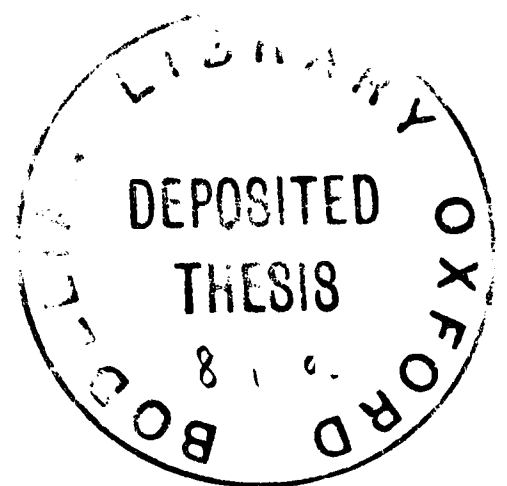


**PRISONERS' RIGHTS IN GERMANY AND ENGLAND:
A COMPARATIVE EXAMINATION**

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Abstract

This thesis is a comparative examination of prisoners' rights in England and Germany. The thesis has three dimensions: first, it is a description of the legal status of the prisoner in Germany and England; second, it is an examination of the social, political and cultural dynamics which have shaped prisoners' rights in each jurisdiction; and third, it is in itself an exercise which seeks to address the problems of comparative law which are identified in the introduction.

England and Germany have been chosen as comparators as their respective approaches to prisoners' rights present illuminating contrasts. In England, despite significant judicial activity in the development of a prisoners' rights jurisprudence, prisoners' rights protection remains partial and equivocal. Many aspects of prison life are left within the realm of executive discretion, and the present Government, much like its predecessors, is unlikely to entrench a bill of prisoners' rights. Proponents of prison reform in England argue that the system of prisoners' rights protection is inadequate, not only in terms of the rights which prisoners can claim, but in terms of the possibilities of enforcement and the independence of enforcement bodies. This equivocal commitment to rights in England is heightened when juxtaposed against Germany's highly articulated rights culture and ambitious system of prisoners' rights protection under the Prison Act 1976. The German Prison Act, which is underpinned by a considerable constitutional jurisprudence on prisoners' rights, sets out foundational principles of prison administration, affords prisoners positive rights, defines the limitations of prisoners' constitutional rights and provides prisoners recourse to a Prison Court. Moreover, the rights and principles under the German Prison Act have been developed and refined in a substantial body of prison law jurisprudence over the last thirty years.

Chapters one to three of the thesis make available to an English audience an in-depth account of the conception and protection of prisoners' rights in Germany and the broader context in which this has taken place. Chapters four and five of the thesis examine the method and manner of conceiving of the prisoner's legal status in England in the light of the German conception and explore the deeper political and cultural reasons for the divergence between England and Germany.

For MY MOTHER

who has given me everything

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Citation Conventions

The citation style in this thesis is that prescribed by the Oxford Standard Citation of Legal Authorities (OSCOLA 2000). There is one exception in chapter three with respect to the citation of German legal commentaries. After citing these commentaries in full, I adopt the standard German citation method for legal commentaries. This is done by referring to the names of the authors, the relevant paragraph (§) of the Prison Act and, where applicable, the margin numbers (mn) of the text relevant to that paragraph (e.g. Calliess/Müller Dietz § 3 mn 4).

The commentaries in question are: R-P Callies and H Müller-Dietz *Strafvollzugsgesetz* (Beck München 1998); H-D Schwind and A Böhm *Strafvollzugsgesetz* (Walter de Gruyter Berlin 1999); J Feest, (ed), *Kommentar zum Strafvollzugsgesetz* (4th edn Luchterhand Neuwied 2000).

Abbreviations

AJCL	American Journal of Comparative Law
AnwBl	Anwaltsblatt
BGB	<i>Bundesgesetzbuch</i> (Civil Code)
Beck	C.H Beck Verlag
BGBI	Bundesgesetzblatt (Federal Law Gazette)
BGH	Bundesgerichtshof (Federal Supreme Court); Decisions of the Federal Supreme Court
BGHSt	Entscheidung des Bundesgerichtshofs in Strafsachen (Decisions of the Federal Supreme Court in Criminal Law Matters)
BJC	British Journal of Criminology
BlfGefk	Blätter für Gefängniskunde
BlStVKunde	Blätter für Strafvollzugskunde
BVerfGE	Bundesverfassungsgerichtsentscheidung (Senate Decision of the Federal Constitutional Court)
BVerfG Beschl.	Bundesverfassungsgericht Beschluß (Chamber Decision of the Federal Constitutional Court)
BT - Dr.	Bundestag Drucksache (Federal Parliament Publications)
Boorberg	Richard Boorberg Verlag
Callies/ Müller-Dietz	R-P Callies and H Müller-Dietz <i>Strafvollzugsgesetz</i> (Beck München 1998)
CEU Press	Central European University Press
ch.	chapter
chs.	chapters
CJPOA	Criminal Justice and Public Order Act
CLJ	Cambridge Law Journal
CLP	Current Legal Problems

Clarendon	Clarendon Press
CUP	Cambridge University Press
CLR	Criminal Law Review
DuR	Demokratie und Recht
EuGRZ	Europäische Grundrechtszeitschrift
f	pages following
Feest	J Feest, (ed), <i>Kommentar zum Strafvollzugsgesetz</i> (4 th edn Luchterhand Neuwied 2000)
FCC	Federal Constitutional Court
GA	Goltdammer's Archiv für Strafrecht
Heymanns	Carl Heymanns Verlag
Howard Journal	Howard Journal of Criminal Justice
IJSL	International Journal of the Sociology of Law
INFO	Info zum Strafvollzug in Praxis und Rechtsprechung (Zeitschrift)
JA	Juristische Arbeitsblätter
JLS	Journal of Law and Society
JRev	Judicial Review
JR	Juristische Rundschau
JuS	Juristische Schulung
Jura	Juristische Ausbildung
JZ	Juristenzeitung
KG	Kammergericht (Higher Regional Court of Berlin)
KrimJ	Kriminologisches Journal
Kriminalistik	Kriminalistik Verlag
Kluwer	Kluwer Law International
LS	Legal Studies

LG	Landgericht (Regional Court)
LQR	Law Quarterly Review
MDR	Monatsschrift für Deutsches Recht
MLR	Modern Law Review
mn	margin number
MPI	Max Planck Institute for Foreign and International Penal Law
Mohr	J.C.B Mohr Verlag
MschrKrim	Monatsschrift für Kriminologie und Strafrechtsreform
Müller	C.F. Müller Verlag
n	footnote
<i>NJW</i>	Neue Juristische Wochenschrift
NK	Neue Kriminalpolitik
Nomos	Nomos Verlagsgesellschaft
<i>NStZ</i>	Neue Zeitschrift für Strafrecht
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
OLG	Oberlandesgericht (Higher Regional Court)
p.	page
pp.	pages
PA	Public Administration
PL	Public Law
PSJ	Prison Service Journal
P & S	Punishment & Society
SAJC	South African Journal of Criminal Law and Criminology
SAJHR	South African Journal of Human Rights

Schwind/Böhm	H-D Schwind and A Böhm <i>Strafvollzugsgesetz</i> (Walter de Gruyter Berlin 1999)
SH	Sonderheft (Special Issue)
S&LS	Social and Legal Studies
Stanford LRev	Stanford Law Review
StV	Strafverteidiger
<i>ZfStrVo</i>	Zeitschrift für Strafvollzug und Straffälligenhilfe
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft
ZRP	Zeitschrift für Rechtspolitik
ZfRSoz	Zeitschrift für Rechtssoziologie
ZfRV	Zeitschrift für Rechtsvergleichung
§	Paragraph

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Introduction

It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.¹

There must ... be justice in our prisons. The system of justice which has put a person in prison cannot end at the prison doors. It must accompany the prisoner into the prison, his cell, and to all aspects of prison life.²

It does not require much imagination to understand why society is concerned about the state of its prisons or the treatment which prisoners receive. In the absence of the death penalty, imprisonment is the most severe form of state punishment. It deprives offenders of their freedom of movement, it removes them from the rest of society and subjects them to numerous other restraints which restrict their liberty and erode their 'civic selves'.³ To quote Nelson Mandela, 'prison not only robs you of your freedom, it attempts to take away your identity. Everyone wears a uniform, eats the same food, follows the same schedule. It is by definition a purely authoritarian state that tolerates no independence and individuality'.⁴ The coercive potential of imprisonment is heightened by the closed nature of prison institutions. Lack of visibility to the outside world increases the vulnerability of the prisoner to the risk of ill or unfair treatment. As Stern argues: 'if people are going to be ill-treated and abused, prison ... seems to provide fertile soil'.⁵

Given the considerable threat to offenders' liberty and humanity which prisons represent, it is small wonder that the protection and enforcement of prisoners' legal rights has occupied a central stage in international and regional human rights discourse over the last 30 years.⁶ Nor is it surprising that in the debates concerning prison policy in the English

¹ N Mandela *Long Walk to Freedom* (Little Brown London 1994) 187.

² *Prison Disturbances April 1990: Report of an Inquiry by the Rt. Hon. Lord Justice Woolf (Parts I and II) and His Honour Judge Stephen Tumin (Part II)* (Cm 1456) 373.

³ E Goffmann 'On the Characteristics of Total Institutions: the Inmate World' in D Cressey *The Prison: Studies in Institutional Organisation and Change* (Holt, Rinehart and Winston New York 1961) 16, 23.

⁴ *Long Walk to Freedom* (note 1 above) 321.

⁵ V Stern *A Sin Against the Future* (Penguin London 1998) 195.

⁶ See *inter alia*: *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (United Nations General Assembly Resolution 3452, 9 December 1975); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (United Nations General Assembly Resolution 39/46, 10 December 1984); *Inter-American Convention to Prevent and Punish Torture* (OAS Treaty Series No. 67; 9 December 1985); *European*

domestic arena ‘much has been made of the notion of prisoners’ rights’.⁷ Yet, despite both international and domestic concern, commentators continue to argue that prisoners’ rights are not adequately recognised in England and remain ‘widely neglected in practice’.⁸ Given this general unease over prisoners’ rights protection, and in the light of the recent incorporation of the European Convention of Human Rights into domestic law, it is timely to stand back and reflect on the conception and protection of prisoners’ rights in England. Consequently, this thesis seeks, through comparative reflection, to deepen our understanding of the legal conception of prisoners’ rights by focusing on the social and legal cultural context within which it has been shaped. By juxtaposing England with Germany, by distancing ourselves from our local environment and bringing out the ‘strangeness in the familiar’,⁹ the thesis aims to sharpen our understanding of the method and manner of conceiving of prisoners’ legal rights in England.¹⁰

This thesis endorses the view that if the debate surrounding prisoners’ rights is to advance it is important to move beyond rhetoric and examine the notion of prisoners’ rights more closely. Others have examined this question by adopting a legal theoretical perspective, seeking to explain the nature and justification of prisoners’ rights.¹¹ These theories, while

Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (European Treaty Series No. 126, 26 November 1987); *Standard Minimum Rules for the Treatment of Prisoners* (Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva 1955, and approved by United Nations Economic and Social Council Resolution 663, 31 July 1957; and amended by Economic and Social Council resolution 2076, 13 May 1977); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (United Nations General Assembly resolution 43/173, 9 December 1988); *Code of Conduct for Law Enforcement Officials* (United Nations General Assembly Resolution 34/169, 17 December 1979). See N Rodley *The Treatment of Prisoners under International Law* (2nd edn Clarendon Oxford 1999) 1–7; R Morgan and M Evans, (edd), *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture in Context* (OUP Oxford 1999) 1–9.

⁷ G Richardson ‘Prisoners and the Law: Beyond Rights’ in C McCrudden and G Chambers, (edd), *Individual Rights and the Law in the UK* (Clarendon Oxford 1993) 179.

⁸ Lord Justice Woolf ‘We still fail our prisoners’ *The Times* 2 (1 February 2001) 4; J Schone ‘The Short Life and Painful Death of Prisoners’ Rights’ (2001) 40 *Howard Journal* 70; S Livingstone and T Owen *Prison Law* (2nd edn OUP Oxford 1999) 456; ‘Prisoners and the Law: Beyond Rights’ (note 7 above) 201–203; C Gearty ‘The Prisons and the Courts’ in J Muncie and R Sparks, (edd), *Imprisonment: European Perspectives* (Sage London 1991) 219; S Livingstone ‘Prisoners have Rights, But What Rights’ (1988) MLR 525.

⁹ M Lacey and K Haakonssen ‘History, historicism, and the culture of rights’ in M Lacey and K Haakonssen *A Culture of Rights* (CUP Cambridge 1990) 1, 17.

¹⁰ Throughout this thesis the term England is to be taken as referring to the legal jurisdiction of England and Wales. While many of the same rules and issues exist in Scotland and Northern Ireland, the nuances of the legal cultures in these jurisdictions are inevitably somewhat different.

¹¹ Although there is significant attention in England to the relationship between rights and the justifications of punishment, there is relatively little attention to the normative foundation of prisoners’ rights post-conviction. The leading theoretical exposition on prisoners’ rights in England is that of Genevra Richardson

varying in detail, all root the prisoner's normative claim to individual rights protection in the view of the prisoner as an equal bearer of fundamental human rights, in their particular view of what these fundamental rights are and in their interpretations of the protections afforded by them. It is argued that while punishment involves the partial loss of basic human rights, it should never involve the complete negation of these rights.¹² Moreover, that while punishment might involve limitations of human rights the extent of such limitations should be dependant on the purpose of imprisonment which in turn should be linked to a background theory for the justification of punishment. In addition, it is argued that, due to their particular vulnerability and dependance in prisons, prisoners should be afforded special legal rights which protect them against the risk of ill or unfair treatment within the prison and compensate for the potential long term damages of imprisonment.¹³

While these analytical approaches help to shed light on the normative foundations of a prisoners' claim to rights protection, they do not consider how prisoners' legal rights are formed, or not formed, within the social practice of the law. The shaping of prisoners' rights within this social context is the central concern of this thesis, which operates on the premise that law and legal institutions can usefully be considered in the light of broader social processes. Theories of prisoners' rights protection are of interest in this thesis to the extent that they have had a formative influence on the conception of the prisoners' legal status in either England or Germany, but this thesis does not seek to provide a theoretical

in 'The Case for Prisoners' Rights' in M Maguire R Morgan and J Vagg *Accountability and Prisons* (Tavistock London 1985) 19. The German literature on the subject of post conviction rights is far richer. See for example, T Würtenberger 'Freiheit und Zwang im Strafvollzug' (1969) *NJW* 1747; H Schuler-Springorum *Strafvollzug im Übergang* (Schwartz Verlag Göttingen 1969); H Müller-Dietz *Strafvollzugsgesetzgebung und Strafvollzugsreform* (Heymanns Köln 1970); B Freudenthal 'Die staatsrechtlich Stellung des Gefangenen', Rektoratsrede Jena 1910, printed in (1955) *ZfStrVo* 157; B Freudenthal 'Der Strafvollzug als Rechtsverhältnis des öffentlichen Rechts' (1911) *ZStW* 222.

¹² 'Prisoners and the Law: Beyond Rights' (note 7 above).

¹³ All of these theories argue that prisoners' rights should enjoy legal protection which Richardson argues 'implies the ultimate stamp of formal authority and carries considerable political significance'. These theories accept that such legal protection need not involve immediate or constant recourse to legal adjudication. At the very least, however, the courts should act as a mechanism of last resort enforcement and supplement other more informal, but independent, control mechanisms within prisons which are themselves adequately equipped with proper powers of rights enforcement. See G Richardson 'The Case for Prisoners' Rights' in M Maguire R Morgan and J Vagg *Accountability and Prisons* (Tavistock London 1985) 19 and T Würtenberger 'Freiheit und Zwang im Strafvollzug' (1969) *NJW* 1747. In this respect it is worth noting that the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (United Nations General Assembly resolution 43/173, 9 December 1988) calls for the protection of prisoners' rights by a 'judicial body' or 'other authority under the law whose status and tenure affords the strongest possible guarantees of competence, impartiality and independence'.

analysis of prisoners' rights. Nor will it seek to resolve the inherently controversial normative questions which arise from such a theoretical analysis, namely the normative foundation of the claim to fundamental rights,¹⁴ the relationship between human rights and punishment,¹⁵ and the justifications of punishment.¹⁶ Rather, the thesis will seek to identify the social, political and cultural dynamics which have shaped the method and manner of conceiving of prisoners' legal rights in the jurisdictions of England and Germany.

England and Germany are useful comparators as their respective approaches to prisoners' rights present illuminating contrasts. While the thesis will examine this in depth, these contrasts can be set out in brushstroke terms at this point. In England, despite significant judicial activity in the development of a prisoners' rights jurisprudence, prisoners' rights protection remains partial and equivocal. Many aspects of prison life are left within the realm of administrative discretion and the present Government, much like its predecessors, is unlikely to entrench a bill of prisoners' rights. Proponents of prison reform in England argue that the system of prisoners' rights protection is inadequate, not only in terms of the rights which prisoners can claim, but in terms of the possibilities of enforcement and the independence of enforcement bodies. This equivocal commitment to rights in England is heightened when juxtaposed against Germany's highly articulated rights culture and ambitious system of prisoners' rights protection under the Prison Act 1976. The German Prison Act, which is underpinned by a considerable constitutional jurisprudence on prisoners' rights, sets out foundational principles of prison administration, affords prisoners positive rights, defines the limitations of prisoners' constitutional rights and provides prisoners recourse to a Prison Court. Moreover, the

¹⁴ R Dworkin *Taking Rights Seriously* (London Duckworth 1978); J Finnis *Natural Law and Natural Rights* (Clarendon Oxford 1982); J Waldron, (ed), *Theories of Rights* (OUP Oxford 1984); A Gewirth 'The Epistemology of Human Rights' (1984) 1 *Social Philosophy and Policy* 1; J Raz *The Morality of Freedom* (Clarendon Oxford 1986); HLA Hart 'Are there any natural rights?' in A Quinton, (ed), *Political Philosophy* (Oxford OUP 1967) 53.

¹⁵ D Knowles 'Punishment and Rights' in M Matravers, (ed), *Punishment and Political Theory* (Oxford Hart 1999) 28; M Cavadino and J Dignan 'Reparation, Retribution and Rights' in A von Hirsch and A Ashworth *Principled Sentencing - Readings on Theory and Policy* (2nd edn Hart Oxford 1998) 351, 348–358.

¹⁶ A Duff *Punishment* (Dartmouth Aldershot 1993); HLA Hart *Punishment and Responsibility: Essay in the Philosophy of Law* (Clarendon Oxford 1970); T Honderich *Punishment: The Supposed Justifications* (3rd edn Polity Press Cambridge 1989); N Lacey *State Punishment: Political Principles and Community Values* (Routledge London 1988); A von Hirsch *Censure and Sanctions* (Clarendon Oxford 1993); M Matravers, (ed), *Punishment and Political Theory* (Oxford Hart 1999); C Ten *Crime, Guilt and Punishment* (Clarendon Press Oxford 1987).

rights and principles under the German Prison Act have been developed and refined in a substantial body of prison law jurisprudence over the last thirty years. Already at first glance, the bold contrasts between Germany and England present potentially fruitful foundations for comparative analysis.

But if comparison is to provide us with meaningful insights into the manner in which prisoners' rights have been defined and the broader context in which this has taken place, the comparative endeavour must be conducted with care. In what remains of this introduction, I examine some of the methodological problems facing comparative law and suggest that comparative analyses of prisoners' rights have not until now fully unravelled the nuances of different legal systems and the broader dynamics surrounding the development of prisoners' rights. I will then go on to examine the aim and methodology of this thesis and key terms which are central in its analysis. Finally, the chapter will set out and explain the structure of this thesis.

1. Comparing prisoners' rights: some issues in comparative law and method

By the international exchanges which it requires, comparative law procures the gradual approximation of viewpoints, the abandonment of deadly complacency and the relaxation of fixed dogma. It affords us a glimpse into the form and formation of legal institutions which develop in parallel, possibly in accordance with laws yet to be determined, and permits us to catch sight, through the differences in detail, of the **grand similarities** and so to deepen our belief in the existence of a unitary sense of justice.¹⁷

It is this imaginative, or constructive, or interpretive power, a power rooted in the collective resources of culture rather than in the separate capacities of individuals ... upon which the comparative study of law, or justice, or forensics, or adjudication should ... train its attention. It is there - in the method and manner of conceiving decision situations so that settled rules can be applied to decide them (as well, of course, of conceiving the rules), in what I have been calling legal sensibility - that the **informing contrasts** lie.¹⁸

Underlying these claims about the purpose of the comparative study of law are two distinct perspectives on the nature of law in society.¹⁹ The first view is that of law as an

¹⁷ K Zweigert and H Kötz *An Introduction to Comparative Law* (Vol 1 North-Holland Publishing Co Amsterdam 1977) 3. Emphasis added.

¹⁸ C Geertz 'Local Knowledge: Fact and Law in Comparative Perspective' in C Geertz *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books New York 1983) 167, 215. Emphasis added.

¹⁹ It is not the intention here to draw comparative legal scholarship into two neatly opposed camps. Between these two pronounced views on comparative law are an array of gradations and differing objectives. See: G Frankenberg 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26(2) *Harvard Intl Law J* 411; B Großfeld *Kernfragen der Rechtsvergleichung* (Mohr Tübingen 1996); M Rheinstein *Einführung in die*

autonomous system existing among different cultures but ultimately similar in form and content across all cultures. The second view is that, far from being autonomous of it, law is culture.²⁰ In other words law, like language and art, is a cultural system - an articulation of the common identity of a particular society. These views, of law independent of culture as opposed to law as culture, influence the way in which comparative law is conducted. Acting on the first universalist view, the comparative lawyer sees law in all jurisdictions as different 'species of the same genus'.²¹ She can ask the same questions of, and apply the same criteria to, each system. Her analysis, like her subject matter, is culturally neutral and without 'local substance'.²² She is able to iron out dissimilarities between the laws of different jurisdictions by classifying them as variations on the same theme. Acting on the second view, of law as culture, the comparative lawyer's task becomes far more problematic, but perhaps ultimately more illuminating. First, if she accepts that law is culture, then she must also accept that, as a lawyer, she is a part of that culture. This acceptance raises difficulties in her examination of other legal cultures. For as Legrand points out 'comparativists, acting as cultural intermediaries, must determine how to convey their acquired understanding of another legal culture within the inconsistent parameters of their own'.²³ Thus the comparative lawyer must place herself within her own analysis - juxtaposing her own legal conceptions against those of the system she has chosen to address. Second, in order to gain knowledge of another legal culture she must also gain understanding of its 'local knowledge'.²⁴ Her task becomes that of illuminating a

Rechtsvergleichung (2nd edn Beck Munich 1987); A Eser 'The Importance of Comparative Legal Research for the Development of Criminal Sciences' Paper at World Law Conference, Brussels, 9–12 September 1996; J Bell 'Comparative Law and Legal Theory' in R Summers, W Krawietz, N MacCormick and G Wright, (edd), *Prescriptive Formality and Normative Rationality in Modern Legal Systems* (Duncker & Humblot Berlin 1994) 19. The view that comparative lawyers need to take more notice of local legal culture is gaining increased support, particularly since legal sociologists entered this field. See D Nelken 'Disclosing/Invoking Legal Culture: An Introduction' (1995) 4(4) *S&LS* 435; B Puchalska-Tych and M Salter 'Comparing Legal Cultures of Eastern Europe: The Need for a Dialectical Analysis' (1996) 16(2) *LS* 157; L Zedner 'In Pursuit of the Vernacular: Comparing Law and Order Discourses in England and Germany' (1995) 4(4) *S&LS* 517. For an interesting perspective on the challenge which local knowledge presents for positivist legal theory see: J Raz 'On The Nature of Law' (1996) 82(1) *Archives for Philosophy of Law and Social Philosophy* 1.

²⁰ The meaning, content and boundaries of the concept of legal culture are by no means settled. This concept will be discussed on pp. 18–24 below.

