identifying information.

Participants were mostly experienced senior staff with a higher education background. Seven interviewees had a training as prison officer, the rest holds university degrees, in law, psychology or social work / social pedagogy or a special degree in the administration of justice. The regional sub-samples differed in so far as in MP three females and seven males were interviewed while the gender ratio in NRW was different with eight females and six males. The age mean was 45,1; in MP it was 48,6, in NRW the interviewees were somewhat younger with 42,6 years of age. Only six participants in the sample were younger than 40, five were older than 56. The years of experience in the prison system were 20,2 in MP and only slightly less in NRW with 19,7 and ranged from 5 to over 30 years of work experience in the overall sample. We cannot say our participants are directly representative of prison managers in these regions, given that public information does not exist on the demographic backgrounds of prison managers in Germany. We note, however, the high proportion of managers within the prisons in this study which took part in the study.

Interviews were conducted using a semi-structured interview guide that had been adapted by the first author along with the creators of that original guide from a related study conducted by the second author in Ireland. The first author spent about one week in each prison to conduct not only these interviews but also working on related research on prisoners, to make connections with managers and to develop trust. During this time, informal communication and observations were possible and were documented in extensive fieldnotes. While these observations were not

analysed formally, they offered a useful additional background by which the first author could understand the setting. It is acknowledged that observations offer a very rich basis for understanding prison culture in particular, and have been used with great effect (Bennett, 2014: Cheliotis, 2006). Further research using observations of decision-making practice would undoubtedly yield great benefits with the present research providing a useful basis.

Pre-testing of the research instrument was completed through a formal feedback process with a focus on language and translation issues from experts, including prison managers and gatekeepers. The questions sought to provide an opportunity to senior staff to reflect on their experiences of three intertwined mechanisms for the protection of rights: complaints procedures, inspection and monitoring and access to the courts. The interviews were conducted by the first author between May and December 2019 and lasted between 45 and 112 min, typically 60 to 75 min. Verbatim interview transcripts were thematically coded and analysed, using the software NVivo. Our analytical approach is based on Thematic Analysis (TA) as described by Braun and Clarke (2006). It has to be acknowledged that many variations of TA exist – the same is true for the German Qualitative Inhaltsanalyse (QA) which exists in several, partly varying forms (Kuckartz, 2018) and informed the German analysis. The relevant aspect of TA and QA for our research is that these methods provide a robust, yet flexible way of structuring and explicating manifest and latent contents of the interviews keeping in mind setting of the interviews in a prison administration context.

Findings

The authority of the law: Responding to the guidance offered by legal regulation

A key finding to emerge was that participants situated their discussions of what constitutes decent treatment and fair procedures within the parameters of legal regulation. Prison legislation was, across the board, a strong and highly present source of guidance for how to act. When asked what constituted fair treatment in prisons, participants tended to turn immediately to the law, and to the Prison Act specifically, to describe what such treatment means to them. Not only legally trained, but also participants with other professional backgrounds replied in this way. It was a strong source of the language, behaviour and attitudes which constitutes the instantiation of fair treatment amongst this group, at least in how they described their approach. Interestingly, the legislation was even used to support what might be their initial or gut reaction to a problem or issue. As such, participants engaged in a kind of translation process, taking their desired way of managing a problem, or their options for responding, and shaping that response into a way prescribed by law. As one participant put it:

> When I have a request, by a prisoner, often you just have a gut feeling. You think, okay, I would decide this and that, but in reality, I still look into the Act and ask myself the question: Can I justify it like that? Is it supported by the law? Can I do it like that? (Interview 15)[5]

This implies that the Prison Act has authority for prison managers. Across all ages and stages of experience, the Prison Acts were generally thought of in a positive way and considered a legitimate and convincing reference system. Two its most valuable features in their eyes were the fact that social reintegration is the explicit main aim of the legislation and, secondly, that the use of the legislation supported a consistent and transparent practice:

> [The Prison Act in …] still has managed to put resocialisation first. And we don't have to say that we have to decide between security and resocialisation. (Interview 21)