²¹ For a critical account of this view, see 'In Pursuit of the Vernacular: Comparing Law and Order Discourses in England and Germany' (note 19 above).

²² 'Comparing Legal Cultures of Eastern Europe: The Need for a Dialectical Analysis' (note 19 above).

²³ P Legrand 'Comparative Legal Studies and Commitment to Theory' (1995) 58(2) *MLR* 262.

²⁴ 'Local Knowledge: Fact and Law in Comparative Perspective' (note 18 above) 215.

‘different structure of meaning’ from which legal discourse and structure may be understood.²⁵

Comparative law has been the object of much virulent criticism.²⁶ Legrand argues that the fault for the poor quality of comparative work lies with comparativists themselves who have ‘failed to ask the most fundamental questions about the act of comparison in law’.²⁷ Furthermore, he insists that comparativists take a dry and narrow view of the comparative endeavour: narrowly comparing the rules of one jurisdiction with that of another. Zedner argues that the problem lies in the ‘generalising imperatives of the comparative’, which grows out of a tendency towards universalism in comparative law and which comparativists have failed to resist.²⁸ Prompted by these concerns, I have chosen in this section, to compare and examine comparative work on prisoners’ rights in England and Germany.²⁹ In section 1.1, by comparing the different treatment of the idea of ‘Europe’ in these comparative writings, I hope to show that the content of much comparative work can be seen as the product of distinct legal cultures. In doing so, I implicitly challenge the assertion that legal comparison can found the basis of a ‘universal legal science’.³⁰ In section 1.2, I set out to show how these writings on prisoners’ rights have tended

²⁵ ‘Comparative Legal Studies and Commitment to Theory’ (note 23 above).

²⁶ See P Legrand ‘How to Compare Now’ (1996) 16(2) *LS* 232 where these various criticisms are summarised at 233–234.

²⁷ ‘How to Compare Now’ (note 26 above) 234.

²⁸ ‘In Pursuit of the Vernacular: Comparing Law and Order Discourses in England and Germany’ (note 19 above) 518.

²⁹ G Douglas and M Moerings ‘Prisoners’ Rights in the Netherlands and England and Wales’ in C Harding et al *Criminal Justice in Europe: A Comparative Study* (Clarendon Oxford 1995) 341; R Prowse et al ‘Rights in Prisons in Germany: Blueprint for Britain?’ (1992) 20 *IJSL* 111; J Vagg *Prison Systems: A Comparative Study of Accountability in England, France, Germany, and the Netherlands* (Clarendon Oxford 1994); J Muncie and R Sparks, (edd), *Imprisonment: European Perspectives* (Harvester Wheatsheaf Hemel Hempstead 1991); G Kaiser *Strafvollzug im Europäischen Vergleich* (Wissenschaftliche Buchgesellschaft Darmstadt 1983); G Kaiser ‘Strafvollzug im internationalen Vergleich’ in HJ Hirsch et al, (edd), *Gedächtnisschrift für Hilde Kaufmann* (Scherper Verlag Berlin 1981) 599; H Müller-Dietz, ‘Entwicklungstendenzen des Strafvollzugs im Internationalen Vergleich’ (1989) 6 *ZfStrVo* 323; D van Zyl Smit and F Dünkel, (edd), *Imprisonment Today and Tomorrow* (Kluwer Deventer 1991); G Blau, (ed), *Die Reform des Strafvollzugs im Lichte internationaler Reformtendenzen* (Brockmeyer Verlag Bochum 1981).

³⁰ The notion of comparative law as a universal legal science was developed by Anselm von Feuerbach in his essay ‘Idee und Notwendigkeit einer Universaljurisprudenz’ which was published posthumously in *Feuerbachs’s Biographischer Nachlass* (2nd edn 1853) cited in W Hug ‘The History of Comparative Law’ [1931/32] *XLV Harvard L Rev* 1027. For further examples of this approach see: K Zweigert ‘Rechtsvergleichung als Universale Interpretationsmethode’ (1949/50) 54 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 203; H Jescheck *Recht und Staat in Geschichte und Gegenwart: Entwicklung, Aufgaben und Methoden der Strafrechtsvergleichung* (Mohr Tübingen 1955); K Zweigert and H Kötz *An Introduction to Comparative Law* (Vol 1 North-Holland Publishing Co Amsterdam 1977); F Ferracuti ‘Possibilities and Limits of Comparative Research in Criminology’ in H Jescheck and G

traditionally to use comparative method to reinforce universal generalisations about law and that this is a problematic foundation for comparative endeavour.

1.1 Comparisons and 'Europe'

The discipline of comparative law has expanded relatively quickly in Europe over the last decade.³¹ The momentum towards European legal harmonisation specifically and the globalisation of law generally play a significant part in this process. Comparative lawyers feed off and into this momentum.³² Criminal justice scholarship in Britain is no exception to this trend.³³ Numerous comparative works and articles have been produced in the UK on criminal justice issues in Europe.³⁴ These works, with titles such as *Criminal Justice in Europe*, *Crime in Europe*, and *Imprisonment: European Perspectives*, indicate an increasing tendency towards viewing 'Europe' as a locus of comparison.

In Britain, this tendency to place domestic criminal justice matters within a European framework has coincided with increased insecurity about the efficacy and reliability of domestic criminal justice arrangements to protect the human rights of those affected by them. Deteriorating prison conditions, highly publicised prison riots and gross miscarriages of justice have provoked serious civil libertarian criticism of home grown criminal justice institutions,³⁵ and prompted governmental enquiries and comparative

Kaiser, (edd), *Die Vergleichung als Methode der Strafrechtswissenschaft und der Kriminologie* (Duncker and Humblot Berlin 1980) 129.

³¹ P Legrand in 'How to Compare Now' (note 26 above) 232 has claimed that 'the European Union is currently experiencing a comparative moment'.

³² A compelling example of this is Hart Publishing's new series entitled *Ius Commune Casebooks for the Common Law of Europe*. See further: B Markesinis 'Learning from Europe and Learning in Europe' in B Markesinis, (ed), *The Gradual Convergence* (OUP Oxford 1994); B Markesinis *Bridging the Channel* (OUP Oxford 1996); U Sieber, (ed), *Europäische Einigung und Europäisches Strafrecht* (Carl Heymanns Köln 1993).

³³ This has occurred despite the fact that criminal law and justice matters remain within the sovereignty of individual European states.

³⁴ For example, C Harding et al, (edd), *Criminal Justice in Europe: A Comparative Study* (Clarendon Oxford 1995); J Vagg *Prison Systems: A Comparative Study of Accountability in England, France, Germany, and the Netherlands* (Clarendon Oxford 1994); F Heidensohn and M Farrell, (edd), *Crime in Europe* (Routledge London 1991); J Muncie and R Sparks, (edd), *Imprisonment: European Perspectives* (Harvester Wheatsheaf Hemel Hempstead 1991); J Dine 'European Community Criminal law?' (1993) *CLR* 163; J Bengoetxea and H Jung 'Towards a European Criminal Jurisprudence?' (1991) 11 *LS* 239; S Field and N Jörg 'Corporate Liability and Manslaughter: Should We Be Going Dutch?' (1991) *CLR* 156.

³⁵ See *inter alia*: P Thornton, A Mallalieu and A Scrivener *Justice on Trial: Report on the Independent Civil Liberty Panel on Criminal Justice* (Civil Liberties Trust London 1992); M Mansfield *Presumed Guilty: The British Criminal Justice System Exposed* (Mandarin London 1994). Two government enquiries were set up

lawyers to go out and seek foreign solutions to domestic problems.³⁶ Equally, as Downes and Morgan argue, comparative research has ‘increasingly been used by the pressure groups to highlight the extent to which prisoners in Britain are both relatively more numerous than in virtually all other Western European countries and often held in worse conditions’.³⁷ These domestic developments have been paralleled by increased attention, at a European level, to the protection of the human rights of persons affected by criminal justice agencies. In 1987 the European Prison Rules replaced the Council of Europe’s Standard Minimum Rules of 1973, while in 1989 the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment came into force, leading to the establishment of a committee with the power to inspect the custodial facilities of the member states of the Council of Europe.³⁸ The combination of these factors has prompted many scholars in Britain to look to ‘Europe’ as a locus of their comparative work.

In this climate in Britain, however, there is a temptation not only to see ‘Europe’ as a locus of legal comparison but also as a standard to which to aspire. As Douglas and Moerings stated, ‘European approaches to imprisonment are the yardstick against which the English system is found wanting’.³⁹ While this may be a useful rhetorical device, it is not a sound basis upon which to conduct comparative research. For one, it assumes that there is such a thing as ‘European approaches to imprisonment’, which leads to the over accentuation of similarities between systems at the expense of deeper, more complex (or more ‘local’) explanations.⁴⁰ Secondly, this work rests on a tacit political commitment towards European harmonisation which has deeper methodological implications. This can be seen in the introduction of *Criminal Justice in Europe*:

as a result: Chairman Viscount Runciman *The Royal Commission on Criminal Justice Report* (HMSO London 1993) (Cm 2263); *Prison Disturbances April 1990, Report of an Inquiry* (Woolf Report) (HMSO London 1991) (Cm 1456).

³⁶ E.g. L Leigh and L Zedner *The Royal Commission on Criminal Justice: A Report on the Administration of Criminal Justice in the Pre-trial Phase in France & Germany* (HMSO London 1992).

³⁷ D Downes and R Morgan ‘Dumping Hostages to Fortune’ in M Maguire et al, (edd), *Oxford Handbook of Criminology* (2nd edn OUP Oxford 1997) 87, 117.

³⁸ R Morgan and M Evans ‘The CPT: An Introduction’ in R Morgan and M Evans, (edd), *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture in Context* (OUP Oxford 1999) 3.

³⁹ ‘Prisoners’ Rights in the Netherlands and England and Wales’ (note 29 above).

⁴⁰ P Legrand ‘European Systems are not Converging’ (1996) 45 *ICLQ* 52.

Whatever the future may bring, Member States of the Council of Europe and those of the European Union must ensure that their criminal justice systems operate in accordance with the requirements of ... European law ... At the present time comparative studies of criminal justice systems in Europe inevitably have to become comparative studies of how Europeanization affects these systems ... Inevitably too, in its own way Europeanization contributes to a process of convergence of national systems of justice.⁴¹

This presentation of European harmonisation as an ‘inevitable’ fact neutralises the political nature of the authors’ decision to define their comparative work within this conceptual framework. If this political dimension remains unacknowledged there is a danger that the similarities between European legal systems will be accentuated in such a way as to fulfil the pre-existing thesis that these systems are converging.⁴² Moreover, by arguing that our legal systems are all ‘European’ now, these writers are implying that the importation of solutions from other European states would be an unproblematic way of reforming our domestic systems. This, as Hill points out, can be a naïve and short sighted approach to legal reform, as we cannot solve indigenous problems with alien solutions.⁴³

German comparative research on criminal justice in general, and prisoners’ rights in particular, is not driven by a heightened sense of insecurity about human rights safeguards under the domestic system.⁴⁴ While remaining critical of a number of aspects of prison law, German comparative research on prison law and prison policy displays decidedly more confidence in its foundations than their English counterparts. As Müller-Dietz explains, ‘an overview shows that several countries are facing problems which have not for a long time, or no longer, pose a problem for German prison law and policy’;⁴⁵ or as Kaiser points out, ‘with respect to the legalisation of prisons, and the supervisory role of the courts, the West German prison system stands without question in the forefront’.⁴⁶ Equally Blau has explained: ‘as a law which clarifies the legal status of the prisoner and realises the Basic Law, the German Prison Act is, also on European standards, a model’.⁴⁷

⁴¹ *Criminal Justice in Europe: A Comparative Study* (note 34 above). Emphasis added.

⁴² J Hill ‘Comparative Law, Law Reform and Legal Theory’ (1989) 9 *OJLS* 101,107.

⁴³ ‘Comparative Law, Law Reform and Legal Theory’ (note 42 above) 106.

⁴⁴ *Strafvollzug im Europäischen Vergleich* (note 29 above); G Kaiser and H-J Albrecht *Crime and Criminal Policy in Europe* (Max Planck Institute for Foreign and International Criminal Law Freiburg 1990); U Sieber, (ed), *Europäische Einigung und Europäisches Strafrecht* (Carl Heymanns Köln 1993); A Eser and B Huber *Strafrechtsentwicklung in Europa* (Max Planck Institute for Foreign and International Criminal Law Freiburg 1993)

⁴⁵ ‘Entwicklungstendenzen des Strafvollzugs im Internationalen Vergleich’ (note 29 above) 323.

⁴⁶ ‘Strafvollzug im internationalen Vergleich’ (note 29 above) 599.

Whether justified or not, German confidence in domestic legal arrangements is accompanied by the perception that European human rights safeguards add little to the basic rights afforded to all prisoners under the Basic Law.⁴⁸ As Müller-Dietz sees it, ‘the relevance of the European Human Rights Convention to the Prison Act is negligible’.⁴⁹ Furthermore, as Dünkel and Rössner explain, Germany has relatively recently experienced ‘the great reform of criminal law’⁵⁰ and much criminal justice reform is now concerned with putting ‘these epoch making changes in the law into practice’.⁵¹ In other words, while few German criminal lawyers would openly argue that Germany has an unblemished human rights record, their concern is more with the fine tuning of their laws in this respect rather than any fundamental reappraisal of them.

Whatever the grounds for the confidence which these German writers have in their own system, the implications of it are that there is less political imperative in Germany to find ‘solutions’ in other European jurisdictions or to rely on European human rights institutions. Equally, these German works are less concerned to promote a particular view of European harmonisation or actively to seek solutions for the failings of German law by placing it within a ‘European’ framework. Moreover these works do not operate on a presumption, present in some recent comparative works in Britain, that Europe is synonymous with human rights culture.

By pointing to the contrasting conception given to the idea of ‘Europe’ in these comparative works I have suggested that comparative law can be as much about the current domestic concerns of those comparing as it is about the foreign systems they purport to analyse. In this sense comparative lawyers can be seen as bound up in the legal and political cultures that they claim to be distancing themselves from.

⁴⁷ *Die Reform des Strafvollzugs im Lichte internationaler Reformtendenzen* (note 29 above) 1.

⁴⁸ The position of the European Convention of Human Rights is complex. Under German Law the Convention is seen as simple federal law as opposed to ‘Basic Law’. The Convention does binds neither the state nor federal legislatures unless the rights thereunder go further, in their protective potential, than those rights under the Basic Law. K Hesse ‘Bestand und Bedeutung der Grundrechte im Bundesrepublik Deutschland’ (1978) *Europäische Grundrechte-Zeitschrift* 427, 428.

⁴⁹ ‘Entwicklungstendenzen des Strafvollzugs im internationalen Vergleich’ (note 29 above) 599.

⁵⁰ This term can be taken to include criminal procedure and prison law.

⁵¹ F Dünkel and D Rössner ‘Federal Republic of Germany’ in *Imprisonment Today and Tomorrow* (note 29 above) 203.

1.2 Methodological assumptions in comparisons of prisoners' rights

Comparative work on prisoners' rights is the product of three distinct legal disciplines: first, as a sub-species of comparative and international human rights law,⁵² second, as a sub-species of comparative constitutional and administrative law,⁵³ and third, as a sub-species of comparative criminology.⁵⁴

Comparative human rights studies are often concerned with the satisfactory implementation of international instruments and standards within domestic jurisdictions. This exercise rests on certain methodological assumptions. First, these comparativists display an implicit belief that international law instruments represent apolitical, acultural normative structures that transcend national boundaries but in some way represent the common foundations of all national systems. Second, that the integration of these external normative values within local legal culture is unproblematic. Thus, Douglas and Moerings show clear admiration for the ability of the Dutch penal system to integrate fully all international and European human rights instruments. At no point, however, do they attempt to unravel why it is that the Dutch legal system is uniquely monist in its approach to international law, or whether certain international (in this case European) law instruments are appropriate for integration in other legal cultures. Third, there is an assumption that legal cultures which have integrated human rights are automatically 'superior' to those that have not done so. Sometimes this is deployed in the construction of circular, and thus ineffectual, argument. For example, Douglas and Moerings conclude that one reason why the Dutch, unlike the British, respect international prisoners' rights is that the Dutch are more 'civilized' than the English. If we are to understand from this that their measure of civilization is the extent to which international human rights are safeguarded by domestic law, then their argument would appear circular: the Dutch are more civilized because they have integrated more human rights instruments. Finally, at the heart of Douglas and Moering's enquiry lies the assumption that human rights have a

⁵² 'Prisoners' Rights in the Netherlands and England and Wales'(note 29 above).

⁵³ 'Rights in Prisons in Germany: Blueprint for Britain?' (note 29 above).

⁵⁴ *Prison Systems: A Comparative Study of Accountability in England, France, Germany, and the Netherlands* (note 29 above); *Imprisonment: European Perspectives* (note 29 above); *Strafvollzug im Europäischen Vergleich* (note 29 above); 'Strafvollzug im Internationalen Vergleich'(note 29 above); 'Entwicklungstendenzen des Strafvollzugs im Internationalen Vergleich' (note 29 above); *Imprisonment Today and Tomorrow* (note 29 above); *Die Reform des Strafvollzugs im Lichte Internationaler Reformtendenzen* (note 29 above).

common significance and meaning across different legal traditions and cultures. Such an approach ignores one of the central claims of this thesis, namely that fundamental rights signify and embody different things in different legal cultures and have a particular ‘social and historical substance’.⁵⁵

As Franco Ferracuti insists, criminologists have, since the inception of their discipline, used comparative method as a means of verifying their theoretical postulates ‘across cultures and nations’.⁵⁶ According to his reading of the history of comparative criminology the purpose of this discipline is two fold: first, it aims to confirm ‘universal data and constructs, trying to achieve general validity from cross-cultural verification’; and second, it uses ‘different cultures ... in order to test general theories against the varieties of facts and situations offered to the researcher by the existing variations in socio-political and economic systems’.⁵⁷ Neither tenet of Ferracuti’s definition allows for the pursuit, or the juxtaposition of, local data (or ‘knowledge’) as an aim in itself. Both assert the supremacy of generalisable ‘universal’ truths over ‘local differences’ and deny the possibility that penal and criminal law may be an articulation of a particular culture. This tendency to abstract or universalise across cultural differences is certainly evident in some comparative criminological work on prisoners’ rights in Germany and Britain.⁵⁸ In their introduction Muncie and Sparks make their intentions clear:

Comparison is about more than simply discovering that the grass is greener, or less green, on the other side of the prison fence. Indeed, in a wider theoretical and historical sense the similarities and connections between national systems may be equally or more important. As Foucault comments on the emergence of new models of incarceration during the eighteenth century, it is a phenomenon which ‘has European dimensions’. At this level the questions which arise include: how did it come about that at particular stages of their development all European nation-states adopted the ‘prison solution’?⁵⁹

This conception of the prison (and legal structures pertaining to it) is as an institution common amongst developed nations which can be easily analysed outside of its local context. This perspective appears also to be assumed in Vagg’s work. Vagg’s interest in

⁵⁵ ‘Comparing legal cultures of Eastern Europe: the need for a dialectical analysis’ (note 19 above) 175. See further ch. 1, pp. 32–37 and ch. 4, pp. 180–197.

⁵⁶ ‘Possibilities and Limits of Comparative Research in Criminology’ (note 30 above) 129–131.

⁵⁷ ‘Possibilities and Limits of Comparative Research in Criminology’ (note 30 above) 129f.

⁵⁸ I am certainly not indicating here that all comparative criminological work uses such methods. For examples of alternative approaches see: D Downes *Contrasts in Tolerance* (Clarendon Oxford 1988); ‘In Pursuit of the Vernacular: Comparing Law and Order Discourses in England and Germany’ (note 19 above).

⁵⁹ *Imprisonment: European Perspectives* (note 19 above) ix. Emphasis in original.

prisoners' rights is as a mechanism that can potentially bolster prison accountability.⁶⁰ He does not ask whether 'accountability' has a distinctive meaning in each culture or whether relations of power and control have a local content. Rather, he views the prison as an entity that experiences common institutional problems, divorced from its local environment. This is evidenced in the fact that Vagg does not integrate his discoveries into a broader argument on the underlying rationales of the penal cultures he is studying. For example, he draws no broader conclusions from his useful point that, unlike empirical studies carried out in Britain, most German empirical criminological work is oriented towards questions of treatment. Furthermore, while Vagg looks at the legislation pertaining to prisons from an institutional perspective, he fails to place such legislation against the broader constitutional, criminal justice and public law systems of each jurisdiction. In particular, he does not examine the differences in the control of discretion under each public law system. This is problematic, as his criticism of the German Prison Act as predominantly containing 'discretionary rights' obscures the fact that the exercise of discretion in Germany is structured around basic rights protections and broader principles of prison administration.⁶¹ This is a significant oversight and it is one which lends easily to Vagg's sceptical conclusion that 'the promise that (prisoners') rights allegedly hold out is unlikely to be realised'.⁶²

Abstraction of a different kind is also to be found in Kaiser's work:

Although the impediments which hinder the evaluation of international and intercultural comparisons should not be disregarded, one can measure penal systems by their repressive content, their range of supervision, their accordance with the *Rechtsstaatsprinzip*, as well as their socialisation potential comparative and judging criteria should therefore be: punitiveness, *Rechtsstaatlichkeit*, socialisation and humanisation.⁶³

These criteria are useful in their guidance as to the priorities of German penal and legal culture, but whether they can usefully illuminate the priorities of any other culture is another question. Certainly, as this thesis will show, the strength and consistency of the

⁶⁰ His interest in comparison is to add weight to his own theory of macro-accountability (control over prisons) and micro-accountability (control within prisons).

⁶¹ *Prison Systems: A Comparative Study of Accountability in England, France, Germany, and the Netherlands* (note 29 above) 66.

⁶² *Prison Systems: A Comparative Study of Accountability in England, France, Germany, and the Netherlands* (note 29 above) 314.

⁶³ 'Strafvollzug im Internationalen Vergleich' (note 29 above) 323. Emphasis in original.

German commitment to ‘socialisation’ is not mirrored in English penal culture.⁶⁴ Moreover, it is a moot point whether it is possible to find an equivalent concept in English for ‘*Rechtsstaatlichkeit*’ - a concept that embraces a panoply of legal principles underpinning German constitutionalism. The translation ‘Rule of Law’ is a rough and inadequate equivalent. As Peter Sack states, ‘the ‘rule of law’ ideal, which fits the English language like a glove, goes against the grain of German’.⁶⁵ Equally, Klaus Stern has emphasised that ‘the word Legal State (*Rechtsstaat*) is a German invention, which has no corresponding expression in other languages’.⁶⁶ From Kaiser’s position, we either have to assume that easy equivalents for ‘*Rechtsstaatlichkeit*’ can be found in other legal cultures, or we must accept that it has a universal meaning. Neither approach would allow for an adequate description of the nuances of any legal system. Were we to take the first approach, a measure of re-description would have to take place in order to define a legal principle in one culture as the equivalent of that in another culture. At the very least, the act of legal translation itself, and its attendant linguistic difficulties, will raise problems in this regard. As Legrand points out, legal translation involves linguistic ‘selecting’ and ‘purging’, which can result in one legal concept losing the connotation that it evokes in its original linguistic context.⁶⁷ If we were to take the second approach, we would have to assume that all law is culturally and linguistically neutral - a point that this chapter has been at pains to contest. Instead of establishing an objective criterion by which to examine foreign penal systems, Kaiser has merely imposed a tenet of his own legal culture on that of another.

In sum, I have tried to show how methods of comparison may run counter to a full appreciation of the peculiarities of different legal systems and cultures. This is not to say, however, that all comparisons of prisoners’ rights are necessarily trapped by such methods. Prowse et al, in contrast to Douglas and Moerings, Vagg, and Kaiser, display a

⁶⁴ See ch. 2, p. 71

⁶⁵ P Sack ‘Law and Custom: Reflections on the Relation between English Law and the English Language’ in V Gessner et al, (edd), *European Legal Culture* (Dartmouth Aldershot 1996) 66.

⁶⁶ K Stern ‘Der Rechtsstaat’ in H Siekmann, (ed), *Der Staat des Grundgesetzes* (Carl Heymanns Verlag Köln 1993) 123.

⁶⁷ ‘Comparative Legal Studies and Commitment to Theory’ (note 23 above) 269. On the more general linguistic problems in comparative law see: *Kernfragen der Rechtsvergleichung* (note 19 above); L Zedner, ‘Comparative Research in Criminal Justice’ in L Noaks et al, (edd), *Contemporary Issues in Criminology* (University of Wales Press Cardiff 1995) 13; ‘Law and Custom: Reflections on the Relation between English Law and the English Language’ (note 65 above).

more developed consciousness of the specificities of the local.⁶⁸ This study is concerned with placing prisoners' rights within broader constitutional debates on citizenship and individual rights in each culture. By analysing the distinctive history of prison legal provisions in each country, Prowse et al demonstrate the problems involved in viewing the German system of prisoners' rights as a 'model solution' for the problems experienced in Britain. This said, their article length study is only a cursory examination of the issues involved. Finally, Müller-Dietz acknowledges that 'penal law and policy is embedded in the culture and development of a country ... it can even be said to be ... its expression.'⁶⁹ Certainly our understanding of prisoners' rights could benefit if this truth were to be recognised more fully.

1.3 Interim conclusion

Criticism is always easier to give out than to act upon. In the case of the criticisms made here of comparative studies of prisoners' rights, this problem is particularly pronounced. First, by arguing, as I did in section 1.1, that comparativists are bound up in their own legal cultures, I have drawn attention to a potentially insurmountable methodological conundrum; for as an aspiring comparatist, I too must lack the capacity to transcend my own legal cultural conditioning. A less pessimistic view is that the acceptance of our legal conditioning should inform rather than limit our possibility of understanding another legal culture. The juxtaposition of our own perceptions against those of the culture which we are studying can form the starting point of reflective comparative endeavour. Insight into our preconceptions can arise through the identification of their dissonance with an alien environment and may in turn lead us to reflect back on our own cultural environment. Moreover, the comparativists vantage point as an 'outsider' to a system should not preclude the possibility of gaining insights into 'insider' knowledge. Indeed, if handled correctly, the comparativists relative lack of familiarity with a foreign legal culture can heighten their possibility of gaining insight. As Downes suggests: 'to be a foreigner may confer certain privileges, in particular a licence to naïveté'.⁷⁰ This relative naïveté can assist the comparativist in unearthing the implicit presumptions, beliefs and attitudes

⁶⁸ R Prowse et al 'Rights in Prisons in Germany: Blueprint for Britain?' (1992) 20 *IJSL* 111.

⁶⁹ 'Entwicklungstendenzen des Strafvollzugs im Internationalen Vergleich' (note 29 above) 323.

⁷⁰ *Contrasts in Tolerance* (note 58 above) 2.

operating within a particular legal culture. In this sense the outsider knowledge may be ‘privileged’, as Lacey and Zedner argue, ‘by the benefits of distance and perspective, and by the insights which present themselves only when appreciation is fresh and free from the accumulated assumptions of long-learned familiarity’.⁷¹

Second, by problematising the tendency towards universalism in comparative law as I did in section two with respect to prisoners’ rights, I have called into question the legitimacy of any generalised or abstracted conclusions that I arrive at in my own comparative endeavour. There is the danger, to which Frankenberg alerts us, that ‘both universalism and relativism tend to reproduce the dichotomy of the self and other; they are non dialectical in the sense that they either come up with ‘bad abstractions or with no abstractions at all’.⁷² And yet an assertion of the importance of local knowledge in comparative legal analysis need not slide into die-hard cultural relativism,⁷³ as it is possible to draw from localities general conclusions about the nature of the relationship between legal culture, legal reasoning and law.

This section has shown how careful scrutiny of the work of past comparativists can alert us to the obstacles which comparativists face. These obstacles, while not easily resolved, are best acknowledged if the comparative endeavour is to produce valuable analysis.

2. Thesis: methodology and structure

As already indicated, this thesis will focus on the method and manner of conceiving of the prisoner’s legal status in Germany and England. At the very least such an exercise entails a full understanding, and explanation, of the formal laws pertaining to prisoners in both jurisdictions. But the comparison of the prisoner’s legal status in this thesis hopes also to fulfil a larger aim, that is to identify, through comparative reflection, the broader dynamics which shape prisoners’ legal rights. The following two sections will reflect on concepts

⁷¹ N Lacey and L Zedner ‘Community in German Criminal Justice: A Significant Absence?’ (1998) 7 *S&LS* 7, 9.

⁷² G Frankenberg ‘Critical Comparisons: Re-thinking Comparative Law’ (1985) 26 *Harvard Intl Law J* 411, 415.

⁷³ This is a potential that P Beirne alerts us to in ‘Cultural Relativism and Comparative Criminology’ (1983) 7 *Contemporary Crises* 371.

central to this broader pursuit, namely the idea of culture and rights culture. Thereafter, the chapter will explain and outline the structure of this thesis.

2.1 Culture and comparative legal analysis

Like sailing, gardening, politics, and poetry, law and ethnography are crafts of place: they work by the light of local knowledge.⁷⁴

Throughout this chapter it has been contended that comparative law can be usefully conducted and can yield meaningful insights through careful attention to the specificities of the local. In seeking to unravel the nuances of the local environment in which law is placed, this thesis makes use of the notion of culture in a variety of contexts, namely legal culture, rights culture, constitutional culture, penal culture and political culture.

In training its attention in this way, this thesis is in line with a number of comparativists who have turned to the notion of culture in their scholastic endeavour.⁷⁵ Indeed, use of the concept of culture is not restricted to comparative analysis. It can also be found in recent analyses on criminal justice and human rights.⁷⁶ The prevalence of its use is indicative of the fact that culture, and associated concepts such as legal culture or rights culture, are a useful means of capturing a broad set of interlinked variables which surround and shape the social practice of the law and legal institutions. In brief, the concept of culture offers us a ‘contextual matrix’ which embraces the nuances of the local environment in which law and legal institutions are situated.⁷⁷

⁷⁴ C Geertz ‘Local Knowledge: Fact and Law in Comparative Perspective’ (note 18 above) in C Geertz *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books New York 1983) 167.

⁷⁵ See *inter alia*: D Nelken, (ed), *Comparing Legal Cultures* (Dartmouth Aldershot 1997); D Nelken, (ed), *Special Issue on ‘Legal Culture, Diversity and Globalization* (1995) *S&LS*; R Gordon ‘Critical Legal Histories’ (1984) 36 *Stanford LRev* 57; V Gessner ‘Global Legal Interaction and Legal Cultures’ (1994) 7 *Ratio Juris* 132; L Friedman ‘Is There a Modern Legal Culture?’ (1994) 7 *Ratio Juris* 117; V Gessner et al, (edd), *European Legal Culture* (Dartmouth Aldershot 1996); R Abel ‘Comparative Law and Social Theory’ (1978) 26 *AJCL* 219; D Downes *Contrasts in Tolerance* (Clarendon Oxford 1988); L-J Constantinesco ‘Die Kulturkreise als Grundlage der Rechtskreise’ (1981) 22 *ZfRV* 161; B Großfeld *Kernfragen der Rechtsvergleichung* (Mohr Tübingen 1996); P Legrand ‘How to Compare Now’ (1996) 16(2) *LS* 232.

⁷⁶ See *inter alia*: D Garland ‘The Culture of High Crime Societies’ (2000) 40 *BJC* 347; D Garland ‘Punishment and Culture: Cultural Forms and Penal Practices’ in D Garland, *Punishment and Modern Society* (Clarendon Oxford 1990); M Hunt ‘The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession’ (1999) *JLS* 86.

⁷⁷ L Friedman *The Legal System: A Social Science Perspective* (Russell Sage Foundation New York 1975) 201.

Whilst the power of culture as an explanatory tool lies in the potential breadth and depth of its descriptive reach, it is also in this that its possible weakness lies. The concept of culture, and the concept of legal culture,⁷⁸ is the object of continuous definitional controversy.⁷⁹ As Garland notes, there are ‘almost as many definitions of the term (culture) as there are anthropologists’.⁸⁰ This definitional clamour is not surprising, as Eagleton states: ‘“culture” is said to be one of the two or three most complex words in the English language’.⁸¹ As a result of this opacity, the notion of culture invites more methodological questions than answers. This is no less the case for the notion of legal culture, as Nelken’s sobering questions reveal:

What about legal culture? Are we interested in the definitions of law used by politicians, legal officials, legal scholars or more in lay or popular definitions of law? How do all these relate to sociological definitions of law? How should we go about studying (legal) culture? Are we aiming to learn more about other cultures or more about what we take for granted about our own? What sources shall we use to make sense of culture? Does behaviour count more than words? Should we rely on what people can tell us, or search for the assumptions that make sense of their world views?⁸²

Given this complexity, it is small wonder that Cotterell finds the concept of culture and legal culture to be ‘lacking in rigour’ and as ‘theoretically incoherent’; and that he is sceptical as to whether these concepts can assist us in gaining any theoretical insights for use in the comparative sociology of law.⁸³

But the quest to pin down culture, to construct a rigorous social scientific concept of culture and associated concepts such as legal culture, the need to identify measurable cultural variables,⁸⁴ is, when looked at in another way, to impoverish of the idea of culture. Friedman defends culture and legal culture whilst accepting that it is not a social variable that can be measured with any precision.⁸⁵ For him, the beauty of concept of culture arises in its capacity to encompass a diversity of variables or elements. Equally,

⁷⁸ See *Comparing Legal Cultures* (note 75 above); *Special Issue on ‘Legal Culture, Diversity and Globalization* (note 75 above).

⁷⁹ For a list of possible definitions see: C Geertz ‘Thick Description: Toward an Interpretive Theory of Culture’ in C Geertz *The Interpretation of Cultures* (Basic Books New York 1973) 3, 4–5.

⁸⁰ ‘Punishment and Culture: Cultural Forms and Penal Practices’ (note 76 above) 195.

⁸¹ T Eagleton *The Idea of Culture* (Blackwell Oxford 2000) 1.

⁸² D Nelken ‘Comparing Legal Cultures: An Introduction’ in *Comparing Legal Cultures* (note 75 above) 1, 1–2.

⁸³ R Cotterell ‘The Concept of Legal Culture’ in *Comparing Legal Cultures* (note 75 above) 13, 14.

⁸⁴ See for example, E Blankenburg ‘Civil Litigation Rates as Indicators for Legal Cultures’ in *Comparing Legal Cultures* (note 75 above) 41.

⁸⁵ L Friedman ‘The Concept of Legal Culture: A Reply’ in *Comparing Legal Cultures* (note 75 above) 33.

Nelken expresses concern that the search for ‘empirical specificity and concreteness’, while enhancing ‘the possibilities of measurement’, may hinder understanding of ‘unmeasurable aspects of cultural ideas and meanings’.⁸⁶

Perhaps the very search to define culture is to miss the point of culture. As Geertz argues, ‘culture is not a power, something to which social events, behaviours, institutions, or processes can be causally attributed; it is a context, something within which they can be intelligibly - that is thickly - described’.⁸⁷ In other words, for Geertz, to describe a culture, to describe thickly, is to describe the ‘socially established structures of meaning’ which can render social practice intelligible.⁸⁸ Culture, for Geertz, is incapable of reduction to a set of social variables. Moreover, the notion of culture, which invites us to deal with the ‘immediacies’ of the local,⁸⁹ does not yield easily to theoretical definition or efforts to create logical coherence. As Geertz suggests, culture is ‘unseverable from the immediacies thick description presents, its freedom to shape itself in terms of its own internal logic is rather limited. What generality it contrives to achieve grows out of the delicacy of its distinctions, not the sweep of its abstractions’.⁹⁰

It is beyond the scope of this thesis to resolve the longstanding, and seemingly intractable, discussion as to the meaning and boundaries of the concept of culture and associated concepts such as legal culture. The opacity of the notion of culture gives rise not merely to differences of opinion as to its meaning, but also to a dispute between those who argue that culture is a blunt tool of social analysis because it eludes clarification and those who argue that the very power of culture lies in its immunity to theoretical definition or logical coherence. Notwithstanding the clamour surrounding this concept, the thesis endorses the

⁸⁶ D Nelken ‘A Comment on Blankenburg’ in *Comparing Legal Cultures* (note 75 above) 69, 74.

⁸⁷ ‘Thick Description: Toward an Interpretive Theory of Culture’ (note 79 above) 14.

⁸⁸ ‘Thick Description: Toward an Interpretive Theory of Culture’ (note 79 above) 13. This view of cultural analysis, as an exercise in ‘thick description’, is hermeneutical and interpretive. It stems from the insights of linguistic philosophy, namely that the meaning of language can only be understood in a broader structure of shared meaning. Thus, in constructing his interpretive theory of culture as ‘thick description’ Geertz borrows from Gilbert Ryle’s theory of meaning and from Wittgenstein’s philosophy of language (see pp. 6–7, 13). In this theory of meaning and in this focus on meaning as a means of gaining understanding of social practice there is a remarkable resemblance between Geertz’s theory of culture and Hart’s theory of law (*The Concept of Law* (2nd edn Clarendon Oxford 1994)).

⁸⁹ ‘Punishment and Culture: Cultural Forms and Penal Practices’ (note 76 above).

⁹⁰ ‘Thick Description: Toward an Interpretive Theory of Culture’ (note 79 above) 25.

notion, along with *inter alia* Friedman, Garland and Geertz,⁹¹ that cultural analysis, if for the very fluidity which it invokes, is a fruitful means of identifying the local nuances of the social context of the law. Moreover, that the power of the notion of culture lies in its capacity to capture an intricate and complex web of attitudes, traditions, beliefs, values, understandings, mentalities, sensibilities and practices which render intelligible the meaning of the objects of social enquiry. This, it is suggested, need not be seen as a controversial assertion, for even sceptics, such as Cotterrell, concede that culture is useful for its capacity to characterise a complex web of social factors which can act as a ‘preliminary to more specific enquiries’.⁹²

At best, a broad description can be advanced of how culture is understood in this thesis. Loosely put, the thesis takes the notion of a cultural analysis as embracing the legal, constitutional, penal, political and rights systems in their formal sense as well as the practices, beliefs and convictions of those operating and exerting influence within these systems and of those viewing, criticising and influencing them from the outside. With respect to law in particular, this notion can be taken to encompass what can be termed ‘internal legal culture’ (which might include professional sensibilities, legalistic habits of mind and intellectual reflexes, interpretive styles, styles of legal argument);⁹³ as well as encompassing the relationship between law and wider culture. Thus, this thesis endorses Nelken’s view that ‘just as legal culture would surely form part of any definition of the wider culture, so it is difficult to imagine any extensive project of comparing legal cultures which did not show the way they were directly or indirectly shaped by larger political, economic and intellectual aspects of the culture(s) of which they formed a part’.⁹⁴

The core material used in this comparative enquiry is the formal law (statutory law and legal judgements) and legal, rights, political and penal discourse.⁹⁵ Such discourse may be viewed as externally observable, conscious attempts to construct or interpret the meaning

⁹¹ ‘The Concept of Legal Culture: A Reply’ (note 85 above); ‘Punishment and Culture: Cultural Forms and Penal Practices’ (note 76 above); ‘Thick Description: Toward an Interpretive Theory of Culture’ (note 79 above); ‘The Concept of Legal Culture: A Reply’ (note 85 above).

⁹² ‘The Concept of Legal Culture’ (note 83 above) 29–30.

⁹³ K Klare ‘Legal Culture and Transformative Constitutionalism’ (1988) 14 *SAJHR* 146, 166–7.

⁹⁴ ‘A Comment on Blankenburg’ (note 86 above) 83.

⁹⁵ Included in the notion of legal and rights discourse are academic, political and popular arguments about law and rights. See below (p.22–24) the distinction between ‘rhetoric about rights’ and ‘rights rhetoric’.

of social practice or to construct a system of meaning in which social practice can be understood.⁹⁶ Moreover, the thesis adopts a reflexive view of the relationship between law, legal culture and wider culture: it embraces the cultural environment within which law is conceived, interpreted, enacted and executed while also noting the bearing that law has on this environment. The law is thus viewed as being responsive to and constructive of the environment out of which it arises. This is particularly the case with respect to the relationship between fundamental rights and rights culture, which the following section will examine.

2.1.1 Rights and rights culture

.. ‘a culture of rights’ is a seamless garment. The habit of arguing in terms of rights and their protection is not likely to be confined to one area of political debate, and it is not likely to be confined to one set of institutions”.⁹⁷

The notion of a rights culture can be distinguished from the substantive law which protects fundamental rights. In its analysis of rights culture in Germany and England, therefore, the thesis adopts the valuable distinctions of Eric Feldman,⁹⁸ namely the distinctions between ‘rights’, ‘rhetoric about rights’ and ‘rights rhetoric’.⁹⁹

In strictly formal terms an individual asserts a legal ‘right’, when she makes a claim to performance, either action or forbearance, on the part of another which is asserted in law.¹⁰⁰ This might involve a right being enshrined in a constitution, a code, a statute or it might be held to be part of the common law. As this thesis will show, England and Germany both have formal legal expressions of special rights and fundamental rights,¹⁰¹ although the rights protected, and the bodies against which these can be enforced, differ

⁹⁶ ‘Local Knowledge: Fact and Law in Comparative Perspective’ (note 18 above) 215; ‘In Pursuit of the Vernacular’ (note above) 519. See also quote from Geertz on p. 5 above.

⁹⁷ A Ryan ‘The British, the Americans and rights’ M Lacey and K Haakonssen, (edd), *A Culture of Rights* (CUP Cambridge 1991) 435.

⁹⁸ E Feldman ‘Patients’ Rights, Citizens’ Movements and Japanese Legal Culture’ in *Comparing Legal Cultures* (note 75 above) 215.

⁹⁹ ‘Patients’ Rights, Citizens’ Movements and Japanese Legal Culture’ (note 98 above) 216.

¹⁰⁰ P Jones *Rights* (Macmillan London 1994) 12–24. This definition encompasses the Hohfeldian notion of a ‘claim right’ and a ‘liberty right’. See W Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press New Haven 1919).

¹⁰¹ In distinguishing between special rights and fundamental rights I am drawing on Hart’s distinction between ‘special rights’ and ‘general rights’ in HLA Hart ‘Are there any natural rights?’ in A Quinton, (ed), *Political Philosophy* (Oxford OUP 1967) 53, 60–66.

significantly. The thesis will also show that while fundamental rights have had an impact on the special rights which prisoners hold in both Germany and England, the result of this impact has been very different indeed. The thesis attributes these differences to far wider factors than differences in the formal law. Rather the thesis seeks to anchor this discussion in a broader concept of rights culture which includes the notions of ‘rhetoric about rights’ and ‘rights rhetoric’.

‘Rhetoric about rights’, which is an important reference point when analysing rights culture, refers to the ‘relative importance attributed to rights in a particular society by popular and academic writers, as well as laypersons. The power rights are imagined to possess, the frequency with which they are supposedly invoked, and how they are thought to define the identity of people’.¹⁰² ‘Rhetoric about rights’ thus refers to the attitudes, mentalities and beliefs which a society reflects when engaging in talk about rights. As this thesis will show ‘rhetoric about rights’ can have a different tone or timbre in different legal cultures. In particular it will show that the extent of faith in fundamental rights and conceptions of the role of fundamental rights within ‘rhetoric about rights’ is markedly divergent in Germany and England.

Finally, analysis of rights culture involves attention to ‘rights rhetoric’ which requires, according to Feldman, ‘an examination of how rights are used to frame, discuss and debate issues relevant to social policy; paying attention to the language of actors engaged in social movements, particularly the context and timing of rights assertion; determining the efficacy of invoking rights rhetoric for mobilizing like-minded individuals; and evaluating success of those who use rights in pursuit of social ends’.¹⁰³ Such an analysis, when applied to the nature of criminal justice discourse in Germany and England, yields interesting insights. As the thesis will show, in Germany criminal justice reformers drew heavily on ‘rights rhetoric’ when advancing arguments about the reform of prison law, and despite the growth of competing discourses within the criminal justice environment, Germany remains characterised by a strong and defining ‘rights rhetoric’ as regards prison policy and prison law. This is less the case in England, however, where ‘rights rhetoric’ holds no such dominance in the conception and definition of prison law and policy.

As the analysis in this thesis will show, there is a strong relationship between the legal protection of fundamental and special rights, the tone and timbre of ‘rhetoric about rights’ and the existence, strength and nature of ‘rights rhetoric’. This relationship is complex and reflexive. Rights instruments, and judicial interpretations of rights, may be shaped by a society’s ‘rhetoric about rights’ but once in place these rights instruments and legal interpretations thereof can also shift ‘rhetoric about rights’. Moreover, ‘rights rhetoric’ may be shaped by the existence of rights instruments and the likelihood of certain judicial interpretations of these instruments, but also by the extent of faith in fundamental rights within ‘rhetoric about rights’. Equally, ‘rights rhetoric’ can shift judicial conceptions and interpretations of fundamental rights, may lead to shifts in the possibility of legal reform of rights instruments and can shift the tone of ‘rhetoric about rights’. All of these facets will be displayed in the account in this thesis of prisoners’ rights in Germany and England.

2.2 Thesis structure

The structure adopted in this thesis is bound up with the criticisms and reflections set out in section one concerning comparative work on prisoners’ rights. This, in particular, is demonstrated in the choice to adopt two different styles of exposition with respect to Germany and England which the following section will explain.

2.2.1 Modes of exposition

Two modes of exposition are adopted in this thesis with respect to Germany and England. In the first three chapters, the thesis seeks to provide a ‘thick description’ of the prisoner’s legal status in the context of German legal, penal and constitutional culture. In these chapters little explicit comparative reference is made to England. The object of these chapters is to provide an English audience with a full and nuanced account of the prisoner’s legal status in Germany and the broader cultural context in which this is

¹⁰² ‘Patients’ Rights, Citizens’ Movements and Japanese Legal Culture’ (note 98 above) 216.

¹⁰³ ‘Patients’ Rights, Citizens’ Movements and Japanese Legal Culture’ (note 98 above) 216.

placed.¹⁰⁴ The chapters on Germany therefore contain a greater degree of background information than that provided with respect to England. They are written with the intention of translating a German legal culture for an audience outside Germany. This identification of audience is, it is suggested, a fruitful starting point for comparative work. If used in the spirit of the pursuit of ‘local knowledge’, the identification of audience has the potential to assist comparativists in facing up to their role as ‘cultural intermediaries’ inviting them to reflect on the cultural assumptions of the readers and, ideally, on the legal cultural perceptions of their local environment.¹⁰⁵ In short, in identifying audience and the comparativists relationship to audience, we can begin a reflective comparative endeavour.¹⁰⁶ In this respect while the chapters on Germany will not be read as an exercise in what could be called **explicit comparison**, they can be read as an exercise in what might be termed **implicit comparison**, namely the exercise of translating a foreign legal culture for an audience outside of that culture. In this the comparativist, acts as a ‘cultural intermediary’, seeking to translate a foreign legal culture whilst recognising the ‘inconsistent parameters of their own culture’.¹⁰⁷

While the chapters on Germany are predominantly intended to provide an English legal audience with a full understanding of the context within which German prisoners’ rights are formed, this is not the only purpose of these first three chapters. An allied purpose of the chapters on Germany is to distance English readers from their own legal culture and to provide a comparative foil for the analysis on England in the latter two chapters of this thesis. Thus, having conducted an exercise in implicit comparison in the first three chapters with respect to Germany the last two chapters of this thesis embark on an exercise in **explicit comparison** with respect to England, asking the reader to reflect on England in the light of the German chapters. Explicit comparison, is essentially an exercise in distancing. It invites the reader to stand back from their own local context, by looking at England through a German lens. It seeks, through juxtaposition, to bring out the ‘strangeness in the familiar’ and thereby to gain insights into the legal cultural dynamics within the domestic environment.

¹⁰⁴ By English audience I do not refer to nationality. I refer simply to those whose legal cultural attitudes are attuned to the law and cultural environment of England and Wales.