> There we have our legal prescriptions, […], and I find it important that you stick to this basis; […] that it is clear and comprehensible *why* we do something, and therefore transparent, and that every prisoner and also the society knows what we are doing here and that we keep to it. And not, to put it bluntly, somehow fiddle or mumble… (Interview 2)

For senior managers in Germany, having a code to refer to when making decisions or taking actions primarily was an asset. This is in considerable contrast to the literature on how prison staff view legal prescriptions in some other settings (Haggerty and Bucerius, 2020; Liebling, Price and Shefer, 2012). This was, in part, because of the way prison managers saw legislation and may have to do with the authority of parliamentary acts mentioned above, as this assessment differs considerably from that of ministerial orders (see below). Participants largely felt that the law offered flexibility, rather than restricted it. One important element of the acceptance of the law was that it was seen to adopt a reasonable balance between the aims of security and rehabilitation. As managers responsible for security and order, their views on how security should be implemented in practice aligned closely with those expressed in the Acts. Particularly relevant, however, for participants, was the flexibility they saw as present in the legislation. This flexibility was viewed as an aspect of fairness, which was understood by them as allowing them to do justice in individual cases rather than applying the law uniformly or mechanistically. The use of discretion has been long documented as important in the literature on prison work (Haggerty and Bucerius, 2020; Liebling, 2008; Liebling, Price and Shefer, 2012), with the latter authors describing its 'centrality' (Liebling, Price and Shefer, 2012: 121). The present study shows, however, that prison managers in Germany see legislation not as a barrier to the use of discretion but a resource for the use of discretion. This presents something of a paradox: senior prison managers in this study speak of legal principles that *can* or cannot be adhered to, rather than something which *must* be followed. In other words, legal obligations and requirements are aids to action in their work rather than sources of strict obligation to behave in particular ways. Legal prescriptions, therefore, are not a dogma, but a guideline. Participants seemed unaware of this contradiction:

> Okay, the Prison Act […], I find it very fair, because it is even more individualised, in that it is more directed towards individual possibilities for prisoners. […] And this means already that you have a good basis there, that you can build on, and there are always possibilities where you can say, yes, we do it always like that, but in special cases, with particularities, we can deviate. And this is what is legitimate for me. (Interview 1)

This need for flexibility, and to be allowed some creativity, was of central importance in nearly all interviews. As has been found in other contexts, whenever the rules become too rigid or too detailed, participants felts that this impedes their work. The German participants mentioned in particular detailed directives from the Ministries of Justice as Higher Prison Authorities as an example of such restrictions. They stressed that the flexibility they found in the law was to be exercised in favour of individualised treatment for a prisoner and stopped short of saying that they are sometimes bending the law, but rather characterised their actions as a balancing act:

> Where discretion is possible, within the limits of these rules, I find it important, not only to look at the rule with one eye but also to look sharply at it with the other eye, to whom and to what do I apply the rules. And then: give him the benefit of doubt… […] there is always a spectrum. I can say in good faith: No, you don 't get it. But I can squint both eyes and say: Yes, we do it. And I tend to do that: yes, we try. Even with the risk that the person concerned fails, that he takes advantage… (Interview 12)

> It is important, that they are treated individually, that they experience that they are not a number, you see? And you give the feedback to them, that we personally also feel that this is difficult, […] but that the rule is like that. This is difficult for the individual officer, when he has no possibility … okay, not to break the law, but to actually take the prisoner into consideration. […] One always looks for a compromise, but this depends strongly on the prison director. When there is this idea: 'No we stick to all the rules, and we are not looking at the individual but at the breach', then it is difficult. (Interview 1)

Others, however, stressed that discretionary decision-making needs to be transparent as well, to be fair, which makes it more complex and time-consuming. In explaining how decisions are discussed in the various prison team meetings including frontline officers, social workers and senior staff, and how they had to be documented, they insisted that discretion does not mean arbitrariness. These findings are in line with much of the research on discretion in prison: It is welcome by practitioners and may be used by senior staff as responsible agents to provide 'flexible consistency' (Liebling, Price and Shefer, 2012) or 'intelligent discretion' (Crewe and Liebling, 2015: 7) but there are equally hints that it is sometimes used to play the system (Dubois, 2018) as will be demonstrated in the next section. We argue that this study adds that such an approach to discretion also holds true even in what has been described as a highly regulated prison environment, where law and compliance with the law is a very prominent feature of penal culture.