¹⁰⁵ P Legrand ‘Comparative Legal Studies and Commitment to Theory’ (1995) 58(2) *MLR* 262.

¹⁰⁶ See p. 16 above.

Distancing might be achieved through other mechanisms, such as historical analysis. It might be possible to achieve the same level of distance by asking ‘was it always thus?’. But equally distancing can be usefully achieved by asking explicit comparative questions such as: why is A like A and not like B? Or, similarly, why is A like B? This process of explicit comparison should not be read in the English chapters as comparative evaluation. This thesis does not seek to ask, through explicit comparison, is A better than B? Answers to such a question would only be possible in the light of a prior standard by which to judge what is the better legal system or culture. This is not the enquiry in this thesis. Rather the thesis seeks in the last two chapters to highlight, through the process of explicit comparison, the method and manner of conceiving of the prisoner’s legal status in England and the broader cultural dynamics surrounding this conception.

2.2.2 Thesis structure in more detail

The thesis sets out in **chapter one** to explore the German conception of the prisoner’s fundamental rights status and explain it to an audience foreign to Germany. In **section one**, it will examine the constitutional culture within which this conception has been developed. Two aspects of this culture will be highlighted. First, the strength of faith in fundamental rights, secondly, the distinctive conception of fundamental rights which has been developed within German constitutional jurisprudence post-1945. In **section two** this chapter examines the constitutional foundations of the German Prison Act and the prisoner’s legal status in detail. It shows how, in three groundbreaking decisions in the early 1970s, the German Federal Constitutional Court declared existing prison law unconstitutional, forced the legislature to introduce a new Prison Act and set out the constitutional foundations of a such an Act. The chapter concludes in **section three** by summarising the constitutional principles which the German legislature was charged to fulfil in producing the Prison Act 1976.

In **chapter two** the thesis explores the broader climate of penal reform in which the decisions of the Federal Constitutional Court were made and the politics surrounding the drafting of the Prison Act. In **section one** the chapter examines the reform ideals present within Germany. It demonstrates that the German penal reform movement has been

¹⁰⁷ ‘Comparative Legal Studies and Commitment to Theory’ (note 105 above).

characterised by a strong impulse towards the codification of prison law on the one and the achievement of the resocialisation purpose of imprisonment on the other. This section also points to the role and strength of the penal academy in both these processes. In **section two** the chapter examines the political compromises made in the final stages of legislative drafting of the Prison Act. It shows how many of the constitutional and reform ideals underpinning the Act were undermined in last minute legislative agreements. In **section three** the thesis alludes to the changing criminal political environment within which the Prison Act is placed. The chapter concludes in **section four** that the Prison Act reflects both the constitutional and reform ideals which prompted its creation and the political compromises which weakened these ideals.

In **chapter three** the thesis examines in some detail the development of the prisoner's legal status since the German Prison Act came into force. In **section one** the chapter outlines the broader legal and cultural environment in which the Act is placed. It shows that the Prison Act stands against the background of a distinctive legal community which is characterised by an influential penal academy and an ambitious and powerful Federal Constitutional Court receptive to the ideas of the penal academy. Moreover that the Prison Act must be read in the light of broader principles of constitutional, administrative and criminal law. In **section two** the chapter examines the founding principles of the Prison Act. In particular, it demonstrates how these principles are rooted in, and strengthened by, constitutional principle whilst at the same time being weakened by the legislative trade-off, described in chapter two, between the vindication of prisoners' rights and the concern for administrative flexibility. In **section three** the thesis examines the special provisions of the Prison Act. It shows that whilst prisoners' access to legal redress is highly developed in the Act, significant problems remain in the enforcement of prisoners' substantive rights. These problems have formed a central focus of penal observers and the penal academy who have raised significant critical opinion in this regard. In **section four** the thesis will examine the latest cases of the Federal Constitutional Court with respect to prisoners' special rights under the Prison Act. It will show that the Federal Constitutional Court has sought to remedy many of the failings identified by the penal academy with respect to the vindication of prisoners' rights. In **section five** the thesis concludes its account of the method and manner of conceiving of the prisoners' legal status in Germany. It argues that despite the considerable institutional and political obstacles placed in the way of their realisation, prisoners' rights in Germany

continue to be strengthened by the constitutional and penological principles which underpin the German Prison Act and the prisoner's legal status. It argues that this is due primarily to the vigilance and commitment of the penal academy and the activism of a Federal Constitutional Court receptive to the ideas of the academy.

In **chapter four** the thesis embarks on an **explicit comparative exercise** with respect to prisoners' rights in England. The leading question that it seeks to answer is why, and in what way, is the English conception of the prisoner's legal status like or unlike that found in Germany. In **section one** the thesis examines the legislative regime governing prisons in England. It argues that unlike Germany this scheme is not concerned with clarifying the prisoner's legal status, but rather seeks to clarify mechanisms of political control and accountability. The section identifies the existence of a strong prisoners' rights lobby who continue to argue for legislative and other reform of prisoners' rights, but notes that, relative to Germany, this reform movement has not made a significant impact on governmental policy. The absence of a strong legislative commitment to the protection and definition of prisoners' rights is explained within the broader context of England's penal culture. Finally, this section analyses the legal protection afforded by the Prison Rules to the prisoner. It shows that while the Courts have shifted in their attitude towards these Rules, legal protection remains highly variable depending on the rule in question and the subject matter involved. The section concludes that the variable legal protection which prisoners receive lies in two deeper issues, first, the broader constitutional culture in which judges are operating and the place and significance of fundamental rights within this context, second the conception of the prisoner's legal status which English judges have developed. These two factors are examined in sections two and three of this chapter. In **section two** the thesis examines the broader constitutional culture within which judges are operating. In particular it notes that unlike Germany's active faith in fundamental rights, both in terms of formal legal protection and within 'rhetoric about rights', England displays a cultural ambivalence about fundamental rights. This cultural ambivalence is examined in depth and the section suggests that this has shaped the judicial development of prisoners' rights over the last thirty years. In **section three** the thesis outlines the contrasts between the prisoner's fundamental rights status in Germany and England. It explains that unlike the ambitious constitutional conception of the prisoner's fundamental rights status in Germany, the English conception of the prisoner's fundamental rights status is modest and rooted in a tacit constitutional acceptance that the judiciary should

not interfere in the development of internal prison policy. In **section four** the chapter concludes by stating that the legislative regime governing prisons, the broader constitutional context in which judges are operating and the judicial conception of the prisoner's fundamental rights status all provide the backdrop against which the judicial development of prisoners' rights over the last thirty years must be viewed.

Chapter five concludes the thesis with a detailed examination of the jurisprudence of prisoners' rights in England. It considers this jurisprudence through the lens of a German conception of prisoners' rights. The chapter seeks to demonstrate, through careful examination of the case law, how the judicial approach to prisoners' rights has been shaped by the background factors developed in chapter four.

Prisoners in a Rights Culture: The Case of Germany

The modern West German code of prison law owes its emergence, more than in most countries, to the application of constitutional principles in the sphere of prison law reform.¹

Observing the complicated and long drawn-out introduction of the German Prison Act we conclude that the presence of a written constitution was the pivotal point, the mechanism that could be activated against the odds of diverse attitudes to punishment.²

This comparative analysis of prisoners' rights in Germany and England roots its discussion in the broader make-up of the political and legal cultures of each country. One fundamental divergence which applied until very recently was the presence in Germany and the absence in England of a legally entrenched Bill of Rights. With the entry into force of the Human Rights Act 1998, this element of German and English legal culture can no longer be said to be so markedly divergent. But for the purposes of our analysis of prisoners' rights over the last 30 years, it remains highly relevant. In Germany constitutional rights have been legally entrenched since 1949 and prisoners' rights have been shaped by the fundamental rights enacted under the German Basic Law. In England, on the other hand, rights protections in prisons have been developed in the absence of a local Bill of Rights: their conception has not been grounded in 'rational adherence to an authoritative and coherent legal text'.³ In short, this divergence has significant implications for the conception, protection and development of prisoners' rights in both countries.

To start off the enquiry of this thesis, this chapter will show how the prisoner's fundamental rights status has been conceived and defined in Germany. It will examine the centrality of the Basic Law to German legal and political culture as well as the normative and practical influence that it, and the Federal Constitutional Court (FCC), have had on

¹ D van Zyl Smit 'Leave of Absence for West German Prisoners' (1988) 28 *BJC* 1, 2.

² R Prowse et al 'Rights and Prisons in Germany: Blueprint for Britain?' (1992) 20 *IJSL* 111, 117.

³ P Legrand 'European Systems are Not Converging' (1996) 45 *ICLQ* 52.

the shape of contemporary prison law. In particular it will examine the foundational judgements of the FCC which shaped the prisoner's fundamental rights status and resulted in the enactment of the German Prison Act (*Strafvollzugsgesetz*) in 1976.

It is not the intention here to apportion responsibility for the conception of the prisoner's legal status solely to the FCC. Recognition must also be given to the work and arguments of academics and politicians who were involved in an ongoing prison reform process which will be examined in more detail in chapter two. While the current chapter will show that the decisive interventions of the FCC in the early 1970s played a pivotal role in the development of the prisoner's fundamental rights status and the ultimate enactment of the Prison Act 1976,⁴ it should nevertheless be noted that the FCC's arguments were significantly shaped by the concerns and expertise of these reformers and the rights arguments that they invoked.

But neither should the existence of prior rights arguments lead us to underestimate the role of the Basic Law and the FCC in this reform process. The reform debate was clearly framed by the legal culture in which it took place. The imperatives of constitutional law in Germany, and the dynamics of German legal and political culture generally, made it unlikely that talk of legal reform could occur without evidence of its basis in, and accordance with, constitutional rights and principles. As Prowse et al indicate in the above opening quote, recourse to constitutional rights and principles was an important rhetorical tool in a culture which, while united by a belief in constitutionalism and fundamental rights, did not display consensus on the issue of punishment. The FCC drew on and built upon the pre-existing prison reform project by explicitly outlining how the proposed foundations of a future Act would be anchored in the rights and principles of the Constitution. Through its unequivocal support the FCC gave the proposed Act legal and political legitimacy of the highest order. Equally crucial, by declaring existing prison law unconstitutional and setting a deadline for the enactment of new legislation, the FCC eliminated any possibility of delay or prevarication in implementing these penal reforms.⁵ Thus, while in Germany the prisoner's fundamental rights status and the Prison Act came

⁴ *BVerfGE* 33, 1; 35, 202; 40, 276.

⁵ The landmark decision of the FCC (*BVerfGE* 33, 1) set a one-year deadline for the introduction of new constitutionally legitimate legislation. This deadline was later extended by three years in *BVerfGE* 40, 276, 284.

into existence through an intricate combination of judicial, academic and political interventions, these interventions were ultimately framed by a political and legal culture dominated by constitutional rights and rights rhetoric. It is these dynamics of German political and legal culture that this chapter will first turn.

1. The Basic Law: the 'heart' of German political and legal culture

The Germans' reverential respect for constitutional law, its insistence that major political faultlines be closed by judicial arbitration and its acceptance of the judiciary's presence in every facet of life, is the product of a nation that has looked over the abyss.⁶

Democracies require tradition. For this, twenty-five years are too few. But enough time has elapsed to say that the Germans of the Federal Republic of Germany can be content with their constitution.⁷

German legal and political culture has been characterised by a growing commitment to constitutionalism since the introduction of the Basic Law in 1949. As Parkes has argued, 'by the 1980s ... the political system and its constitution enjoyed such prestige for the term constitutional patriotism (*Verfassungspatriotismus*) ... to have entered into political debate'.⁸ The strength of German constitutionalism is in part a reflection of local anxiety about Germany's frail democratic tradition, partly born out of a German faith in law, rather than politics, as a successful mediator of social relations, and partly due to the success of the FCC in maintaining its own legitimacy and that of the constitution. The German Constitution, by entrenching the Federal, Democratic, Social and *Rechtsstaat* principles, has comprehensively shaped the entire political order.⁹ Equally the Constitution sits at the apex of the German legal hierarchy of norms.¹⁰ At the heart of German constitutionalism, however, is an unwavering belief in basic rights (*Grundrechte*). In Germany, unlike Britain, fundamental rights occupy a central place in the legal order. As symbols of a rejection of Germany's recent totalitarian past their political weight and meaning are quite unique. Those who assume that rights evoke a

⁶ G Craig *The Germans* (Penguin London 1991) 41.

⁷ Comment on the Saar Radio on the 25th anniversary of the German Basic Law quoted in *The Germans* (n 6 above) 60.

⁸ S Parkes *Understanding Contemporary Germany* (Routledge London 1997) 34.

⁹ K Hesse 'Bestand und Bedeutung der Grundrechte' (1978) *Europäische Grundrechte-Zeitschrift* 427, 428.

¹⁰ 'Bestand und Bedeutung der Grundrechte' (note 9 above).

common meaning across different legal traditions, cultures and languages should take note. Rights may signify and embody different things in different cultures: they have a particular ‘social and historical substance’.¹¹

The legal substance and symbolic meaning of basic rights in Germany has been significantly shaped by recent German history.¹² The Basic Law was passed by the German Parliamentary Council in 1949 in response to the systematic and large-scale violations of human rights committed during the Third Reich. In the first line of their preamble, the German Parliamentary Council declared themselves ‘conscious of their responsibility before God and humankind’. This historical setting not only underpins the continuing symbolic and normative force of the Basic Law, it is also central to the legal construction of the document and, in particular, the emphasis placed therein on basic rights. The weakness of the Weimar Constitution, which placed basic rights in the second part of the Constitution and allowed these rights to be amended by Parliament, was identified as the cause of its eventual breakdown under National Socialism.¹³ The perceived failure of the Weimar Constitution motivated drafters of the Basic Law to place basic rights at the head of the text of the Constitution,¹⁴ to declare certain rights and principles unamendable,¹⁵ and to ensure that all State institutions are unambiguously obliged to safeguard and protect basic rights.¹⁶ In addition, the drafters of the Constitution vested in the FCC the guardianship of the Basic Law by affording it extensive powers of

¹¹ B Puchalska-Tych and M Salter ‘Comparing legal cultures of Eastern Europe: the need for a dialectical analysis’ (1996) *LS* 157, 175.

¹² The immediate factors which lead to the introduction of the Basic Law should not, however, be confused with its legal historical origins. German constitutional historians locate the historical roots of the Basic Law in the ferment of democratic libertarian ideas in American and Western European political philosophy during the eighteenth century. In Germany, this political movement found brief public expression in Paulskirche in 1848 and the resultant Frankfurt Constitution of 1849, was more weakly represented in the Prussian constitution of 1850 and the North German Federal Constitution of 1867 and 1871, and later in the Weimar Imperial Constitution of 1919. See H Hofmann ‘Die Grundrechte 1789–1949–1989’ (1989) *NJW* 3177; H Hofmann ‘Zur Herkunft der Menschenrechtserklärungen’ (1988) *JuS* 841; B Pieroth ‘Geschichte der Grundrechte’ (1984) *Jura* 568; J-D Kühne ‘Die französische Menschen- und Bürgerrechtserklärung im Rechtsvergleich mit den Vereinigten Staaten und Deutschland’ (1990) *Jahrbuch des öffentlichen Rechts der Gegenwart* 1; J Ziekow ‘Deutsche Verfassungsentwicklung und sozialer Liberalismus’ (1989) *JuS* 107.

¹³ ‘Geschichte der Grundrechte’ (note 12 above).

¹⁴ Basic Law, Articles 1–19. Further basic rights can be found in Basic Law, Articles 20 (4), 33, 38, 101, 103, 104. Despite the exclusion of these rights from the first chapter of the Constitution they are still considered to be fundamental. ‘Bestand und Bedeutung der Grundrechte’ (note 9 above) 427.

¹⁵ Basic Law, Article 79 (3) states that: ‘Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be prohibited’.

¹⁶ Basic Law, Article 1 (3) states that: ‘The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law’.

legislative review, and giving citizens direct access to this Court.¹⁷ This drafting was intentionally designed to avoid the mistakes of the past. As Hesse explains:

the fact that, in the Federal Republic of Germany, basic rights are not only constitutionally guaranteed, but are generally ensured and protected, is ... above all historically explicable: these guarantees, safeguards and extensive protections are to be understood as being created, in the first instance, as a response to modern Germany history.¹⁸

The distinctiveness of Germany's approach to fundamental rights lies not only in the strength of faith in such rights. Of equal importance is the particular conception of constitutional rights which Germans have developed since 1945. Basic rights are seen in Germany as legitimating the existence of a State which had forfeited its claim to legitimacy in the Third Reich. This is evident in standard interpretations by the FCC¹⁹ and constitutional commentators²⁰ of the first and most fundamental Article of the Constitution which proclaims that:

the dignity of man is inviolable. To respect and protect it shall be the duty of all public authority.

The wording of Article 1 (1) Basic Law embodies the notion of basic rights as 'pre-State'.²¹ As Jarass argues 'the State is there for the sake of the people and not the other way round'.²² This is taken to mean, in German constitutional thinking or 'rhetoric about rights', that the State is not merely, by its actions, to refrain from violating human dignity, its every activity must be guided by the purpose of upholding it. In Germany then, basic rights represent not merely the restriction of State action but also provides the very rationale for the State's existence. As Pieroth and Schlink argue, 'human dignity is not only the limit of, but also the responsibility, of state activity'.²³

¹⁷ Basic Law, Article 19 (4), Article 93 (1) (4a).

¹⁸ 'Bestand und Bedeutung der Grundrechte' (note 9 above) 427.

¹⁹ *BVerfGE* 27, 344, 351; 6, 32, 41; 12, 45, 53; 27, 1, 6; 30, 1, 39; 30, 173, 193; 32, 98, 106, 108; 37, 57, 65f.; 45, 187, 227 and 50, 166, 175. References in K Stern 'Menschenwürde als Wurzel der Menschen-und Grundrechte' in H Siekmann, (ed), *Der Staat des Grundgesetzes* (Heymanns Köln 1993) 224.

²⁰ C Starck 'Menschenwürde als Verfassungsgarantie im modernen Staat' (1981) *JZ* 457; 'Menschenwürde als Wurzel der Menschen-und Grundrechte' (n 19 above); K Sontheimer 'Principles of Human Dignity in the Federal Republic' in K Stern, (ed), *Germany and its Basic Law* (Nomos Baden Baden 1993) 213; H D Jarass and B Pieroth *Grundgesetz für die Bundesrepublik Deutschland* (4th edn Beck München 1997).

²¹ This is often expressed in the idea that State limitations of rights must be justified whereas the exercise of citizens' rights must not. See B Pieroth and B Schlink *Grundrechte - Staatsrecht II* (13th edn Müller Heidelberg 1997) 13.

²² *Grundgesetz für die Bundesrepublik Deutschland* (note 20 above) on Article 1 m.n. 1.

²³ B Pieroth and B Schlink *Grundrechte: Staatsrecht II* (2nd edn Müller Heidelberg 1986) 87.

This view of basic rights represents a departure from the classical liberal notion of negative rights (*Abwehrrechte*) which protect the individual from the State. Rather basic rights are viewed not only as limits to State intervention, they can also create reasons and justifications for State action. Equally, the State is viewed not only as a threat to rights but also as a protector of rights. As a result the FCC has developed ‘positive claim rights’ (*Leistungsrechte*),²⁴ which allow individuals to claim benefits or demand certain action from the State in order to ensure the minimum existence for the enjoyment of their basic rights. Equally, the FCC has developed ‘protective duties’ (*Schutzpflichten*) which place positive duties on the State to protect against the violation of rights of individuals by other individuals.²⁵ Furthermore, basic rights are not only considered as being subjectively held by the individual, but also as ‘objective norms’ or a ‘system of values’ which radiate throughout the legal system as a whole.²⁶ This can be seen, not only in the constitutional protection of social institutions,²⁷ but also in the view of the FCC that basic rights ‘radiate’ their intrinsic value outside the public law sphere and over legal relationships between individual parties in civil law.²⁸

The departure from classical liberal conceptions of basic rights in Germany is also evident in Germany’s social conception of rights and the ideal of the *Soziale Rechtsstaat*.²⁹ While social liberal values were reflected in the social rights protected under the Weimar constitution, the crucial link between the guarantee of individual rights and the protection of social justice was highlighted by Herman Heller in the early 1930s.³⁰ Writing in a time

²⁴ These rights can be strictly interpreted as a Hohfeldian ‘positive claim right’ but correspond closely to the anglo-american concept of social and economic rights.

²⁵ *Schutzpflichten* are often used as a justification for the criminal law. See J Isensee ‘Das Grundrecht als Abwehrrecht und als staatliche Schutzpflicht’ in J Isensee and P Kirchhoff, (edd), *Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band IV: Allgemeine Grundrechtslehren* (Müller Heidelberg 1992) 143.

²⁶ BVerfGE 7, 198; R Alexy ‘Grundrechte als subjektive Rechte und als objektive Normen’ (1990) *Der Staat* 49; H Jarass ‘Grundrechte als Wertentscheidungen bzw. objektivrechtliche Prinzipien in der Rechtsprechung des Bundesverfassungsgericht’ (1985) *Archiv des öffentlichen Rechts* 363; E Böckenförde ‘Grundrechte als Grundsatznormen’ (1990) *Der Staat* 1.

²⁷ For example to marriage and the family in Basic Law, Article 6 (1).

²⁸ This is commonly justified by the concept of ‘indirect effect’ (*mittelbare Drittwirkung*) whereby the Constitution is said to apply indirectly to private parties. See BVerfGE 7, 198; R Zimmerman in W Ebke and M Finkin, (edd), *Introduction to German Law* (Kluwer The Hague 1996) 18.

²⁹ BVerfGE 4, 7, 15; BVerfGE 5, 85, 198; K Stern ‘Sozialstaat’ and ‘Menschenwürde als Wurzel der Menschen- und Grundrechte’ in H Siekmann, (ed), *Der Staat des Grundgesetzes* (Heymanns Köln 1993) 123 and 224.

³⁰ P Kunig ‘The Principle of Social Justice’ in U Karpen, (ed), *The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law* (Nomos Baden-Baden 1988) 187.

of economic depression and in the last days of the Weimar Republic, Heller viewed the attainment of social justice as a precondition of a sustainable liberal state and as a necessary bulwark against anti-democratic forces in German politics.³¹ Heightened by the lessons of history, Heller's views were even more pertinent in a war-ravaged Germany where the daunting task of social and economic reconstruction post-1945 called for high levels of social co-operation and a strong and effective State. Given this historical and social context it comes as little surprise that the drafters of the Basic Law sought to attain a balance between individual rights protections and social justice: a balance which the FCC continues to strive towards. This is not only evident in the entrenched Social State Principle (*Sozialstaatsprinzip*) and in the FCC's continuing development thereof, but also in the FCC's definition of the relationship between the individual and society. Thus, the FCC stated firmly that the 'image of man under the Basic Law is not that of the isolated sovereign individual, rather, the Basic Law resolves the conflict between the individual and the community by binding the citizen to the community without detracting from his intrinsic value'.³² In this social constitutional climate, the State as the guarantor and protector of fundamental rights is charged with balancing seemingly incommensurable rights against one another and may be justified in limiting the basic rights of certain individuals in order to protect those of others.

In sum, German fundamental rights interpretation and rhetoric about rights goes beyond a notion of rights as regulating bipolar and uni-directional relationships between the individual and the State: with the State as aggressor and the individual as the victim. Rather, fundamental rights are viewed as multifaceted (as negative and positive and as subjective and objective) and as regulating a complex network of social relations both between the State and the individual, between individuals within society and for the development of society as a whole.

The effect of the German commitment to and conception of fundamental rights, both in the provisions of the Basic Law and in 'rhetoric about rights', has been such as to make rights highly constitutive of legal and political culture: few social relations are expressed without recourse to the language of basic rights. 'Rights rhetoric' has come to dominate most processes of political and legal change and judges of the FCC are called upon to

³¹ 'The Principle of Social Justice' (note 30 above).

determine the constitutionality on many issues of central social importance.³³ This high level of ‘rights rhetoric’ has led to the problematic overloading of the FCC³⁴ and more, recently, criticisms that German legal culture has been undermined by ‘rights fundamentalism’.³⁵ This has in turn led to the FCC reconsidering its own role in German politics and measures have been implemented to limit immediate access to it.³⁶

But although these recent doubts are significant, they have not succeeded in undermining the social and cultural weight which constitutional rights, and the FCC, enjoy in Germany. Certainly, the level of rights scepticism found in England is not present in Germany.³⁷ Rather, basic rights are viewed as representing the cornerstone of modern German democracy and are a defining feature of its legal and political culture. As Klaus Stern explains: ‘basic rights have become the heart of the free democratic and legal state’ in Germany.³⁸

2. The constitutional foundations of the Prison Act and prisoners’ legal status

While the German Basic Law gives the State competence to imprison criminal offenders,³⁹ asserts a right to personal liberty⁴⁰ and habeas corpus,⁴¹ and lays out criteria by which a person may be punished,⁴² detained or sentenced to imprisonment,⁴³ it is not

³² *BVerfGE* 12, 45, 51; 28, 175, 189.

³³ A Stone Sweet *Governing With Judges: Constitutional Politics in Europe* (OUP Oxford 2000) 78.

³⁴ E Böckenförde ‘Die Überlastung des Bundesverfassungsgericht’ (1996) *ZRP* 281; J Rivers ‘Stemming the flood of constitutional complaints in Germany’ (1993) *PL* 553.

³⁵ K Redecker ‘Der moderne Fluch der Versuchung zur Totalität’ (1995) *NJW* 3369. This article was written in response to the ‘Crucifix Decision’ (*BVerfGE* (1995) *NJW* 2477) which held that placing crucifixes on walls of school classrooms was in violation of article 4 Basic Law (Freedom of faith, conscience and creed). Redecker argued, voicing the concerns of others, that German society has become too determined by rights and law and that it, therefore, suffers from ‘rights fundamentalism’ or ‘legal totalitarianism’. A leading constitutional judge and theorist, Ernst-Rudolf Böckenförde, has recently admitted that since the Crucifix decision the FCC no longer holds the unquestioned status that it once had. (‘Die Überlastung des Bundesverfassungsgericht’ (note 34 above)).

³⁶ ‘Stemming the flood of constitutional complaints in Germany’ (note 34).

³⁷ See ch. 4, pp. 180–197.

³⁸ K Stern ‘Staatsrecht und Verfassungsrecht in Ihrer Wechselbezüglichkeit’ in H Siekmann, (ed), *Der Staat des Grundgesetzes* (Heymanns Köln 1993) 133.

³⁹ Basic Law, Article 74 point 1.

⁴⁰ Basic Law, Article 2 (2) sentence 2.

⁴¹ Basic Law, Article 104 (2) and (3).

⁴² Basic Law, Article 103 (2).

⁴³ Basic Law, Article 104.

explicit about how prisons should be administered or which rights prisoners should hold post conviction.⁴⁴ As such the existence and shape of the legislation that governs a prisoner's legal status today is determined by the FCC's interpretation of constitutional rights and principles. These constitutional foundations were clearly set out in the decisive and creative interventions of the FCC in the early 1970s. It is to these decisions that the remainder of this chapter will turn.

2.1 Prisoners, basic rights and the Rechtsstaatsprinzip⁴⁵

In 1972 prisoners were a legal anomaly. This anomaly was that they were not seen as full bearers of basic rights,⁴⁶ and were not subject to any statute or secondary legislation which determined their legal status. As a result, the prisoner's legal status was in violation of two central tenets of the *Rechtsstaatsprinzip*: the 'legal proviso' (*Gesetzesvorbehalt*)⁴⁷ and the principle that all state authorities are bound by basic rights (*Grundrechtsbindung*). The 'legal proviso' stipulates that a primary statute, or clearly and narrowly defined secondary legislation, must authorise administrative action wherever such action relates to a matter which is of 'substantial importance for the citizen or the public'. A 'substantial interest' may be a basic right or any other significant interest.⁴⁸ The principle of 'binding basic rights' is derived from Article 1 (3) Basic Law which stipulates that 'basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law'. Given that they are unamendable,⁴⁹ these principles are central provisions of the German Constitution and therefore foundational principles of the entire legal order.

⁴⁴ C Gusy 'Freiheitsentziehung und Grundgesetz' (1992) *NJW* 457, 461.

⁴⁵ This is a central principle in German constitutional law and culture. It is equivalent to, but not the same as, the Rule of Law in England. For an explanation of the significance of the *Rechtsstaatsprinzip* see: K Stern 'Der Rechtsstaat' in H Siekmann, (ed), *Der Staat des Grundgesetzes* (Carl Heymanns Köln 1993) 3.

⁴⁶ The prisoner's right of recourse to law (*Rechtsschutzgewährleistung*) under Basic Law, Article 19 (4) and the *Rechtsstaatsprinzip* had, however, been recognised in 1961 in the Introductory Act to the Constitution of the Courts Act, §§ 23 ff. H Müller-Dietz *Strafvollzugsrecht* (Walter de Gruyter Berlin 1977) 49.

⁴⁷ H Maurer *Allgemeines Verwaltungsrecht* (11th edn Beck München 1997) 105; C Degenhart *Staatsrecht I* (13th edn Müller Heidelberg 1997) 116.

⁴⁸ This is often referred to as the theory of 'substantiality' (*Wesentlichkeitstheorie*) which holds that legislation is always necessary if the issue involved is one of 'substantial' importance for the citizen or the public. H-U Schwarze *European Administrative Law* (Sweet & Maxwell London 1992) 216; *Staatsrecht I* (note 47 above) 113.

⁴⁹ As explained before these principles are tenets of the *Rechtsstaatsprinzip* which is explicitly enshrined in Basic Law, Article 20. Under Basic Law, Articles 79 (3), 20, and 1 are declared unamendable.

Despite the existence of such fundamental principles, however, prisoners were governed by the Service and Administration Ordinance of 1962 (*Dienst- und Vollzugs-Ordnung 1962*). As an administrative regulation this Ordinance was, strictly speaking, classified as ‘internal law’ (*Innenrecht*)⁵⁰. It did not create prisoners’ rights nor was it legally binding duties on the prison administration.⁵¹ Importantly, it did not qualify as primary statute law for the purpose of fulfilling the ‘legal proviso’. As a result reformers argued that, under the Ordinance, limitations of prisoners’ rights were without constitutional legitimacy.⁵² As Würtenberger insisted in 1969, ‘in a *Rechtsstaat*, the prison as a State institution and social entity may never be outside the remit of law and statute (*Recht und Gesetz*)’.⁵³

The justification given for the anomalous position of the prisoner was the doctrine of the ‘special authority relationship’ (*besonderes Gewaltverhältnis*). This doctrine was a product of nineteenth century administrative legal theory⁵⁴ and was allied to the distinction between ‘internal’ and ‘external’ law.⁵⁵ It stipulated that categories of persons who were in an unusually close relationship to the State, such as prisoners, school students and members of the armed forces, were not protected by the full range of basic rights. The original logic of the doctrine was that these groups of individuals were considered ‘internal’ to the State and in a ‘sphere unregulated by law’ (*rechtsfrei erachteten Bereich*).⁵⁶ As matters internal to the State were regulated through ‘internal law’, these persons were viewed as exempt from the protections of the ‘legal proviso’ (*Gesetzesvorbehalt*) as they were without the full range of basic rights to be protected by ‘external law’. Needless to say, with the introduction of the Basic Law in 1948 and the

⁵⁰ A central distinction in German administrative law is between external law (*Außenrecht*) and internal law (*Innenrecht*). External law regulates the relationship between the individual and the State and has a direct impact on citizens and other legal persons outside of the administrative structure (*Unmittelbare Rechtswirkung nach außen*). In general acts classified as, or made on the basis of, external law are legally binding and can be challenged by citizens. In opposition thereto, internal law regulates the activity of administrative officials only and is regarded as not binding on citizens outside the administration. Citizens are therefore generally not able to directly challenge a rule or act classified as internal law, unless they can be shown to violate the equality principle (*Gleichheitssatz*) under Article 3 of the Basic Law. See *Allgemeines Verwaltungsrecht* (note 47 above) 36 and 598.

⁵¹ *Strafvollzugsrecht* (note 46 above) 49.

⁵² H Müller-Dietz *Strafvollzugsgesetzgebung und Strafvollzugsreform* (Heymanns Köln 1970) 33.

⁵³ T Würtenberger ‘Freiheit und Zwang im Strafvollzug’ (1969) *NJW* 1747, 1748.

⁵⁴ D Merten ‘Grundrechte und Besonderes Gewaltverhältnis’ in B Börne et al, (edd), *Einigkeit und Recht und Freiheit - Festschrift für Karl Carstens* (Heymanns Köln 1984) 721.

⁵⁵ See note 50 above.

⁵⁶ *Allgemeines Verwaltungsrecht* (note 47 above) 166.

growing influence of the *Rechtsstaatsprinzip*, the negation of the ‘legal proviso’ through the ‘special authority relationship’ came under increasing criticism.⁵⁷

If the original rationale which underpinned the ‘special authority relationship’ doctrine was being questioned in the late 1960s and early 1970s, it was clearly discredited by the groundbreaking decision of the FCC in 1972. Here the protections of the *Rechtsstaatsprinzip* were strongly invoked and it was decided that prisoners should be protected in the same way as all citizens under the Basic Law.⁵⁸ This decision was the FCC’s first important intervention into matters of prison reform and its close relationship with this ongoing process was evidenced in direct references to the proposals of the Prison Administration Commission of the Federal Ministry (*Strafvollzugskommission des Bundesministerium*)⁵⁹ and leading academic publications on the subject.⁶⁰ The judgement, which concerned the power of a prison governor to intercept a prisoner’s correspondence, ended the legal anomaly that prisoners represented at the time.⁶¹

In this decision, the FCC noted that the ‘special authority relationship’ had been used as an ‘independent and implicit limitation of the basic rights of the prisoner’,⁶² and insisted that all basic rights and the ‘legal proviso’ applied to prisoners. It thereby dismissed the doctrine as inadequate justification for the prisoner’s unconstitutional status, and described it as ‘qualifying’ prisoners’ basic rights ‘in an intolerably vague manner’.⁶³ The FCC’s position on the prisoner’s legal status was unequivocal:

⁵⁷ *Strafvollzugsgesetzgebung und Strafvollzugsreform* (note 46 above) 33; ‘Freiheit und Zwang im Strafvollzug’ (note 53 above) 1748.

⁵⁸ *BVerfGE* 33, 1.

⁵⁹ Bundesministerium der Justiz *Entwurf eines Gesetzes über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung–Strafvollzugsgesetz* (Müller Karlsruhe 1971).

⁶⁰ H Schüler-Springorum *Strafvollzug im Übergang* (Schwartz Verlag Göttingen 1969); *Strafvollzugsgesetzgebung und Strafvollzugsreform* (note 46 above) 33.

⁶¹ Concretely, the decision concerned the constitutionality of an administrative regulation (Service and Administration Ordinance 1962) which permitted the prison governor to monitor and intercept post in the interests of security. The FCC accepted that the provision in question violated the prisoner’s fundamental right under Basic Law, Article 5 (1) (freedom of expression) of the Basic Law and declared that, in the absence of primary legislation setting out constitutionally legitimate limitations of these rights, these actions were unconstitutional. Given that this legislation did not exist at the time, the FCC acknowledged that for an interim period certain violations of basic rights would have to be tolerated.

⁶² *BVerfGE* 33, 1, 10.

⁶³ *BVerfGE* 33, 1, 10.

The Basic Law is a value-bound order, which recognises the protection of the freedom and dignity of persons as the uppermost aim of all law; the image of humanity is not however one of an egotistical individual, but rather one of a socially bound figure with manifold obligations ... In Article 1 (3) Basic Law it is declared that basic rights bind the legislature, the administration and the judiciary as directly enforceable law. This comprehensive binding of all organs of the State is contradicted when in the administration of prisons, prisoners' basic rights are limited in an arbitrary or discretionary manner. Such a limitation is only possible when it is essential to the achievement of a socially related constitutional purpose and occurs in a constitutionally recognised form. The basic rights of prisoners can therefore only be limited on the basis of, or through, a law which while unable to avoid the use of general clauses should be as limited as possible.⁶⁴

It was clear then that prisoners were not only to be afforded full and equal rights under the Basic Law, but that limitations of these rights could only be constitutionally legitimate if they were made pursuant to a primary 'external' law which, itself, fulfilled a 'constitutional purpose'. Only in this way could prison law be in line with the 'legal proviso' and thereby the *Rechtsstaatsprinzip*. Having declared the law on prisons to be unconstitutional as it stood, the FCC set a time by which a new legal regime was to be introduced. The result was the introduction of the Prison Act of 1976.⁶⁵

The significance of this decision lies not only in its hastening of legislative reform, its assertion of the *Rechtsstaatsprinzip*, or its categorical support of prisoners' rights. It is also important for its explicit grounding of prisoners' rights within a social context: a grounding which was in line with the FCC's approach to fundamental rights in general.⁶⁶ In this regard, it is significant that the FCC insisted that the constitutional purpose of imprisonment be 'socially related'. Equally it is noteworthy that before pronouncing on the subject of prisoners' rights, the FCC reminded us again that basic rights are premised on the notion of the individual as a 'socially bound figure with manifold obligations'.

The FCC's use of this language hinted at two interconnected issues: first, its reference to the individual's 'manifold obligations' signalled its opinion that prisoners should not only bear rights but should also be placed under obligations and duties which could ultimately be justified by the protection of the social interest. Secondly, the FCC's allusion to a

⁶⁴ BVerfGE 33, 1, 11.

⁶⁵ The doctrine of the *Besondere Gewaltverhältnis* was discredited in general by this decision. While the notion of a 'special administrative relationship' (*verwaltungsrechtliche sonderbeziehungen*) still remains, it is clear from the decision that basic rights and the 'legal proviso' applies in these cases. On pragmatic grounds, however, it is acknowledged that, with regard to such relationships, the extent of the 'legal proviso' is more restricted than with respect to normal administrative relationships. This said, there is no doubt that with respect to infringements of basic rights the 'legal proviso' applies. See *Allgemeines Verwaltungsrecht* (note 47 above) 113–117, 166–171; *Staatsrecht I* (note 47 above) 115.

‘socially related constitutional purpose’ voiced its concern that the new legislation on prisons should serve the interests of society as well as the interests of the prisoner. In so doing it averred that prisoners’ rights should be balanced against the social rationale for their limitation or protection. This relationship between the social interest and the prisoner’s individual interest was not necessarily seen as one of conflict. To a great extent, the FCC has viewed the social interest as being served by vesting prisoners with basic rights.⁶⁷ On the other hand, the FCC has often invoked the social interest, in particular in being protected from crime, as justification for the limitation of prisoners’ rights. Both these tendencies can be shown in the FCC’s development of the purpose of prison administration, a development to which this chapter will now turn.

2.2 The Federal Constitutional Court and the purpose of imprisonment

To recapitulate briefly, by vesting prisoners with full and equal basic rights and asserting the protections of the *Rechtsstaatsprinzip*, the FCC placed the onus on the State to justify any rights limitations where they occurred. Without legal authority to encroach upon the rights of individuals, explained in legal terms as *Eingriffsbefugnisse* (power to encroach on rights), State encroachments would be struck down as violations of rights. Furthermore, as the FCC explained, infringements cannot simply be justified through the legislative process, as the purpose and extent of these infringements must be in accordance with the fundamental principles of the Basic Law.⁶⁸ In other words, the basic rights of prisoners can be limited, but such limitations are themselves subject to the limitations set out by the Constitution.⁶⁹ Given these constitutional requirements it was essential that the proposed legislation should state, quite explicitly, the purpose, function and extent of legal limitations of prisoners’ basic rights.

The demand for a clear purpose in legislation is reinforced by a further substantive principle of the *Rechtsstaatsprinzip*: the doctrine of proportionality

⁶⁶ See p. 35 above.

⁶⁷ See p. 46–50 below.

⁶⁸ Under Basic Law, Article 20 (3) the legislature is bound by the constitutional order and is therefore duty bound to respect basic rights in the content and shape of legislation.

⁶⁹ This contorted logic is famously explicated by Pieroth and Schlink as the notion of ‘limits of limits’ (*Schranken-Schranken*). B Pieroth and B Schlink *Grundrechte - Staatsrecht II* (13th edn Müller Heidelberg 1997) 64. See further pp. 52–56 below.

(*Verhältnismäßigkeitsgrundsatz*). The doctrine stipulates that State measures have to be ‘suitable’ and ‘necessary’ for attaining a legitimate (i.e. constitutional or legal) purpose, and ‘proportional’ in the narrow sense. A measure is only ‘suitable’ where it is clearly related to the achievement of the purpose in question, while it is ‘necessary’ when it has been shown that it is the least restrictive or invasive measures which achieve the end in question ‘as effectively’. In its narrow sense the measure has to be ‘proportional’ in that it should strike a proper balance between the rights which are being protected by the measure (e.g. the protection of society from crime) and the protection of the rights of the individuals being affected by the measure in question (e.g. prisoners).⁷⁰ Without a clear legislative purpose by which a State measure could be judged to be ‘necessary’ and ‘suitable’, the doctrine of proportionality in its wide sense would be undermined. Such is the centrality of the doctrine of proportionality to the fulfilment of the ‘legal proviso’ requirement that Schlink has argued for a separate constitutional principle called ‘the proportional law proviso’ (*Vorbehalt des verhältnismäßigen Gesetzes*).⁷¹

Given this constitutional framework, the Prison Act was expected to define clearly a constitutionally legitimate purpose of prison administration and set out a homogenous and coherent legal basis, in line with this purpose, upon which administrative action with regard to prisoners is justified. It is important to recognise, at this stage, that the Prison Act was as much about justifying and laying out limitations of prisoners’ basic rights as it was about giving prisoners special rights, if not more so.⁷² The central problem of the Act was therefore to find a justificatory purpose which was in line with the values of the Constitution. The FCC was in a central position to give guidance on this point.

2.2.1 The purpose of punishment and the purpose of imprisonment

Before moving on to show how the purpose of imprisonment was constitutionally defined, a brief clarification must be made. The German Prison Act forms part of the

⁷⁰ *Staatsrecht I* (note 47 above) 128–133.

⁷¹ *Grundrechte-Staatsrecht II* (note 69 above) 63. See further pp. 52–56 below.

⁷² See further pp. 50–52 below.

criminal law in its broad sense,⁷³ but regulates prison administration only. The purpose of imprisonment referred to in this chapter therefore refers to the purpose of prison administration alone and not to the purpose of punishment in general. The latter is regulated in the general part of the Penal Code (*Strafgesetzbuch*). This stipulates in paragraph 46 that the primary basis upon which the sentence is to be awarded is the extent of the offender's criminal guilt (*Schuldausgleich*)⁷⁴ and that within these limits the effect of the sentence on the offender's future life in society can be taken into account.⁷⁵ Only after the sentence is set (*Strafzumessung*) and officially executed (*Strafvollstreckung*) does the administration of the prison sentence (*Strafvollzug*) become governed by the provisions and purpose of the Prison Act.

Historically the relationship between prison law and criminal law has been articulated in terms of the 'three-pillar theory' (*Drei-saulen-theorie*).⁷⁶ This argues that the criminal law in its broader sense is composed of three stages: the material criminal law threatens punishment, the criminal judge determines punishment and the executive executes and administers punishment. Complementing the 'three-pillar theory', Roxin's widely accepted 'dialectical-unification-theory' (*dialektische Vereinigungstheorie*)⁷⁷ and the 'step-theory' (*Stufentheorie*)⁷⁸ argue that different purposes of punishment predominate at different stages of the criminal justice system. In brief, the criminal law and resultant 'legislative threat of punishment' is said to be aimed primarily at general deterrence; conviction, predominantly,⁷⁹ at retribution and the execution and administration of punishment at special prevention (*Spezialprävention*) which emphasises prisoner resocialisation. While it is acknowledged that the separate stages of the criminal justice system are intrinsically interconnected, it is nevertheless argued that a specific aim of the criminal law and of punishment should predominate at each individual stage.

⁷³ There is much controversy amongst criminal law theorists as to whether prison law is procedural (*formelles*) or material (*materielles*) criminal law or whether it forms a third part of the criminal law. The debate is reported on in G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 8.

⁷⁴ Penal Code, § 46 (1) sentence 1.

⁷⁵ Penal Code, § 46 (1) sentence 2.

⁷⁶ *Strafvollzug* (note 73 above) 19.

⁷⁷ C Roxin 'Sinn und Grenzen staatlicher Strafe' (1966) *JuS* 377.

⁷⁸ *Strafvollzug* (note 73 above) 80.

⁷⁹ As stated above, Penal Code, § 46 (2) allows consideration of the resocialisation effects of the sentence on the offender within the limits of the proportionality guarantee of Penal Code, § 46 (1).

The setting of a clear distinction between the aims of criminal punishment and the aims of the administration of prisons was a central aim of campaigners and authors of preliminary drafts of the Prison Act.⁸⁰ These reformers were concerned to remedy the problems of prior prison regulations, in particular the Service and Administration Ordinance 1961, which set out multiple purposes of imprisonment and thereby did not provide a clear substantive basis for the exercise of discretion in prisons. In solving these problems, these reformers were concerned not only to distinguish the aims of the criminal punishment from the aims of the administration of punishment, but also to settle on a clear primary purpose of prison administration. According to majority opinion, this is what paragraph 2 Prison Act was meant to achieve.⁸¹

From the perspective of the prisoner the difference between decisions taken at the sentencing stage and those at the administration of punishment stage are distinguished as ‘status’ (*Status*) decisions and ‘administrative’ (*Gestaltungs*) decisions.⁸² Status decisions are made under the direction of the Penal Code and determine ‘which’ sentence (i.e. type and length) the prisoner should be given. This includes decisions about parole which are taken by judges of the Penal Execution Chambers (*Strafvollstreckungskammer*)⁸³ and governed by the Penal Code.⁸⁴ Administrative decisions are governed by the provisions of the Prison Act and determine ‘how’ the prisoner should be treated in prison. Status decisions will have a ‘reflexive influence’ on administrative decisions, in that the length of the prison sentence set at the sentencing stage will indirectly determine the content of the sentence plan as well as the timing and implementation of particular measures stipulated in the Act. Beyond this reflexive relationship, however, criminal and penal theorists argue that the two types of decisions are distinct in both the legislation which applies and the punishment aim to be followed.⁸⁵ As Van Zyl Smit argues, the distinction

⁸⁰ See J Baumann et al, (edd), *Alternativ-Entwurf eines Strafvollzugsgesetzes* (Arbeitskreis deutscher und schweizerischer Strafrechtslehrer Tübingen 1973); *Regierungsentwurf eines Strafvollzugsgesetzes* (BT-Dr. VII/918, 1972/73)

⁸¹ See ch. 3, p. 95

⁸² R-P Callies and H Müller-Dietz *Strafvollzugsgesetz* (Beck München 1998) §2 mn 9.

⁸³ Criminal Procedure Code, § 462a.

⁸⁴ Penal Code, §§ 57–58. The procedure to be followed when making parole decisions is regulated in Criminal Procedure Code, § 454 and 454a.

⁸⁵ R-P Callies and H Müller-Dietz *Strafvollzugsgesetz* (Beck München 1998) § 2 mn 10; K Laubenthal, *Strafvollzug* (2nd edn Springer Berlin 1998) 76.

in some way reflects the Anglo-American dictum: that ‘people are sent to prison as punishment and not for punishment’.⁸⁶

While, the distinction between the aims of criminal punishment and the aim of prison administration has not been without its challengers,⁸⁷ the law as it stands continues to distinguish between a primary retributive justification for punishment as explicated in the Penal Code, and a primarily resocialisative purpose of imprisonment as entrenched in the Prison Act.⁸⁸ Equally the law distinguishes between ‘status’ and ‘administrative’ decisions with the Penal Code regulating the former and the Prison Act regulating the latter. In the following section, therefore, the constitutional basis for the choice of resocialisation as the primary purpose of prison administration will be examined.