It is likely that participants wished to present themselves in a favourable light during interviews in seeking to emphasise that their use of the law was in the best interests of the prisoner. What is more interesting, however, is that staff did not demonstrate discomfort with the level of discretion they have or how they use it. Participants' self-conceptions were that discretion, and the legislation were to be used to support the prisoner in some way. This can be analysed in two highly contradictory ways. The first supports the idea that prison legislation in Germany supports the implementation of a rehabilitative approach and one which favours the promotion of human rights and individualisation. The other way to conceive of this is to view it through the perspective of the human rights scepticism of Armstrong (2018, 2020), that is, that the discretion and flexibility built into the law, used ostensibly in aid of the prisoner, exacerbates the dependence of the prisoner on prison staff and thus extends penal power. While the law should be applied fairly and equitably and give guidance as to how a particular matter should be resolved, the way it is in fact used reintforces the role of the individual decision-maker and how they wish to personally resolve a matter. While efforts to come up with a solution which is seen to favour the person in prison over the strict requirements of the law are viewed as ways of being humane or fair, they, perhaps inadvertently, still emphasise the crucial dependence of the prisoner on the position of the decision-maker. As such, penal power and the 'rule of man' or the rule of the individual remains, even in a system which prides itself as being highly regulated by law.

Another finding lends credence to this position. While the existing legal framework for running prisons with its discretion and flexibility was valued by prison managers, some legal regulation was met with ambivalence or even fierce criticism. This perspective appeared when discussing

directives issued by more senior entities, particularly the Ministries for Justice. Requirements for documenting activities, felt as a 'documentation duty' manifested through paperwork were strongly criticised. Some participants rejected these requirements for account by the Ministry outright:

> We are all controlled somehow… there is this [documentation system], where they [the Ministry] are looking at [what we do], … nonsense in my opinion'. (Interview 6)

Others expressed resignation towards these demands for account by more senior bodies. As one participant put it there is: 'a lot of paper … but there is a habituation effect' (Interview 1). The source of frustration was less the paperwork as such but that the participants were not always sure what the ministerial bureaucracy was interested in and why documentation was required to the extent experienced. They suspected political and financial reasons and generally doubted that there was genuine interest or understanding what the required data or documentation meant:

> This is what I would have wished – that the Ministry sets clear targets. This, of course is useful for our management, you know, we want to know what they want from us, what they expect from us? And that there will be an understanding how these targets can be met. […] but this is difficult when […] they make no secret of the fact that there is nobody that actually has thought about it, what actually is the prison concept? Where do we want to go? (Interview 13)

> There is no substance. No substance. Nothing. NOT AT ALL. These are admin people, who do not understand the substance at all [laughs]. It is all about facts and numbers: Have we got those right? (Interview 16)

In sum, bureaucratic regulation which had the prison management as its target came in for a lot of resistance. Bennett (2014) has found evidence of high levels of annoyance and concern with the 'audit explosion' accompanying the adoption of managerialist policies in prisons in England and Wales. In this study we see similarly strong feelings amongst prison managers in Germany, as well as a common experience that prison work is something unique and impossible for 'outsiders' to understand (Bennett, 2016b; Crawley and Crawley, 2008; Curristan and Rogan, 2022). All participants expressed scepticism that their work in prisons could be quantified in ways they perceived regulation by the ministries required:

> And I wonder how you want to measure it – when you grant 20 prisoners leave, is this a good thing or a bad thing? (Interview 23)

The reasons given for being critical about both administrative and managerialist prescriptions for their work overlapped to a remarkable degree. Senior staff also feared that 'the human being falls by the wayside … it is wrong to believe that inmate A needs the same amount of time and attention and care as inmate B' (Interview 18) and that 'there is a risk that prisoners are reduced to numbers' (Interview 1).