2.2.2 Resocialisation as ‘Verfassungsgebot des Sozialstaats’⁸⁹

The FCC first gave explicit guidance on the purpose of imprisonment in the *Lebach* decision of 1973,⁹⁰ where it determined that resocialisation was the purpose of imprisonment most in line with the basic principles of the Constitution.⁹¹ The decision dealt with a prisoner’s claim that his constitutional rights to human dignity (Basic Law, Article 1 (1)) and personal freedom (Basic Law, Article 2 (2)) would be violated if a documentary on his involvement in a group which murdered four soldiers was screened on national television. The documentary was scheduled to be broadcast shortly before the prisoner’s release and, in addition to reminding viewers of his criminal act, insinuated that the prisoner had had homosexual relations with his criminal partners. The conflict in the case was therefore between the prisoner’s aforementioned rights and the television broadcaster’s right to freedom of expression under Article 5 (1) sentence 2.

The starting point of the FCC was that the public’s information interest in knowing about serious crimes generally took precedence over the personality protection of the offender.

⁸⁶ ‘Leave of Absence for West German Prisoners’ (1988) 28 *BJC* 1.

⁸⁷ See ch. 3, p. 95–101

⁸⁸ R-P Calliess and H Müller-Dietz *Strafvollzugsgesetz* (Beck München 1998) § 2 mn 8ff.

⁸⁹ ‘A constitutional requirement of a Social State’

⁹⁰ *BVerfGE* 35, 202.

⁹¹ *BVerfGE* 35, 202, 203.

However, it went on to argue that, in assessing infringements of basic rights, one could not ignore the doctrine of proportionality: the invasion of the prisoner's personal sphere should not go any further than that required to fulfil the public's interest in information about crime and criminals in general.⁹² Concretely, this meant that constitutional protection of the personality limited television broadcasters to reporting on the facts of serious crimes and hindered them from reporting on irrelevant aspects of the offender's personality or on any other facts which could be said to belong to his private sphere. One central argument in support of the prisoner's case was the negative effect of the content and timing of the documentary on his chances of social reintegration. In particular, the reference to the prisoner's homosexual relations with members of the criminal group was regarded as being damaging to the prisoner's chance of reintegrating back into his conservative home town. Specialist opinion⁹³ was heard and drawn upon by the FCC in forming its conviction that the documentary in question would seriously disadvantage the prisoner's chances of resocialisation. This deleterious effect was considered by the FCC to be a major factor in tipping the proportional balance between the public interest in knowing about crimes committed and the prisoner's right to dignity (Article 1 (1)) and to the free exercise of his personality (Article 2 (1)). The FCC therefore upheld the prisoner's rights over those of the broadcaster.

In its process of reasoning, the FCC developed what came to be referred to as the prisoner's 'right' to resocialisation,⁹⁴ and more recently as the 'constitutional resocialisation requirement' (*Verfassungsrechtliche Resozialisierungsgebot*).⁹⁵ The FCC began by quoting paragraph 2 of the Federal Government Draft Proposal for a Prison

⁹² See *BVerfGE* 35, 202, 232.

⁹³ From Prof. Dr. Lüscher, a social psychologist and communications scientist (media studies), who argued that the content of the film would create social prejudice against the claimant; from Dr. Einsele a specialist on prison administration who argued (1) that the purpose of imprisonment could only be that of resocialisation and (2) that the timing and content of the film would particularly damage the prisoner's chances of reintegrating into society after his release as it would undermine the potential support of his community; from Mr. Possehl, the prisoner's own prison psychologist, who showed that the prisoner was prone to isolating himself from society and that social prejudice against him would raise the chances of this occurring.

⁹⁴ While implicit in the FCC's reasoning in the *Lebach* decision, actual explicit reference to a 'right to resocialisation' (*Anspruch auf Resozialisierung*) was first made in *BVerfGE* 45, 187, 239. See also: H D Jarass and B Pieroth *Grundgesetz für die Bundesrepublik Deutschland* (4th edn Beck München 1997) Article 2 mn 30; R-P Callies and H Müller-Dietz *Strafvollzugsgesetz* (Beck München 1998) §2 mn 6.

⁹⁵ *BVerfGE* 98, 169. See also 'Gefangene müssen bei Pflichtarbeit besser entlohnt werden' *Frankfurter Allgemeine Zeitung* (2 July 1998) 1.

Act⁹⁶ which entrenched resocialisation as the primary purpose of imprisonment and the Response of the Federal Council (*Bundesrat*)⁹⁷ which gave categorical support on this point. It went on, however, to anchor this resocialisation purpose in the fundamental principles of the Basic Law:

Constitutionally this claim (to resocialisation) corresponds to the self image of a society that places human dignity at the centre of its value order and that is bound by the Social State principle. As the holder of human dignity and the rights which guarantee it, the criminal offender must have the chance, after serving his sentence, to integrate into society. From the position of the offender this interest in resocialisation grows out of his basic right under Article 2 (1) in connection with Article 1 (1) Basic Law. From the vantage point of society, the Social State principle demands State assistance for groups in society who, through personal weakness, guilt, inability or social deprivation are hindered in their social and personal development. Prisoners and released prisoners also belong to this group. Not least, resocialisation serves the protection of society itself which has a direct interest in the prisoner not re-offending and once more damaging his fellow citizens or society in general.⁹⁸

While the FCC's 1972 decision was designed to bring prison law in line with the imperatives of the *Rechtsstaatsprinzip*, the *Lebach* decision was a creative application of the Social State principle (*Sozialstaatsprinzip*) to prison law reform. As previously indicated, the Social State principle represents a constitutional acknowledgement that the State is, in some way, bound to ensure the achievement of social justice.⁹⁹ In theory this means that the State is required to intervene in order to guarantee the basic material and social existence necessary for the realisation of a dignified existence for each individual.¹⁰⁰ But although the *Sozialstaatsprinzip* is clearly of normative importance,¹⁰¹ it is in most cases viewed by the FCC, constitutional theorists and lawyers as too vague to give rise to rights and duties on its own. Rather it represents a general goal of the State (*Staatszielbestimmung*) to act towards the achievement of social justice but does not

⁹⁶ *Regierungsentwurf eines Strafvollzugsgesetzes* (BT-Dr. VII/918, 1972/73).

⁹⁷ *Gesetzesvorschlag des Bundesrates* 1973 (BT-Dr. VII/918).

⁹⁸ *BVerfGE* 35, 202, 235–236.

⁹⁹ P Kunig 'The Principle of Social Justice' in U Karpen, (ed), *The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law* (Nomos Baden-Baden 1988) 187.

¹⁰⁰ E Benda, W Maihofer and H-J Vogel, (edd), *Handbuch des Verfassungsrechts* (De Gruyter Berlin 1983) 107f.

¹⁰¹ The Social State principle is enshrined in Basic Law, Article 20 (1) which stipulates that: 'The Federal Republic of Germany shall be a democratic and social state.' It is one of the five central principles of the constitution. The others being the *Rechtsstaatsprinzip* (Basic Law, Article 20 (1)); the Democratic Principle (Basic Law, Article 20 (1)), the Federal State Principle (Basic Law, Article 28) and the Republican principle (Basic Law, Article 28 (1)). The normative importance of the Social State principle is also underlined by the fact that, like Article 1, Article 20 has been made immune from constitutional amendment under Basic Law, Article 79 (3).

indicate the means by which this might be achieved.¹⁰² Thus in the majority of cases, the Social State principle cannot give rise to positive claim rights (*Leistungsrechte*)¹⁰³ without an alliance with other stipulated basic rights. As a result, the FCC was only able to interpret the Social State principle as giving rise to a ‘right to resocialisation’ by combining it with the fundamental rights of human dignity (Basic Law, Article 1 (1)) and freedom of the personality (Basic Law, Article 2 (1)). Explicit in the FCC’s reasoning was a belief that a socially isolated existence ran counter to the notion of human dignity, and implicitly, that the chance to ‘start afresh’ was guaranteed by the freedom to develop one’s personality.¹⁰⁴ In this way, the FCC viewed the prisoner’s ‘interest’ in resocialisation as a consequence of his basic rights. Allied to this, the Social State principle placed a positive duty on the State to assist socially vulnerable groups in their ‘social and personal development’, the correlative of which was the prisoner’s claim to be resocialised.

In line with its earlier decision in 1972, the FCC was concerned here to invoke the social interest in order to bolster the prisoner’s substantive claim to resocialisation. This was evident in two ways. Firstly, at an abstract level, the FCC developed the prisoner’s right to resocialisation by recourse to an ‘image of society which placed human dignity at the centre of its value order and was bound by the Social State principle’. Implicit in this statement was the value judgement that German society would have to pursue the aim of resocialising its criminal offenders if it was to fulfil its stated social and constitutional ideals. Secondly, and at a more concrete level, the FCC highlighted the practical benefits to society that could be derived from such a penal strategy. It thus concluded that society would benefit from resocialisation in that it would be protected from the damage caused by future crimes.¹⁰⁵

¹⁰² *Grundgesetz für die Bundesrepublik Deutschland* (note 94 above) Article 20 mn 79; ‘The Principle of Social Justice’ (note 99 above) 187; K Stern ‘Sozialstaat’ in H Siekmann, (ed), *Der Staat des Grundgesetzes* (Heymanns Köln 1993) 123; K Koepsel *Strafvollzug im Sozialstaat* (Dissertation Hamburg 1985) 13f. For an exceptional decision in this regard see: *BVerfG Beschl.* (1990) *NJW* 2869, 2871 where the FCC developed rights directly from the Social State principle.

¹⁰³ See note 24 above.

¹⁰⁴ *Grundgesetz für die Bundesrepublik Deutschland* (note 94 above) Article 2 mn 30.

¹⁰⁵ See quote p. 48 above - *BVerfGE* 35, 202, 235.

2.2.3 Resocialisation: a mixed blessing?

To the extent that the prisoner benefits from this substantive claim to resocialisation, the FCC allied the ‘social interest’ with that of the prisoner. The FCC’s insistence on a unitary purpose of imprisonment was clearly an advance, as it delimited the State to a clear substantive basis for the exercise of prison administration. In addition, as will be shown further in chapter three, ‘the constitutional resocialisation requirement’ and its concretisation in the Prison Act has led to important rights for prisoners in Germany.¹⁰⁶ Yet resocialisation clearly had the potential to work against the prisoner’s individual interests. This potential was quickly realised in the FCC’s next decision on prison law in 1975.¹⁰⁷

In the *St.Pauli-Nachrichten* case the FCC had to consider whether refusing a prisoner access to a magazine containing pornographic and sado-masochistic materials violated his basic rights to human dignity, personal development and freedom of expression under Articles 1, 2 (1) and 5 (1) Basic Law respectively. The FCC started out by repeating that the basic rights of prisoners could only be limited on the basis of primary legislation which reflected a ‘contemporary understanding of basic rights’ and a respect for the Social State and *Rechtsstaat* principles.¹⁰⁸ It insisted that it was the State’s function to introduce all legislative measures that were necessary and suitable to the resocialisation of the prisoner, but immediately qualified this by claiming that these actions were to be undertaken ‘within reason’ (*im Rahmen des Zumutbaren*). This qualification represented the first weakening of the ambitions voiced in the *Lebach* decision as it indicated that the fulfilment of the resocialisation aim by the federal legislature could be curtailed by considerations of affordability, political acceptability and general administrative constraints. While it is understandable that the FCC was concerned not to usurp Parliament’s legislative role, it had clearly left a considerable margin of interpretation in this regard.

The FCC’s subsequent line of reasoning in this case was particularly sobering for those who viewed resocialisation as a key to prisoner empowerment alone:

¹⁰⁶ See ch. 3, pp. 94–104, 132–148.

¹⁰⁷ BVerfGE 40, 276.

¹⁰⁸ BVerfGE 40, 276, 283.

The refusal to hand over the *St. Pauli-Nachrichten* to the complainant is a measure which is indispensable to the proper maintenance and organisation of the prison. Indispensable are those measures without which the administration of prisons would break down or the aim of imprisonment would be seriously endangered ... Particularly indispensable are attempts to reintegrate the offender into society. The ability and will to conduct his life in a responsible manner should be conveyed to the offender. He should learn to live in a free society, maintaining a crime-free existence, using the chances offered to him while withstanding the risks presented. **A prison administration understood in this way cannot only establish the rights of the prisoner, but, under certain circumstances, should justify those rights limitations which are necessary for the promotion of a crime-free existence for the prisoner in the future.**¹⁰⁹

The FCC's reasoning here brought home clearly what has already been hinted at above and had always been implicit in the reasoning of the FCC: that a purpose of prison administration was required by the FCC not only to empower prisoners, but also to legitimise State **limitations** of prisoners' basic rights. The decision vividly displayed the double-edged nature of a 'constitutional resocialisation requirement' or a 'right to resocialisation'. Thus in one sense the right to resocialisation could be seen in German constitutional terms as a 'negative right' (*abwehrrecht*) which delimits State intervention in prisons to one particular constitutional purpose. From the negative right perspective the State has the correlative duty not to pursue other prison administrative aims, such as retribution, alongside that of resocialisation. Strictly speaking this means that prison administrators may not take other punishment aims into consideration when exercising their discretion under the Prison Act. For example, when prison officials consider the risks involved in giving a prisoner leave from prison, they may not take the gravity of the prisoner's original offence into account as this would amount to a retributive consideration.¹¹⁰

In another sense, a right to resocialisation in German constitutional terms is also viewed as a 'positive right' (*Leistungsrecht*) which places an obligation on the State to assist the prisoner in becoming resocialised. This positive aspect can give rise to special rights to State action that would enhance the prisoner's chances of resocialisation. Rights to home leave, to be placed in an open prison, or to family visits are examples of such special rights. On the other hand, the State in fulfilling the 'constitutional resocialisation requirement' can also place prisoners under certain duties, such as the duty to work, that

¹⁰⁹ BVerfGE 40, 276, 285. Author's own emphasis. The conclusion of this quote is reprinted as the ratio decidendi of the case.

¹¹⁰ D van Zyl Smit 'Leave of Absence for West German Prisoners' (1988) 28 *BJC* 1, 7. The Prison Act reflects this notion although it has not been without controversy (See ch. 3, pp. 95–101).

would enhance their chances of resocialisation and give effect to society's interest in their resocialisation. In this latter context the State can be justified in limiting the prisoners' negative fundamental rights in pursuance of the aim of resocialising them.

Implicit also in the FCC's statement was the acknowledgement that limitations of basic rights are inherent to imprisonment. The creation of a substantive constitutional purpose for prison administration was not meant to wipe away such limitations, but rather to provide a constitutional justification for their use. While it was clear that imprisonment would involve the abrogation of rights, it was moot whether the purpose of resocialisation in Germany's new prison law would involve a greater abrogation of rights than any other possible purpose. In theory, resocialisation had clear invasive potential. As Hassemer argued, it could amount not only to a mere deprivation of liberty but also to a closer analysis of the offender's personality.¹¹¹ Equally, as the substantive basis of prison administration, resocialisation had increased invasive potential due to its lack of conceptual clarity.¹¹² Although the FCC indicated, in both the *Lebach* and *St. Pauli-Nachrichten* decisions, that resocialisation measures should be aimed at reintegrating the offender into society, it did not stipulate clearly which measures it viewed as being in line with such an aim. This was left to the legislature to concretise. The extent of the invasive and empowering qualities of the 'constitutional resocialisation requirement' can therefore only be judged in the light of the particular provisions of the Prison Act.¹¹³

2.2.4 The constitutional limits of resocialisation

Whilst chapter 3 will look more closely at the provisions of the Prison Act, it should be made clear at this point that the legislature was not free to limit the rights of prisoners in whichever way it chose. Like the administration and judiciary, the legislature was, and remains, bound by Article 1 (3) Basic Law which entrenches basic rights as directly enforceable law. Accordingly, the legislature had to abide by the substantive limits in the

¹¹¹ W Hassemer 'Resozialisierung und Rechtsstaat' (1982) *KrimJ* 161; The theoretical arguments against resocialisation are more pervasive in anglo-american culture. The most sustained critique comes from advocates of just deserts theory. See: A Von Hirsch *Doing Justice: The Choice of Punishments* (Hillang Wang New York 1976). On the distinctive academic view of resocialisation in Germany see ch. 2, pp. 71–79.

¹¹² H Schellhoss in G Kaiser et al *Kleines Kriminologisches Wörterbuch* (Müller Heidelberg 1993) 429.

¹¹³ The provisions of the Act will be fully elucidated in ch. 3.

Constitution when limiting the prisoner's basic rights in the name of resocialisation. To start out basic rights may only be limited where the constitution permits.¹¹⁴ Such permission is made in the form of legal or constitutional reservations (*Verfassungs- oder Gesetzensvorbehalte*). Legal reservations exist where the constitution expressly stipulates that a basic right may be limited in law. The concept of 'constitutional reservations' refers to the restrictions of certain basic rights by other basic rights or further constitutional norms known as *Verfassungsimmanente Schranken*. There are basic rights which are not subject to any limitation, such as the right to human dignity (Basic Law, Article 1 (1)) and the right to equality (Basic Law, Article 3), but most basic rights will be subject to some kind of legal or constitutional limitation.

Where the constitution foresees the limitation of a basic right, there are a number of principles which must be followed when proceeding with such a limitation. While many of these principles stem from the *Rechtsstaatsprinzip*, they are referred to independently under the umbrella term of 'limits of limits' (*Schranken-Schranken*).¹¹⁵ Included in the notion of *Schranken-Schranken* are five important limitations, two of which have substantive or qualitative implications and three of which could be viewed as formal limits on rights-limiting legislation. The first substantive limitation is known as the 'essence guarantee' (*Wesensgehaltgarantie*) and is set out in Article 19 (2) Basic Law. This guarantee sets an absolute limit beyond which no basic right can be restricted by asserting that each right has an inviolable essence or core. No general definition of this guarantee has been set beyond the basic conditions that an individual can not be deprived of the protections of his basic rights in total and that the extent of the protection differs according to the rights, actions, individuals and context in question.¹¹⁶ Furthermore, commentators argue that the 'essence guarantee' offers little practical protection beyond that inherent to Article 1 (1) which declares human dignity inviolable and from which all other basic rights are said to follow. For this reason attempts at defining the inviolable core of every right as equal to the protection offered under Article 1 (1) have been

¹¹⁴ R-P Callies and H Müller-Dietz *Strafvollzugsgesetz* (Beck München 1998) 12.

¹¹⁵ B Pieroth and B Schlink *Grundrechte-Staatsrecht II* (13th edn Müller Heidelberg 1997) 73.

¹¹⁶ *Grundrechte-Staatsrecht II* (note 115 above) 70; *Grundgesetz für die Bundesrepublik Deutschland* (note 94 above) Article 19 (2) m.n 6f.

criticised for redundancy.¹¹⁷ It has also been shown from the case law that the ‘essence guarantee’ has not proved to be a strong legal tool in practice.¹¹⁸

The vagueness and weakness of the ‘essence guarantee’ notwithstanding, it would have placed at least one important limit on the legislature. This would have been the case were the guarantee to have been defined either as a core protection of each particular right or as a re-affirmation of Article 1 (1) Basic Law. It was clear that statutory provisions which attempted to make prisoners into ‘mere or passive objects’ (*bloßen Objekt staatlichen Handelns*) of treatment measures aimed at resocialisation would have been problematic because of their total denial of the prisoner’s free will.¹¹⁹ This would have been in violation of Article 1 (1) and the essence of Article 2 (1) which protects a person’s ability to determine her own actions for herself. It would therefore have been problematic to force the prisoner to take part in therapeutic or treatment programmes by creating an absolute duty to abide by them.¹²⁰ As Feest argued: ‘... it conflicts with our legal culture to change people against their will, even if this ... were to be possible’.¹²¹

Limitations of rights short of those which infringed upon the ‘essence’ of a right were, however, also subject to limitation. This limitation was to be found in the principle of proportionality which would have placed a substantive limit on the legislature’s power. As explained above,¹²² this principle would have prohibited the legislature from producing a law which could have excessively limited the rights of individuals beyond that which was ‘necessary’, ‘suitable’ and ‘proportional’ to the attainment of a ‘legitimate’ purpose. It has therefore often been referred to as the ‘prohibition of excess’ principle (*Übermaßverbot*). Inherent in this principle is a check on both the ‘purpose’ of prison administration and the ‘means’ of attaining this purpose. It would have had bearing on the basic and specific provisions of the Prison Act. For example, a provision in the legislation which gave prison administrators broad powers to use solitary confinement and sought to

¹¹⁷ *Grundrechte-Staatsrecht II* (note 115 above) 70.

¹¹⁸ *Grundgesetz für die Bundesrepublik Deutschland* (note 94 above) Article 19 (2) mn 6f.

¹¹⁹ *BVerfGE* 5, 85, 204; 27, 1, 6. See also: *BVerfGE* 22, 219; T Würtenberger ‘Freiheit und Zwang im Strafvollzug’ (1969) *NJW* 1747, 1751; H v. Schewick ‘Verfassungsrechtliche Grenzen der Resozialisierung’ (1985) *Bewährungshilfe* 3; B Haffke ‘Gibt es ein verfassungsrechtliches Besserungsverbot’ (1975) *MschKrim* 246, 251; M Walter *Strafvollzug* (Boorberg Stuttgart 1991) 56.

¹²⁰ See Prison Act, § 4 (1) and commentary thereon in ch.3, pp. 105–109.

¹²¹ J Feest, (ed), *Kommentar zum Strafvollzugsgesetz* (3rd edn Luchterhand Neuwied 1990) § 2 mn 3.

¹²² See pp. 42–43 above.

justify this as a resocialisation enhancing measure would have fallen foul of the requirements of the proportionality principle.¹²³ Such a provision would either have been ‘unsuitable’ as there is no evidence that solitary confinement promotes resocialisation, ‘unnecessary’ as there are many other, less invasive, measures which are ‘as effective’ in promoting resocialisation and/or ‘disproportional’ as it would not have struck a proper balance between the rights of the prisoner and the rights of those being protected by the measures chosen (e.g. society as potential victims of future crimes). It was clear then, that the legislature was restricted in its power in that it had to concretise the resocialisation purpose in the Prison Act in line with the proportionality requirement.

Finally there were the three formal requirements which the legislature had to fulfil when limiting basic rights through legislation: the ‘clarity principle’ (*Bestimmtheitsgebot*), the ‘specification principle’ (*Zitiergebot*),¹²⁴ and the ‘generality principle’ (*Verbot des einschränkenden Einzelfallgesetzes*).¹²⁵ The ‘clarity principle’ would have had bearing on the drafting of the legislation in that it required that legal provisions be ‘clearly defined’ in order that the bearers of rights knew what they had to do, what kind of behaviour was prohibited or inhibited or what kind of rights they had.¹²⁶ It was therefore important that the legislation followed the stipulations of the FCC by avoiding the use of ‘general clauses’ giving broad powers to infringe basic rights ‘as much as possible’.¹²⁷ This specification had relevance for resocialisation in that it would have been problematic to create a broad power to encroach upon basic rights (*Eingriffsbefugnis*) in the name of resocialisation in general.¹²⁸ Rather the limitations justified by resocialisation would have had to be specific and clearly defined. The ‘specification principle’ provided that Parliament should exactly ‘specify’ the basic rights which would be limited by the legislation. Thus it would not have been possible to limit all basic rights through the legislation, but only those which had been particularly specified.¹²⁹ The ‘generality

¹²³ While solitary confinement is permitted under the Prison Act, § 88, it is subject to a requirement of indispensability to prisoner or prison security. Thus it is only to be used as a last resort where the prisoner is dangerous to herself, to others or to the security of the prison in general. The imposition of solitary confinement has therefore been drafted in order to allow a strict proportionality requirement: it would have to be justified that the measure was clearly indispensable to the security aim to be achieved.

¹²⁴ Basic Law, Article 19 (1) sentence 2.

¹²⁵ Basic Law, Article 19 (1) sentence 1.

¹²⁶ C Degenhart *Staatsrecht I* (13th edn Müller Heidelberg 1997) 117.