As mentioned above, managerial tools such as BSC or other forms of performance measurement have found their way into the German prison system, but the Federal States differ in the degree they apply them. In our study we find differences between NRW and MP, the latter making more use of these instruments. Participants in NRW emphasised that they were glad that performance indicators

were not used regularly, and we find several remarks like 'Thank God, no' (interview 7), or 'Fortunately not yet' (interview 21). Others, however, explained that performance indicators were piloted and something 'we have to expect, if we like it or not' (interview 8).

As such, we see considerable difference in attitudes towards the use of law and regulation by law when such controls are exercised *by* or *on* senior staff. When using the law to decide on matters concerning people in prison, participants felt that they could use the law in ways which suited their purposes, and that law was a resource rather than a burden. This was interesting in so far, as the reformed Prison Acts developed relatively recently and including new and partly very detailed prescriptions for prison work were generally accepted. By contrast, when regulation was used by superior authorities in ways which had impacts on prison managers, law and in particular ministerial regulation was viewed as a constraint rather than a support.

Following the rules as a way of neutralising threats

As well as using law in a flexible way to support their goals, participants also used the law as a way to defend themselves against review or scrutiny, especially in circumstances where they may be subject to blame for their actions and held accountable before a court in a judicial complaint procedure initiated by a prisoner. Under this perspective, following the rules was a useful defence mechanism:

> […] you know that there are clear rules. That there is, in principle, the law that you can stick to. That you know, okay, in principle there is a rule for everything. […] you know that it is reviewable. It is simply that a third person can look at basically everything we are doing and say: 'Okay, they stick to the rules'. (Interview 24)

> I have to justify before the court why we have taken a measure in the way we have. […] Yes, I do not experience this, erm, as negative or so. Rather as a confirmation of my work. (Interview 1)

Many participants used terms like hedging, covering or guarding against (*absichern*) and then even found the above-mentioned paperwork ('documentation') acceptable as one stated:

> … to put is casually: With the documentation I want to cover my ass, this is what I always say. So, when somebody asks. Why do you document so much? I really want… although I am relatively young and not so long [working in] prison, I have undergone quite a lot, where one wanted to … yes, indeed … attribute guilt. And then I was always glad when I had really documented an incredible lot. (Interview 20)

This view was also expressed by another participant, who felt that documentation had become excessive because of the need to provide evidence for decisions, in case of challenge:

> Perhaps we already have gone a little too far, what concerns the rights of prisoners. So, we are often in the position to justify ourselves although I say: From the legal point of view, everything is clear, we did what we could for him, and we know what we are allowed to do and what not. (Interview 9)

While many participants, especially those with less experience, felt that documentation was a bulwark against reproach, and a strategy to avoid blame, some participants criticised the courts

in this context and spoke of their ever-increasing demands. As one put it, increased scrutiny by the court had:

> … some advantages, but also clear disadvantages. … and one wants the right thing, you know, one wants to strengthen prisoners' rights, but for in-prison climate, and also for the development of prisoners in prison, one achieves the opposite. (Interview 13)

The perspective displayed here, that legal regulation can be a way of neutralising threats of litigation, blame or some other negative consequence, has been seen in both prison and non-prison contexts (Calavita and Jeness, 2014). There, the complaints or grievance procedures were viewed by senior staff as forms of protection from and defence in actions before the courts to prove that they had done the right thing in terms of the following procedure. Similar perspectives have been found in the literature on the oversight of policing (Bottoms and Tankebe, 2013; Okulicz-Kozaryn and Bouška, 2016).

These findings show a complex and even inconsistent picture: On the one hand, the right to complain is generally accepted and with it the judicial or other oversight procedures. On the other hand, some participants imply that rule-following by officers is self-evident and makes court (or other) oversight mechanisms largely superfluous. If at all, court procedures were valued as confirmation of prison decisions. In the following section, these findings are supplemented by senior staff's attitude on the stakeholders – in how far is a generally accepted legal position in practice accorded to real people in real prisons?

Views of prisoners: Persons with needs, bearers of rights?

Thus far, we have seen law and other regulation viewed by prison managers as a positive source of empowerment in how to manage people in prison, a constraint on their own work when imposed from higher authorities, and something that provides cover from negative consequences. In this section, we explore how prison managers see the rights of people in prison, and their position as holders of rights. To begin with, virtually all participants viewed prisoners as people *in need*.