¹²⁷ *BVerfGE* 33, 1, 11. See quote on p. 41 above.

¹²⁸ ‘Gibt es ein verfassungsrechtliches Besserungsverbot’ (note 119 above) 251.

¹²⁹ See Prison Act, § 196.

principle' stipulated that rights-limiting legislation must apply generally (i.e. to all prisoners) and not to one special case, and thus prohibited the singling out of a particular group of prisoners for resocialisation at the expense of others.

In sum, while it was clear that the FCC had given the legislature authority to limit basic rights in the name of resocialisation and ample discretion to define what resocialisation could mean or include, it did so in the context of a constitutionalised legal culture. In such a culture the legislature was already bound by pre-existing substantive and formal constitutional limits on the legislative process. In this culture, the word 'limit' (*Schranken*) did not evoke a total negation, or disproportionate invasion, of basic rights. Nor did it permit broad and undefined powers to encroach upon unspecified basic rights in an unequal or inconsistent manner.

3. Conclusion

This chapter has described the constitutional imperatives which the Prison Act had to fulfil. It showed that its legislators had to deliver a constitutionally legitimate, clear and coherent legislative basis for State limitation and protection of prisoners' basic rights at the 'administrative' level. Importantly, the protection and limitation of prisoners' basic rights had to be commensurate with the constitutional ideal of resocialisation. In this sense the FCC had inextricably linked prisoners' rights to the purpose of imprisonment. Furthermore it argued that the basic rights to personality and human dignity, along with the Social State principle, gave rise to this purpose. Basic rights and principles therefore became constitutive of the very purpose of imprisonment. The Prison Act was to be infused with the ideals of the constitution from start to finish.

In realising these constitutional ideals, the legislature had to strike a balance between the competing imperatives of the *Rechtsstaat* and the Social State principles.¹³⁰ On the one hand the Social State Principle offered a legitimate basis for rights limitations, while on the other hand the State was to be limited in the exercise of its powers by the *Rechtsstaatsprinzip*. These competing aims reflected the FCC's multi-dimensional

¹³⁰ G Bemann 'Strafvollzug im sozialen Rechtsstaat' in G Bemann and I Manodelakis *Probleme des Staatlichen Strafens unter besonderer Berücksichtigung des Strafvollzugs* (Nomos Baden Baden 1989) 35; 'Freiheit und Zwang im Strafvollzug' (note 119 above) 1748f.

conception of basic rights: as both negative rights against State infringement and as positive rights (both social and individual) to State action. As a result the legislators of the Prison Act had to resolve a tension between what Würtenberger referred to as ‘*Freiheit und Zwang*’ (freedom and coercion).¹³¹ A line had to be drawn between State limitations of prisoners’ rights in the name of resocialisation and restrictions on State intervention on the basis of prisoners’ negative rights.

To explain the problem more fully. In order to fulfil the *Rechtsstaatsprinzip* the Prison Act had to provide a mechanism by which prison administration could be limited and held to legal account. This limiting of the prison administration to those acts stipulated in the Act was reinforced by the *Rechtsstaat* principle of the ‘legality of administration’ (*Gesetzmäßigkeit der Verwaltung*). This provides that the administration shall (1) respect the priority of primary Statute law over any other secondary source of law (*Gesetzesvorrang*), (2) apply the law (*Anwendungsgebot*) and (3) neither deviate from nor contravene the law (*Abweichungsgebot*).¹³² The extent to which this could be effectively achieved, however, depended on the clarity and particularity of the provisions in question and thereby the extent of the discretion (*Ermessen*) granted by them. It was therefore imperative that the legislation followed the ‘clarity principle’ (*Bestimmtheitsgrundsatz*), which required that legal provisions be as clearly defined as possible. Equally, the Act had to specify explicitly which rights were to be limited and ensure that these limitations applied generally and not to one particular case.¹³³ Furthermore, the granting of substantive powers to encroach upon prisoners’ basic rights (*Eingriffsbefugnisse*) had to be in line with the ‘proportionality principle’.¹³⁴ The *Rechtsstaatsprinzip* also required that the Prison Act provide sufficient legal avenues to challenge the prison administration’s actions under the Act and thereby fulfil the principle of legal protection (*Rechtsschutzgewährleistung*) by protecting the prisoner’s access to a court of law.¹³⁵ In short, by fulfilling the *Rechtsstaatsprinzip* the Act should have been designed to protect the negative aspect of prisoners’ rights (*abwehrrechte*) by providing a clear legal limit to State action and an effective legal mechanism by which this could be enforced.

¹³¹ ‘Freiheit und Zwang im Strafvollzug’ (note 119 above) 1748f.

¹³² F Ossenbühl ‘Rechtsbindung der Verwaltung’ in H-U Erichsen *Allgemeines Verwaltungsrecht* (10th edn Walter de Gruyter 1995) 172, 174.

¹³³ See p. 52–56 above.

¹³⁴ See p. 50–52 above.

¹³⁵ Basic Law, Article 19 (4).

In following the Social State Principle and the prisoners' basic rights under Article 1 (1) and 2 (1) Basic Law, the Prison Act had to breathe life into the 'constitutional resocialisation requirement' and the prisoner's positive claim rights (*leistungsrechte*) to a prison regime which promoted the prisoner's chances of resocialisation.¹³⁶ In this sense the Act had to provide substantive provisions which could make up the kind of prison regime best suited to the resocialisation aim. But the provision of substantive prisoners' rights, as the FCC had indicated in the *St. Pauli-Nachrichten* decision, was not the only object of the resocialisation purpose: prisoners' basic rights could also be limited by measures aimed at their resocialisation. The State was justified in doing this in pursuance of society's interest in the prisoner being resocialised. In sum, the Prison Act could do three things in order to fulfil the 'constitutional resocialisation requirement'. First, it had to provide a clear and unitary statement on the purpose of imprisonment; second, in the special provisions of the Act it had to entrench substantive positive rights for prisoners which further concretised the 'right to resocialisation'; third, it could impose specific duties on prisoners which were in line with the resocialisation aim.¹³⁷

In fulfilling its constitutional duty to give legal form to the ideals enunciated by the FCC, Parliament had a large measure of legislative discretion. This was evident from the explicit statements made in the *St. Pauli-Nachrichten* case, it was also a necessary concomitant of the process of legal concretisation from broad constitutional principles. The Prison Act was therefore indelibly marked by the politics surrounding its realisation. In the following chapter, therefore, the broader legal and political context of the prison reform process and the legislative drafting of the Prison Act will be examined.

¹³⁶ See p. 46–50 above.

¹³⁷ K Koepsel *Strafvollzug im Sozialstaat* (Dissertation Hamburg 1985) 44f.

Prison Reform in Germany: Reform Ideals and Political Compromise

As the previous chapter intimated,¹ the groundbreaking decisions of the Federal Constitutional Court in the 1970s were deeply embedded in a broader process of prison reform. There was a direct relationship between the Court's interpretation of the Basic Law with respect to prisoners' rights and the opinions, beliefs and arguments of those within the prison reform movement. This movement drew on constitutional and criminal justice values peculiar to Germany's legal and political culture. Its ideals were a key influence not only in the reasoning of the Federal Constitutional Court, however, but also in the make-up of the Prison Act. Thus, while the previous chapter has shown that the conception of the prisoner's legal status was embedded in Germany's constitutional environment, this chapter will demonstrate that this conception was also the product of the ideals and arguments of those involved in the broader process of prison reform.

The political forces in play during the final stages of legislative drafting were equally fundamental to the content of the Prison Act, however. The imperatives of German federalism gave rise to substantial tension between the Federal Parliament (*Bundestag*) committed to far-reaching reforms and the Federal Council (*Bundesrat*) concerned to protect the administrative and fiscal interests of the States (*Länder*). The composition of the Prison Act thus reflected the compromise between reform ideals and political imperatives. This chapter will examine the context in which prison reform ideals were shaped as well as the political and institutional imperatives which undercut their legislative realisation.

¹ Ch. 1, p. 31.

1. Reform ideals

Penal reform in Germany encompassed movements for the codification of prison law on the one hand and the achievement of the resocialisation purpose of imprisonment on the other. The following sections will look at the development of both of these movements.

1.1 Prison administration and the codification impulse

Calls for the codification of prison law from academics, prison practitioners and parliamentarians significantly predate the enactment of the Penal Code of the German Reich in 1871.² Prominent in the early nineteenth century were the views of Hirzel, Mittermaier and Von Holtzendorff who argued that the basic principles of prison administration should be defined by Parliament and taken out of the province of administrative discretion. These arguments flowed from the imperatives of the *Rechtsstaatsprinzip*. It was contended that prison authorities must be bound by clear principles concerning the execution of criminal judgements, that the judge should have exact knowledge of the content of the punishment, that the punished person should be protected by law against arbitrary administrative treatment, and that the public must be informed of the extent of the hardship imposed by the prison authorities and of the steps being taken towards the rehabilitation of the prisoner. On the basis of the ‘separation of powers doctrine’ (*Gewaltenteilungsprinzip*), reformers maintained that Parliament should determine the content of the punishment and the judge should enforce Parliament’s will.³

Importantly, the achievement of an Act regulating the administration of the criminal sanction was seen as central to the achievement of the ‘unity of the criminal law’ (*Strafrechtseinheit*). The theory behind *Strafrechtseinheit*, which later came to be identified as the *Drei-Säulen-Theorie*,⁴ saw the criminal law as a three-stage process whereby the material criminal law threatened punishment, the criminal judge imposed

² H Müller-Dietz *Strafvollzugsgesetzgebung und Strafvollzugsreform* (Heymanns Köln 1970) 1f; B Huber ‘Safeguarding of Prisoners’ Rights Under the New West German Prison Act’(1978) *SAJC* 229.

³ *Strafvollzugsgesetzgebung und Strafvollzugsreform* (note 2 above) 2.

⁴ See ch.1, p. 43–46.

punishment and the administration executed and administered punishment. Thus, already at this early stage, prison and criminal law were conceptually linked in an ‘internal relationship’ (*Innere Zusammenhang*) which revolved around the criminal sanction of imprisonment. The material criminal law formed the legal conditions under which sanctions could be imposed, while prison law represented the substantive basis of the administration and execution of the sanction. In short, reformers argued that prison sanctions imposed under criminal law could only be properly executed through a law regulating prisons. Prison law thus came to be known as the ‘last piece of customary criminal law’.⁵

These arguments were already present in the debate surrounding the codification of the criminal law in the North German Federation of the 1860s,⁶ but intensified with the introduction of the Penal Code in 1871. Moreover, with the process of German unification in this period, codification of prison law became viewed as a means of eliminating differential treatment of prisoners in different states and thereby achieving legal unity (*Rechtseinheit*) and equality before the law (*Rechtsgleichheit*).⁷ Overall, therefore, ‘the necessity for a Prison Act was widely acknowledged’ in this period.⁸ This was manifest in two proposals for prison law reform, namely the ‘Bill on the Execution of the Prison Sentences 1879’ and the ‘Bill regarding the Administration of Prisons’ in 1892.

Resistance to a Prison Act came from State Executives, represented in the powerful Federal Council (*Bundesrat*),⁹ who were concerned about infringements of their executive independence and the costs involved in prison reform.¹⁰ Instead of an Act, the Federal Council agreed in 1897 to the ‘Basic Principles Applicable to Court-Imposed Prison Sentences until the Enactment of a Common Prison Regulation’, an executive agreement which was widely criticised for reinforcing the discretion of the States rather than limiting it.¹¹ The impetus for codification of prison law thus faltered in the face of German-style

⁵ Wirth ‘Beiträge zur Frage über die gesetzliche Regelung des Strafvollzugs’ (1873) 8 *BlGefk* 36.

⁶ G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 89–90.

⁷ Wirth ‘Soll der Strafvollzug auf dem Wege der Gesetzgebung geregelt werden?’, (1875) *BlGefk* 359, 362; K Krohne *Die Gesetzliche Regelung des Strafvollzugs im Deutschen Reiche* (Schulze Oldenburg 1875) 2.

⁸ K Krohne ‘Der gegenwärtige Stand der Gefängniswissenschaft’ (1881) *ZStW* 53, 71.

⁹ The power of the Federal Council was enshrined in the Constitution of the German Reich of 1871.

¹⁰ *Strafvollzugsgesetzgebung und Strafvollzugsreform* (note 2 above) 8.

¹¹ P.F Aschrott ‘Die neuen Grundsätze über den Vollzug von Freiheitsstrafen in Deutschland’ (1898) 18 *ZStW* 384; v. Engelberg ‘Zur Frage des Strafvollzugs’ (1898) 3 *DJZ* 195.

federalism: a central element of her political structure borne out of the fragile compromise necessary for German unification.¹² From this point on it was clear that any successful prison legislation would have to allow for substantial administrative autonomy at State level.

Calls for the codification of prison law nevertheless continued after the turn of the century. Practitioners argued that ‘the best Criminal Code remain(ed) incomplete without a good Prison Act’.¹³ Objecting to the fact that the content of the prison sentence (*Strafinhalt*) was determined by administrative customary practice, the Society of German Prison Administrators published ‘Proposals for a Law on the Administration of the Prison Sentence and other Security Measures’ in 1913. In Parliament, the unsuccessful ‘Preliminary Draft of a German Criminal Code’ (1909), ‘Alternative Draft of a German Criminal Code (1911)’ and ‘Draft of the German Criminal Code (1913)’ all incorporated provisions on the basic principles of prison administration.¹⁴

At the forefront of academic opinion at this time were the views of Berthold Freudenthal, Rector of the *Akademie für Sozial- und Handelswissenschaft* and Professor of Public and Criminal Law at the University of Frankfurt am Main.¹⁵ In his famous inaugural lecture in 1909, he argued that a Prison Act was a legal requirement of the *Rechtsstaat* principles of ‘equality before the law’ (*Gleichheitsgrundsatz*) and the ‘legal proviso’ (*Gesetzesvorbehalt*). The prisoner’s legal status, he argued, had to be defined in law:

In the legal relationship between the State and the prisoner, nothing may be imposed on the prisoner which has not been included in the legal definition of the judicially imposed prison sentence.¹⁶

Freudenthal’s lecture is still viewed as the classic exposition of the legal status of the prisoner, and his arguments were as influential in the prison reform debate after 1945 as

¹² I will not rehearse the history of German unification here. For an in-depth analysis see: D Blackbourn *The Fontana History of Germany: The Long Nineteenth Century, 1780–1918* (Fontana London 1997) ch. 5.

¹³ *Strafvollzugsgesetzgebung und Strafvollzugsreform* (note 2 above) 15.

¹⁴ *Strafvollzugsgesetzgebung und Strafvollzugsreform* (note 2 above) 11–12.

¹⁵ F Geerds ‘Berthold Freudenthal’ (1969) *ZfStrVo* 251.

¹⁶ B Freudenthal ‘Die staatsrechtliche Stellung des Gefangenen’, Rektoratsrede Jena 1910, printed in (1955) *ZfStrVo* 157. See also B Freudenthal ‘Der Strafvollzug als Rechtsverhältnis des öffentlichen Rechts’ (1911) *ZStW* 222; G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 7.

they were at the beginning of the century.¹⁷ His exposition was rooted both in the ‘internal relationship’ between criminal law and prison law and in broader constitutional principles.

Having been interrupted by the First World War, the movement towards the codification of prison law received new impetus in the reform climate of the Weimar Republic.¹⁸ Proposals for a Prison Act were bound up with the criminal law reforms inspired by Gustav Radbruch, Professor of Law and Social Democrat Minister of Justice in the early 1920s.¹⁹ The primary aims of these reforms were the deepening of the aim of offender rehabilitation and, in line with Freudenthal’s views, the strengthening of the legal guarantees of the prisoner.²⁰ In 1923 the States therefore agreed, in anticipation of a General Prison Act, to the ‘Basic Principles of the Administration of the Prison Sentence’ which both enhanced the standardisation of prison administration amongst States and highlighted the aims of prisoner correction. From this flowed the ‘Governmental Prison Bill’ in 1927 which was presented alongside the ‘Governmental Bill for a General Criminal Code’. The simultaneous drafting and presentation of these two bills reflected the continuing acknowledgement of the ‘internal relationship’ between criminal sanctions and the regulation of prison administration. The Bills would certainly have become law were it not for the dissolution of Parliament in 1930 and the demise of the Social Democratic Government three years later.²¹

Between 1933 and 1945, criminal law and prison administration became a tool of National Socialist ideology.²² In this context punishment was aimed ‘in the first instance at deterrence (*Abschreckung*)’, a policy which Frank noted should be maintained ‘until the world of crime was wiped out’.²³ In addition, National Socialists saw punishment as

¹⁷ *Strafvollzugsgesetzgebung und Strafvollzugsreform* (note 2 above) 15.

¹⁸ See in detail H Müller-Dietz, ‘Der Strafvollzug in der Weimarer Zeit und im Dritten Reich’ in M Busch and E Krämer, (edd), *Strafvollzug und Schuldproblematik* (Centaurus Pfaffenweiler 1988) 15.

¹⁹ Radbruch was strongly influenced by the ideas of Franz von Liszt and the Modern Criminological School in this respect. See further p. 77 below.

²⁰ *Strafvollzugsgesetzgebung und Strafvollzugsreform* (note 2 above) 15.

²¹ On the historical circumstances of this demise see: M Fulbrook *The Fontana History of Germany: 1918–1990 - The Divided Nation* (Fontana London 1991) ch. 3.

²² G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 9 and 43–44; B Olechinski ‘Strafvollzug in Deutschland vor und nach 1945’ (1992) 2 *Neue Justiz* 65; P O’Brien ‘The Prison on the Continent: Europe, 1865–1965’ in N Morris and D Rothman, (edd), *The Oxford History of the Prison* (OUP Oxford 1998) 178, 216f.

²³ H Frank ‘Der Sinn der Strafe’ (1935) *BlfGefK* 191.

serving the secondary aims of prisoner atonement (*Sühne*) and retribution (*Vergeltung*).²⁴ Thus, in 1934 the executive amended the ‘Basic Principles of the Administration of the Prison Sentence’ of 1923 to emphasise the deterrent and retributive elements of the prison sentence. A year later, the administration of prisons was placed under the central control of the Minister of Justice, a move later entrenched in the ‘Ordinance for the Standardisation of Prison Administration Provisions’ 1940. It hardly needs saying that during this time any notion of prisoners’ rights was entirely eliminated; as Christians argued, ‘the prisoner can claim no rights, but must submit’.²⁵ Rather, under the National Socialist regime, prisons, and the more extreme concentration camps,²⁶ became synonymous with ‘systematic repression and extermination’.²⁷

The history of prison reform post-1945 was indelibly marked by its immediate past.²⁸ The extremes of the Third Reich provoked widespread calls for the ‘re-humanisation’ of the prison system and for the ‘total reform’ of the criminal law. In this time of ‘restoration’, the immediate purpose was the denazification of criminal and penal law through fundamental reform.²⁹ While prompted to a large extent by the demands of the Allied powers,³⁰ calls for denazification were also heard from Social Democrat academics, politicians and prison administrators who had suffered under the Nazi regime and who came together in the Working Group for Prison Reform (*Arbeitsgemeinschaften für Reform des Strafvollzugs*).³¹ Their first instinct was to call for a return to the criminal political ideals of the Weimar period.³² This meant three things: a recognition of the ‘internal relationship’ between the definition of criminal sanctions under the Penal Code and the administration of the punishment under a Prison Act; a commitment to the notion

²⁴ K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 43.

²⁵ Christians ‘Die Sicherung gerechter Behandlung der Gefangen im deutschen Recht’ (1935) 66 *BlGefk* 232, 242.

²⁶ See: W Sofsky *Die Ordnung des Terrors: Das Konzentrationslager* (Fischer Frankfurt a.M. 1993).

²⁷ ‘The Prison on the Continent: Europe, 1985–1965’ (note 27 above) 217.

²⁸ The first legislative change came immediately after the fall of the Third Reich, when the Control Council issued Directive No. 19 on the ‘Basic Principles for the Administration of German Penitentiaries and Prisons’ 1945. This Ordinance, while an interim measure, signalled a clear move away from the practices of National Socialism.

²⁹ G Blau ‘Die Entwicklung des Strafvollzugs seit 1945 — Tendenzen und Gegentendenzen’ in H-D Schwind and G Blau *Strafvollzug in der Praxis* (2nd edn Walter de Gruyter Berlin 1988) 19.

³⁰ M Fulbrook *The Fontana History of Germany 1918–1990: The Divided Nation* (Fontana London 1991) 141–150.

³¹ *Strafvollzugsgesetzgebung und Strafvollzugsreform* (note 2 above) 24.

³² ‘Die Entwicklung des Strafvollzugs seit 1945 - Tendenzen und Gegentendenzen’ (note 29 above) 19.

of prisoner correction (*Erziehungsgedanken/ Kriminalpädagogik/ Spezialprävention*); and, importantly, a belief in the codification of prison law and the protection of prisoners' rights. This latter aim had special resonance both nationally and internationally in the light of the horrors of the concentration camps during the Third Reich.³³

Yet despite this vocal reform movement, legislative initiatives towards the creation of a Prison Act were not forthcoming. Much of this was due to the belief, remaining predominant until the mid-1960s, that the 'total reform' of the criminal law had to be completed before a Prison Act could be properly discussed.³⁴ It was argued that the content and hierarchy of criminal sanctions had to be determined by the Penal Code before a law regulating prison administration could be enacted. Legislative initiatives were thereby stalled until the completion of the work of the Great Criminal Law Commission (*Große Strafrechtskommission*) which began in the early 1950s. Moreover, judicial development of prisoners' rights was hindered by the persistence of the administrative law 'special authority relationship' (*Besondere Gewaltsverhältnis*) which, as explained in chapter one, continued to apply to prisoners for almost thirty years after the enactment of the Basic Law.³⁵ Thus, despite much talk of prison reform, the only legal change after the Control Council Directive of 1945³⁶ was the Service and Administration Ordinance of 1962 (*Dienst- und Vollzugs-Ordnung 1962*), an administrative agreement between the States which was heavily criticised by the promoters of a Prison Act.³⁷

Early work on criminal law reform was not without significance for prison reform, however. In the 1950s, the Ministry of Justice commissioned comparative research which included detailed reports on prison reform developments in countries such as the Netherlands, Scandinavia and the USA.³⁸ The ideas in these reports were to have a strong influence on the proposals tabled in Germany in the early 1970s, and ultimately included in the Prison Act. More generally, by placing academic research and opinion at the centre

³³ 'The Prison on the Continent: Europe, 1985–1965' (note 27 above) 218.

³⁴ *Strafvollzugsgesetzgebung und Strafvollzugsreform* (note 2 above) 25.

³⁵ 'Die Entwicklung des Strafvollzugs seit 1945 - Tendenzen und Gegentendenzen' (note 29 above) 20; T Würtenberger 'Freiheit und Zwang im Strafvollzug' (1969) *NJW* 1747, 1748.

³⁶ Control Council Directive No. 19 on the 'Basic Principles for the Administration of German Penitentiaries and Prisons'.

³⁷ See ch. 1, p. 39.