> Yes, we do work with human beings, not with 'material'. We must be loyal, must go up to people, show understanding, be professional. Yes, and of course the aim of imprisonment is also to change people. They have offended, they are in prison and we try to understand their deficits and then … get them on track again. (Interview 7)

> We have people here, where I think, there really went a lot wrong in their lives. And basically, you know, they have a good core, you know? But this sometimes simply is not enough, even if we check and do and do. Erm, … there we would like to achieve more, more development for him. (Interview 9)

While nobody denied that prisoners had and must have rights, attitudes to prisoners' rights differed. For some – as in interviews seven and nine above – not rights but needs were in the foreground. For others, prisoners explicitly had rights, and this was described in such terms. The rights that people in prison hold, for this group, were tied closely to those which exist within the Prisons Act, or those which were most directly connected with the principle of resocialisation. These rights were translated into specific and concrete demands, including for enough opportunities

for rehabilitative work and accompanied prison leave. These rights were also framed as matters which prisoners were not getting enough access to and were situated within the very practical context of staff and financial shortages, with participants admitting and criticising the fact that opportunities are limited. It was important to this group that prisons, and prison managers, implemented the Prison Acts:

> They don't manage to have enough staff, you know, I find that shoddy, these things, one denies them something, you know and then prisoners do not have enough means [to stand up against that]. (Interview 6)

A third group, partly overlapping with the first one, equally spoke of rights, partly when prompted in the interview with regard to the right to complain. These voices, however, added that the law may have gone 'a little too far' (interview 7) or is '*too* fair, if you ask me' (interview 11) in conceding prisoners several different possibilities to complain. Even if these statements were rare, it is interesting that they are almost identical to some of those found by Calavita and Jeness (2014: 106 et passim).

It was also a notable feature of interviews that, amongst those who discussed rights, those were tied to the practicalities in prison, and the objectives of social reintegration. What we might consider to be the 'classic' civil and political rights: the right to privacy, the right to family life, the right to communication or free speech did hardly appear in the discussion.

This distinction is interesting as it suggests, first, that the Prisons Acts in Germany are influential on the thinking of senior prison managers when it comes to conceptualising the types of rights people in prison have. As mentioned above, prison legislation in Germany has been noted for its emphasis on resocialisation (Lazarus, 2004; Van Zyl Smit, 2010) which is stipulated in the Prison Acts as main aim of imprisonment. The present study suggests that such prioritisation in the law matters, and influences how senior prison staff view the rights of people in prison. Here, we see rights being discussed in ways directly connected to the prison legislation, with almost identical language on display. As noted above, the Prisons Acts were, in many instances, the boundaries within which prison managers saw the purpose of prison and their work. In the case of rights, these acts formed the limits of those rights. This may explain why prison managers did not refer to other rights, including freedom of expression. When these rights have not been heavily juridified or placed in legislation directly, they do not become the central focus for prison managers. This may be a finding limited to Germany, given the strong emphasis on legal regulation found there, but it does suggest that international human rights standards need to be transposed into domestic legislation in more detail in order to become salient in the minds of those tasked with implementing them. Secondly, it is also notable that, amongst these participants, rights were framed as sources of obligations to take practical steps to provide for example, access to particular programmes. This is in considerable contrast to the perspectives on rights found by Murphy and Whitty (2007), where senior prison managers in England and Wales saw rights as things which could trip them up and be the source of criticism. This further reinforces the perspective that there is a culture which favours rights protection in Germany which does not exist to the same degree in England and Wales, and that the strong position of the Prison Acts may, in part, account for this difference.

The framing of people in prison as people with *needs* by prison managers should also be considered regarding the influence of the right to resocialisation. On the one hand, the right to

resocialisation inherently casts people in prison as having deficiencies which need to be remedied – to be *re*-socialised. The high priority placed on this in German prison law may explain why senior managers conceive of prisoners in this way. It may also be, however, that senior managers are displaying elements of a paternalistic approach to people in prison. The implications of this perspective are deep at both theoretical and practical levels. First, it suggests that penal-welfarist approaches to punishment are, or remain, strong in Germany. As Garland (1985) notes, the 'modern' penal approach involved a view of people who had committed crime as in need of the review and intervention by the then new disciplines of social and psychological sciences; resonses to the individual needs of the prisoner were prioritised, with educative labour a central plank in such work. A new language of reform, correction and normalisation came to the fore, which sought to support the 'inadequate' (Newburn, 2003: 12) and de-emphasise personal responsibility. Writing of senior civil servants in the United Kingdom, Loader (2006) finds similar sentiments, which he calls 'platonic guardianship', and that such officials viewed the rehabilitative ideal as part of a broader civilising project.

Penal-welfarist sensibilities are found in German prison legislation, and, as this research shows, these sensibilities are also displayed by prison managers. This suggests that, at the very least, there is a shared conception of the purpose of punishment between the law and practice amongst prison managers. While penal-welfarist approaches are often contrasted favourably with those of a more punitive style, as Armstrong (2020) reminds us, rehabilitation can be a cloak for the exercise of profound power. In this respect, it is notable that the language of rights was not as prevalent in interviews as the language of need. Casting prisoners as having rights offers prisoners more power than portraying them as people in need. This characterisation of people in prison as in need rather than rights holders was also found in discussions about complaint-making by prisoners. This is so even though participants largely acknowledged that prisoners must be able to complain and used the term 'right'.

> Well, everybody has this right, to complain, you know? (Interview 17)

> Yes, I tell him – go and complain, you have every right! (Interview 2)

> Then, often, when things were left unclear in the past, if I can say so, in uncertain discretionary spaces, and the prisoner sees that and seeks his right, then he gets it. And this is okay. (Interview 12)

Participants, however, considered complaints as a kind of legitimate communication, an approved way of bringing issues and problems to their attention, and a mechanism for sorting things out, especially in grey areas. Even when the language used was of 'rights', this was seen more as a permission, or something granted by the authorities. This somewhat reduced understanding is supported by the fact that only one participant explicitly acknowledged the need for procedural safeguards in the making of complaint, saying:

> Documentation secures the rule of law, you know? So that it is clear how this decision has been taken and why, and only then the prisoner can reflect and see if he wants to take action against it or not. […] so that it is amenable to control, whether it was lawful, possibly. What does the right to complain serve him, when we have not kept a file and all can tell a story, just as it suits us? (Interview 10)

For most participants, being held accountable through the use of complaints was something taken for granted, a necessary element of their work and something they were comfortable with. While managers in Californian prisons (Calavita and Jeness, 2014) also saw complaints as a form of communication, they rather viewed the legal mechanisms as protections against liability, reflecting a litigious culture. Senior managers in Germany saw complaints as manifestations of the rule of law. As one person put it:

> Basically, I think it is good. It just is the rule of law, you know? It is just part of it. It just is something – that one can be controlled and thinks: Okay, I cannot make a blunder. […] Sometimes one thinks: Oh no, not again. I can't deny that myself. But when I think about it objectively … This is the RIGHT [emphasis by interviewee] of prisoners, and we should be glad that we have that. We have, well, I mean, the Third Reich was not so long ago. We could just be glad that we have this opportunity. And even if it is annoying and bothersome, we should be under no illusion – it is just like that and we should all be glad to live under the rule of law. (Interview 24)

This perspective is both revealing and important. For prison managers to be comfortable speaking in terms of the rule of law shows a high level of maturity and reflection – something that was, however, not found across the board.

Conclusion

This study provides a rare examination of how legal regulation and human rights are viewed by people who are in a critical position to implement them: senior prison managers. It indicates that senior prison managers in Germany in this study accepted and actively used the respective Prison Acts as a resource, suggesting that they view these Acts are a legitimate framework and guideline for their work. They felt self-confidence and trust in their own ability to fill the discretionary space conceded to them – thus: agency. Importantly, prison legislation was felt to be supportive in how they used discretion, rather than an impediment to it. Participants insisted on their need for discretion, arguing that it enables them to work with prisoners humanely, doing justice to individual cases. This contradicts earlier research characterising the system as overly 'juridified' and stultifying. This study provides support for the contention that German prison law is based on the principles of individualisation and resocialisation, but it also shows that prison managers' favourable view of the law was derived from their belief in the flexibility it offered them, displaying both an instrumental and a value-oriented use of it.

While participants accepted the 'reviewability' of their decisions as a necessary part of their work, thus generally accepted the idea of accountability, there was less acceptance of legal regulation when it was imposed on them, rather than something they could impose. Only a few interviewees found oversight by the ministries helpful because they thought of it as technical and interested in formal details rather than substance. Performance indicators or other managerial techniques to measure and control prison work provoked different reactions: While some senior staff took them as inevitable developments of modern administration that must somehow dealt with, others rejected them. A third group, particularly in NRW, was clearly in a state of denial in this regard – whether this means that they would actively resist any new instruments, remains open. Regarding the oversight by courts, there was evidence that senior managers considered such review to be a way of ensuring practice complied with legislation and validation of their actions, but equally, review and scrutiny led in some cases to court-proofing and risk averse handling of problems. Senior managers' views of the rights of prisoners revealed a strong ethos of penal-welfarism and a characterisation of prisoners as people in need,

hardly referring to their position as holders of rights. This was particularly apparent in discussions of complaints, which were seen as a kind of communication or management tool, rather than a right. At the same time, however, there was also a matter-of-factness in how participants discussed the legitimacy of complaining, viewing it as a central element of the rule of law, and a welcome one.

As the first comprehensive study on senior prison staff's experiences with accountability and prisoner rights in Germany, we find another jurisdiction in which certain important existing research findings are confirmed: Senior prison staff act as responsible human agents in the prison system (Cheliotis 2006, Crewe and Liebling, 2015, Bennett, 2016a, 2016b) navigating a complex system of regulations and practical demands, requiring 'practical wisdom' (Dubois, 2018). Legal prescriptions are seen both as constraint and resource, the respective statutory Prison Act serving as a practical resource to a larger extent than expected. Senior prison staff know how to use the discretionary power for their work 'engaging in forms of ''creative compliance", in which they operate in accordance with the organisation's stated values, but in a way that is not completely consistent with its procedures' (Crewe and Liebling, 2015: 8).

The present study also shows differences to prior research. Managerialism, financial accounting and performance measurement are still less of a concern to the senior prison staff in our study than elsewhere. Accountability demands were not necessarily seen as box-ticking exercise but, mostly at least, as legitimate and necessary in a sensitive field of work with an unequal distribution of power, even if they were perceived as time-consuming and cumbersome.

An important new perspective also emerges from this work: The use of a comprehensive legal framework, based on the rule of law, the respect for human dignity and human rights was indeed a genuine set of coordinates which senior prison staff can navigate. Nonetheless, the right to resocialisation that is deeply engrained in the German system and prevalent in our study does not necessarily alter the power gap between staff and people in prison: While the orientation towards the *needs* of prisoners can be characterised as benevolent and is rooted in a welfare approach rather than a particularly punitive one, it still implies the dependence, otherness or even inferiority of people in prison. This research has shown that understanding the concept of resocialisation as entailing freedoms and *rights* for prisoners, not only needs, was underdeveloped amongst senior prison staff in Germany, serving as a warning against calls for resocialisation-based approaches which are not equally based on respect for the individual as a holder of rights. This insight should be borne in mind by those creating legislation, policy or practice based on the principle of resocialisation. As others have cautioned before (Ryan 2003, Garland 1985), welfarist approaches are not necessarily ones which promote rights, and further research in other jurisdictions would assist us to explore the dynamic between rights and resocialisation in penal practice. To respect the autonomy of people in prisons is, however, necessary for a penal system in which human rights are respected in substance and not only in procedure.

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Notes

1. So-called Lebach decision, 5.6.1973 – 1 BvR 536/72.
2. Kammergericht, 7.10.1968 – 2 VAs 38/53/68; this reminds of the term 'carceral logic' in the subtitle of the book by Calavita and Jeness, 2015.
3. 14.3.1972 – 2 BvR 41/71.
4. This system remained intact in the 16 new Prison Acts.
5. The interviews were conducted in German. These are translations by the first author that seek to keep the characteristics of the original, such as the use of colloquial language.

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