³⁸ *Materialien zur Strafrechtsreform: rechtsvergleichende Gutachten zur Strafvollzugsreform* (Bundesministerium der Justiz Bonn 1969) Volume 8.

of the reform debate, the report intensified an ongoing trend of academic dominance over penal thinking. This was a process termed by Blau as the *Verwissenschaftlichung* of prison reform.³⁹ Furthermore, exposure to penological thinking in Scandinavia and the USA had the effect of shifting academic thinking from a traditional Weimar agenda with its focus on prisoner correction (*Erziehung*) associated with the moral improvement of the criminal offender, to a more ‘humane and social science oriented’ notion of prisoner treatment (*Behandlungsvollzug*).⁴⁰

Nevertheless, it was not until after the publication of the first Draft Penal Code in 1962 that the debate surrounding the content of a Prison Act began in earnest. The 1962 Draft Penal Code acknowledged that criminal law reform would only be complete once a Prison Act had been enacted, but in so doing it restricted itself to determining only the ‘type, duration and incidental consequences (*Nebenfolgen*) of custodial sentences (paragraph 43ff)’.⁴¹ It left a future Prison Act to elaborate on the substantive aims and content of custodial sanctions. The Draft Penal Code was thus heavily criticised by the working group of German and Swiss Criminal Law Professors, progressive penologists and criminal lawyers who came together privately to publish an Alternative Draft Penal Code in 1966.⁴² These academics were critical of the Draft Penal Code on the grounds that it lacked a ‘modern criminal political conception’, restricted as it was to eliminating the doctrinal inconsistencies of the old Criminal Code.⁴³ A primary aim of the Alternative Code was to create a coherent sanctions system in line with the aim of resocialisation. This not only involved classifying sanctions but also setting out principles defining the substantive basis of the execution and administration of these sanctions.⁴⁴ The Alternative Draft Penal Code was picked up by the Free Democratic Party (*Freie Demokratische Partei*) in 1966 and became the official legislative counter-proposal. It represented a ‘turning point’ in the politics of German criminal law reform in that it placed the resocialisation ideal at the centre of the discussion on custodial sanctions.⁴⁵

³⁹ ‘Die Entwicklung des Strafvollzugs seit 1945 - Tendenzen und Gegentendenzen’ (note 29 above) 21.

⁴⁰ K Laubenthal *Strafvollzug* (Springer Berlin 1998) 44.

⁴¹ *Strafvollzugsgesetzgebung und Strafvollzugsreform* (note 2 above) 26.

⁴² J Baumann et al, (edd), *Alternativ-Entwurf eines Strafgesetzbuches (Allgemeine Teil)* (Arbeitskreis deutscher und schweizerischer Strafrechtslehrer Tübingen 1966).

⁴³ A Schönke and H Schröder *Strafgesetzbuch Kommentar* (25th edn Beck München 1997) 1.

⁴⁴ *Strafgesetzbuch Kommentar* (note 43 above) 1.

⁴⁵ G Blau ‘Die Kriminalpolitik der deutschen Strafrechtsreformgesetze’ (1977) *ZStW* 511, 534; C Roxin ‘Zur Entwicklung der Kriminalpolitik seit den Alternativen-Entwürfen’ (1980) *JA* 545, 547.

The suggestions of the Alternative Draft Penal Code were echoed in the proposals of the Special Committee for Criminal Law Reform (*Sonderausschusses für die Strafrechtsreform*). This Committee had been set up by the government in 1963 in response to the debate surrounding the publication of the Draft Code and had the task of advising government on the reform of the Criminal Code, including proposals on the ‘criminal political problems of prison administration’.⁴⁶ As part of this process the committee heard a number of detailed representations by eminent penologists on the question of the content of a future Prison Act. Influenced strongly by these representations, the committee reiterated the view that the criminal law would only be complete once a Prison Act had been introduced and, importantly, that resocialisation should be the aim of prison administration. Furthermore, it recommended instituting an expert Prison Administration Reform Committee (*Strafvollzugskommission*). This was achieved in 1967 when the Federal Ministry of Justice brought practitioners and academics together to work in committee on a Draft Prison Administration Act.⁴⁷

The establishment of the Prison Administration Reform Committee represented a crucial breakthrough in the prison reform process, as this was the first time since 1945 that the content of the Prison Act could be discussed in an officially sanctioned forum. Given the widespread currency of views on a future Prison Act,⁴⁸ backed up by a substantial academic literature, the Committee was able to deliver a Draft Act with relative speed. It drew on the ideas contained in the Alternative Draft Penal Code in 1966 and was strongly influenced by the views of eminent penologists such as Würtenberger, Schüler-Springorum and Müller-Dietz.⁴⁹ In 1971 the Commission Draft of a Prison Act was

⁴⁶ *Strafvollzugsgesetzgebung und Strafvollzugsreform* (note 2 above) 38.

⁴⁷ K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 46; *Strafvollzugsgesetzgebung und Strafvollzugsreform* (note 2 above) 38–40.

⁴⁸ These were cogently summarised in the well-timed report of the Criminal Division of the 48th *Deutsche Juristentag* (German Lawyers Conference) in 1970, which is the most prestigious annual legal conference held in Germany attended by practising lawyers, judges and academics. See *Verhandlungen des 48. Deutschen Juristentages* (Beck München 1970).

⁴⁹ T Würtenberger ‘Freiheit und Zwang im Strafvollzug’ (1969) *NJW* 1747; T Würtenberger *Kriminalpolitik im sozialen Rechtsstaat* (Enke Stuttgart 1970); H Schüler-Springorum *Strafvollzug im Übergang* (Schwartz Verlag Göttingen 1969); *Strafvollzugsgesetzgebung und Strafvollzugsreform* (note 2 above).

presented and one year later adopted by the Government as their own legislative draft proposal.⁵⁰

The speed with which the committee's proposals were picked up by Government in the early 1970s was linked to the reformist political climate which had characterised German society from the mid-1960s. This began with the inclusion of the Social Democratic Party (SDP) in the governing 'Great Coalition' with the Christian Democratic Union (CDU) and Christian Social Union (CSU) in 1966 and intensified when the Social-Liberal coalition, made up of the majority Social Democrat Party (SDP) and the minority Free Democrat Party (FDP), were elected to Government in 1969. The explicit Social Democratic (later to become the Social-Liberal) agenda was to effect widespread reform of the legal system.⁵¹ This was evidenced by the fact that 31% of the criminal law reforms introduced between 1945 and 1982 took place between 1969 and 1977.⁵² These included the five fundamental Penal Code Reform Laws,⁵³ the Introductory Act to the Penal Code,⁵⁴ the Prison Act (*Strafvollzugsgesetz*) of 1976, as well as numerous other smaller Acts introducing and changing specific offences in the Criminal Code.⁵⁵

The reforms implemented were by no means limited to criminal and penal law and procedure: also targeted were family law, consumer protection law and civil procedure.⁵⁶ With respect to criminal justice, however, the Social-Liberal program included three fundamental aims. First, the government sought to continue the endeavours of the Great Criminal Law Commission and build on the Draft Criminal Code of 1962 by perfecting doctrinal criminal law in line with the constitutional ideal of '*nulla crimen, nulla poena sine lege*' (no crime and no punishment without a law).⁵⁷ Focused mainly on the precision

⁵⁰ Bundesministerium der Justiz *Entwurf eines Gesetzes über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung—Strafvollzugsgesetz* (Müller Karlsruhe 1971); *Regierungsentwurf eines Strafvollzugsgesetzes* (BT-Dr. VII/918, 1972/73).

⁵¹ H-J Vogel '10 Jahre sozialliberale Rechtspolitik' (1980) *ZRP* 1. The extent to which this represented a new era post the 1968 political demonstrations is unclear from the literature.

⁵² K Rogall 'Stillstand oder Fortschritt der Strafrechtsreform' (1982) *ZRP* 124.

⁵³ 1 *Strafrechtsreformgesetz* vom 25.6.1969 (BGBl I 645); 2 *Strafrechtsreformgesetz* vom 4.7. 1969 (BGBl I 717); 3 *Strafrechtsreformgesetz* vom 20.5.1970 (BGBl 505); 4 *Strafrechtsreformgesetz* vom 23.11. 1973 (BGBl I 1725); 5 *Strafrechtsreformgesetz* vom 18.6.1974 (BGBl 1287).

⁵⁴ *Einführungsgesetz zum Strafgesetzbuch* vom 2.3.1974 (BGBl I 469).

⁵⁵ See overview in *Strafgesetzbuch Kommentar* (note 43 above) 2–3.

⁵⁶ '10 Jahre sozialliberale Rechtspolitik' (note 51 above) 1.

⁵⁷ This is expressly guaranteed in Basic Law, Article 103 (2) and (3).

of offence construction (*tatbestande*),⁵⁸ this work had originated primarily in response to National Socialist abuse of criminal law doctrine.⁵⁹ Secondly, the Social Liberal government was committed to ‘humanising’ the criminal law by respecting the highest possible individual freedom. This was achieved by restricting the application of the criminal law only to those acts which were seriously damaging to society and only when other forms of legal intervention were not appropriate for such a social aim.⁶⁰ Frequently expressed as the ideal of ‘*ultima ratio Strafrecht*’ (criminal law of last resort) or the maxim ‘*in dubio pro libertate*’ (when in doubt favour liberty), this involved the decriminalisation of certain offences, the redefinition of minor criminal offences as regulatory offences (*Ordnungswidrigkeiten*), and the elimination of so called ‘moral crimes’.⁶¹ A corollary of this aim was that State intervention through punishment should be as restricted and proportionate as possible. Thirdly, the Social-Democrat welfarist agenda included giving effect to the resocialisation ideal through the determination and administration of criminal law sanctions.⁶² This was to have an effect on the type and duration of sanctions included in the Penal Code and would necessitate a law regulating prisons with the primary aim of prisoner resocialisation.

Against the background of German post-war rights consciousness, this reformist climate was fertile ground for campaigners for a new Prison Act. Their case was also made easier once the first two Penal Code Reform Laws,⁶³ which dealt with the classification and duration of criminal sanctions, had been completed.⁶⁴ Moves towards the enactment of a Prison Act could now no longer be defeated by the argument that reform of sanctions within the Criminal Code had first to be completed. Thus, in the early 1970s, the debate turned towards the possible content of legislation governing the administration of prisons. It was in this climate that the proposals of the Prison Administration Reform Committee and the ideas of penologists committed to prisoners’ rights and resocialisation were adopted as the Government’s legislative proposals. Likewise, it was in this context that the

⁵⁸ *Strafgesetzbuch Kommentar* (note 43 above) 1.

⁵⁹ ‘Die Kriminalpolitik der deutschen Strafrechtsreformgesetze’ (note 45 above) 515.

⁶⁰ ‘10 Jahre sozialliberale Rechtspolitik’ (note 51 above) 1.

⁶¹ ‘Die Kriminalpolitik der deutschen Strafrechtsreformgesetze’ (note 45 above) 516.

⁶² ‘10 Jahre sozialliberale Rechtspolitik’ (note 51 above) 1.

⁶³ 1 *Strafrechtsreformgesetz vom 25.6.1969* (BGBl I 645); 2 *Strafrechtsreformgesetz vom 4.7. 1969* (BGBl I 717)

⁶⁴ *Strafvollzug* (note 47 above) 46.

Federal Constitutional Court made its groundbreaking decisions in 1972 and 1973.⁶⁵ There was, to say the least, a clear relationship between the Court's interpretation of the Basic Law in these cases and the views presented in the legislative draft proposals at the time. Once the Court had given these proposals constitutional authority and set a deadline for the completion and enactment of a Prison Act, all that remained was for the German legislature to agree upon the content of the Prison Administration Act. This final drafting process benefited from a broad consensus around the general aims of the Act but nevertheless involved significant compromise as to their concrete application. The following sections will elaborate on each of these elements in turn.

Before moving on, however, it is necessary to highlight important aspects of the prison reform movement mentioned thus far. It can be seen that Germany has experienced a strong impulse towards the codification of prison law for over 100 years. This impulse was founded on interpretations of constitutional principles and on a particular view of the relationship between prison law and criminal law, which was itself the object of intense codification activity since the late nineteenth century. The commitment to the codification of prisoners' rights in Germany was also shaped by the broader historical context. Crucial amongst these were the imperatives of German unification in the 1870s, the reformist climate of the Weimar period, the resolute commitment to the 'rehumanisation' of prison law after 1945 and the aggressive reformism of the social-liberal alliance in the 1970s. The depth of the codification impulse, whilst an important factor contributing to the existence and shape of the Prison Act, is also central to the ongoing commitment to the legal development of the German Prison Act which has been evident since 1976. This ongoing commitment will be explored in chapter three of this thesis.

Importantly, the codification impulse was inspired and dominated by the arguments of the legal and penal academy. This process began with the arguments of Hirzel, Mittermaier and Von Holtzendorff in the 1860s, was continued by Freudenthal and Radbruch in the early 1900s and picked up by Muller-Dietz, Schüler-Springorum and Wurtenberger after 1945. Legislative reform proposals in the area of prison law were thus primarily 'professor-made'.⁶⁶ This heavy academic influence is characteristic of the rationalist and

⁶⁵ See ch. 1, pp. 38–42, 46–52.

⁶⁶ R van Caenegem *Judges, Legislators and Professors: Chapters in European Legal History* (CUP Cambridge 1987) 67.

categorical style of the codification method,⁶⁷ and is a signal of Germany's civilian legal culture which has been heavily influenced by 'learned jurists' since the sixteenth century.⁶⁸ The strength of academic opinion is also indicative of the high status of academics in the eyes of the German people who, as Craig tells us, 'have always had an inordinate respect for their professors'.⁶⁹ The influence of the academy over the shape of prison law is a point of substantial comparative significance. It stands in sharp contrast to England's 'anti-rationalist' and 'anti-categorical' legal culture,⁷⁰ where academic influence over the shape of prison law has been negligible.⁷¹ The substance of German prison law can thus be explained not only in terms of its particular constitutional and legal roots, but also as an indication of the close relationship between legal writings and legal form within German legal culture. This relationship will be shown to be a crucial factor in the development of prisoners' rights in Germany in the course of the following sections and in chapter three.

1.2 Resocialisation and Zeitgeist⁷²

Legislators, reformers and policy makers in the 1970s shared a noticeable commitment to resocialisation as a substantive aim of imprisonment and as a guiding administrative principle around which prisoners' rights should be shaped. The strength of this commitment is peculiar from a comparative perspective in that belief in resocialisation was at its strongest in Germany just when, in Anglo-American penal discourse, it had begun to decline.⁷³ This contrast is explored tentatively below; for as Radzinowicz warns, 'generalised and abrupt conclusions should be avoided when attempts are made to search for causal connections or even parallelisms between phenomena as complex and fluid as

⁶⁷ V Gessner et al 'Introduction: The Basic Settings of Modern Formal Law' in V Gessner et al, (edd), *European Legal Cultures* (Dartmouth Aldershot 1996) 89.

⁶⁸ I will not rehearse the historical reasons for this element of German legal culture. For the best account on this matter see: *Judges, Legislators and Professors* (note 66 above) ch. 2.

⁶⁹ While the student protests of 1968 challenged German's unquestioning faith in professors and effected some reform of the university structures, Craig argues that in less radical parts of German society their status remained high and continues to do so. G Craig *The Germans* (Penguin London 1991) ch. 8.

⁷⁰ See ch. 4, pp. 183–190.

⁷¹ See ch. 5.

⁷² With apologies to G Kaiser 'Resozialisierung und Zeitgeist' in R Herren et al, (edd), *Kultur-Kriminalität-Strafrecht: Festschrift für Thomas Würtenberger* (Duncker & Humblot Berlin 1977) 359.

⁷³ 'Resozialisierung und Zeitgeist' (note 72 above) 362.

ideology in criminal justice and the prevailing spirit of the age'.⁷⁴ From an outsider's perspective the task is daunting, and would be even more so were it not that penologists in Germany were themselves acutely conscious of this divergence.⁷⁵

In the 1970s and 1980s, the 'rehabilitative model' faced a crisis of political legitimacy in Britain, the United States and notably, Sweden.⁷⁶ This crisis of 'rehabilitation' was characterised inside Germany in the following way. First, German penologists noted that the treatment model had been severely contested by Martinson's empirical study in 1974.⁷⁷ This was understood to generate the attitude that 'nothing works' with respect to the treatment of offenders, explained in Germany as '*Behandlungsnihilismus*' (treatment nihilism).⁷⁸ Second, German penologists recognised that 'rehabilitation' was negatively associated with excessive restrictions of the offender's liberty. This was said to be due to the fact that 'rehabilitation' afforded judges, parole boards and prison psychologists considerable discretion to determine the length and type of the prisoner's sentence based on their perception of the offender's 'improvement'.⁷⁹ While harmful in its own right, the German academy recognised that this had the added consequence of effectively making rehabilitation compulsory. This, German penologists explained, had made a mockery of the treatment model which should, at the very least, be premised on the voluntary and active participation of the offender.⁸⁰ Finally, rehabilitation was understood in Germany as being inhumane and paternalistic in that it 'pathologised' criminal offenders, thereby eliminating their free will and moral agency. Yet despite full recognition of all the reasons for the crisis of the 'rehabilitative ideal' outside Germany, most German penologists

⁷⁴ L Radzinowicz *The Roots of the International Association of Criminal Law and their Significance* (MPI Freiburg i. Br. 1991) 57.

⁷⁵ 'Resozialisierung und Zeitgeist' (note 72 above); T Weigend 'Neoklassisismus - ein transatlantisches Mißverständnis' (1982) *ZStW* 801; G Blau 'Die Entwicklung des Strafvollzugs seit 1945 - Tendenzen und Gegentendenzen' in H-D Schwind and G Blau *Strafvollzug in der Praxis* (2nd edn Walter de Gruyter Berlin 1988) 23.

⁷⁶ See in general: B Hudson *Justice Through Punishment: a critique of the 'Justice' Model of Corrections* (Macmillan London 1987) ch. 1; A Bottomley *Criminology in Focus: Past Trends and Future Prospects* (Martin Robertson Oxford 1979) ch. 4; A Bottomley 'The Justice Model in America and Britain: development and analysis' in A Bottoms and R Preston *The Coming Penal Crisis: a criminological and theological explanation* (Scottish Academic Press Edinburgh 1980).

⁷⁷ R Martinson 'What works? — questions and answers about prison reform' (1974) *The Public Interest* 22.

⁷⁸ 'Die Entwicklung des Strafvollzugs seit 1945 - Tendenzen und Gegentendenzen' (note 75 above) 23.

⁷⁹ 'Neoklassisismus - ein transatlantisches Mißverständnis' (note 75 above) 805–808.

⁸⁰ See ch. 3, p. 105–109 on the 'voluntary co-operation' requirement.

viewed ‘imprisonment **without** the offer of resocialisation ... as inhumane and retrograde’.⁸¹

German penologists defended ‘resocialisation’ on a number of grounds. One line of defence consisted in distinguishing the term ‘resocialisation’ from the Anglo-American term ‘rehabilitation’. It was argued that these differences in meaning rendered objections to ‘rehabilitation’, in the Anglo-American sense, irrelevant in Germany. Both the standard German criminological dictionaries maintain that while ‘rehabilitation’ refers to the treatment of a pathological offender, ‘resocialisation’ merely signifies in neutral terms the process whereby the prisoner, who in offending violates the basic prerequisites of social co-existence, is reintegrated into society.⁸² The aim of ‘resocialisation’ is said to be less about ‘curing’ offenders of their ‘criminal illnesses’ than to ensure that their relationship to society is sufficiently restored in order to prevent them from committing further criminal acts. This dissociation from offender ‘pathology’ was initially presented in Kaiser’s emphatic defence of resocialisation in 1977 where he maintained: ‘it is hardly ever seriously argued in this country that offenders are generally, or mostly, sick; rather it is usually contested’.⁸³ For Kaiser, ‘treatment’ was very rarely meant in the strictly therapeutic sense, but rather referred to ‘general care, social assistance and charitable endeavours’.⁸⁴ The terms ‘resocialisation’ and ‘treatment’ in Germany denoted assistance towards social reintegration, argued Kaiser, not a clinical response to ‘pathological’ offenders.

Whether this dissociation from ‘pathology’ is entirely convincing is less clear. For one, the German definition can be criticised for overstating the ‘pathological’ implications of the Anglo-American concept of ‘rehabilitation’ which stems from a small number of highly publicised cases in American prisons.⁸⁵ Moreover, it is difficult to draw a bright line between the aims of seeking to ‘treat an offender’ and ‘assisting an offender to reintegrate into society’, when one considers the potential similarity between the means of achieving them. Nor was the view that ‘resocialisation’ could be dissociated from offender

⁸¹ ‘Resozialisierung und Zeitgeist’ (note 72 above) 371.

⁸² H Schellhoss in G Kaiser et al *Kleine Kriminologisches Wörterbuch* (Müller Heidelberg 1993) 429; H Janssen in H Kerner *Kriminologie Lexikon* (Kriminalistik Heidelberg 1990) 278.

⁸³ ‘Resozialisierung und Zeitgeist’ (note 72 above) 367.

⁸⁴ ‘Resozialisierung und Zeitgeist’ (note 72 above) 371.

⁸⁵ D van Zyl Smit ‘Leave of Absence for West German Prisoners’ (1988) 28 *PL* 1, 13.

pathology held by all German penologists alike. Blau explicitly associated ‘treatment’ with ‘sickness’,⁸⁶ while Eser’s 1974 article ‘*Resozialisierung in der Krise*’ reflected a similar perspective.⁸⁷ Equally, overtones of pathology could be heard in Hassemer’s later statement that ‘resocialisation’ takes the ‘odour of the gaoler from the punishing State and gives him the dignity of the doctor’.⁸⁸

A more plausible argument in defence of ‘resocialisation’ in Germany, rested on the difference between the legal frameworks in which ‘resocialisation’ and ‘rehabilitation’ are respectively applied. As explained in chapter one, resocialisation in Germany refers to the purpose of prison administration, as distinct from the purpose of punishment in general.⁸⁹ Thus, Weigend argued that those in support of a shift in Germany towards Anglo-American neo-classical punishment models were labouring under a ‘transatlantic misunderstanding’.⁹⁰ He pointed out that civil rights objections to ‘rehabilitation’ had no relevance in the German context where ‘resocialisation (is) only applied in as far as the requirements of retribution ... allow’.⁹¹ Thus, discretion to determine sentence length afforded by ‘rehabilitation’ was not present within the German system where the aims of sentencing were distinct from that of imprisonment.⁹² Furthermore offenders’ voluntary co-operation in their treatment was guaranteed in Germany by the constitutional protection of their free will.⁹³ As a result, Weigend maintained that it would be mistaken to associate ‘resocialisation’ in Germany with the negative consequences of ‘rehabilitation’ deplored in Anglo-American discourse. Moreover, Weigend argued that the Germans, with their view of the ‘constitutional State’, did not display the distrust of government intervention found in the U.S.A in the years following the Watergate

⁸⁶ See G Blau ‘Die Entwicklung des Strafvollzugs seit 1945 - Tendenzen und Gegentendenzen’ in H Schwind and G Blau *Strafvollzug in der Praxis* (Walter de Gruyter Berlin 1976) 29; G Blau ‘Aufgaben und Grenzen der Kriminalpädagogik’ in M Busch and G Edel, (edd), *Erziehung zur Freiheit durch Freiheitsentzug* (Luchterhand Neuwied 1969) 383.

⁸⁷ A Eser ‘Resozialisierung in der Krise’ in J Baumann and K Tiedemann, (edd), *Einheit und Vielfalt des Strafrechts: Festschrift für Karl Peters*: (Mohr Tübingen 1974) 505.

⁸⁸ W Hassemer ‘Resozialisierung und Rechtsstaat’ (1982) *KrimJ* 161.

⁸⁹ See ch. 1, p. 43–46.

⁹⁰ ‘Neoklassismus - ein transatlantisches Mißverständnis’ (note 75 above).

⁹¹ ‘Neoklassismus - ein transatlantisches Mißverständnis’ (note 75 above) 804.

⁹² See ch. 1, pp. 43–46 where I explain the relationship between criminal sentencing and prison administration.

⁹³ See ch. 1, pp. 52–56 and ch. 3, pp. 105–109 on the ‘voluntary co-operation’ requirement.

scandal.⁹⁴ In short, the legal impact of ‘resocialisation’ could only be accurately viewed in the context of Germany’s legal and constitutional culture.

A final argument raised in defence of resocialisation was that empirical objections raised by Martinson’s research had done little to threaten scientific belief in resocialisation inside Germany.⁹⁵ This was because so-called *Behandlungsoptimismus* (treatment optimism), which had existed in Anglo-America, had never taken hold in Germany. Rather, caution about the results of offender treatment had been present in German penological discourse since the beginning of the 1960s. In line with this attitude, German penology received Martinson’s controversial study with circumspection.⁹⁶ Penologists maintained that there were no grounds for abandoning a ‘criminal political strategy’ which had always been based on a ‘realistic’ understanding of the limitations of offender treatment.⁹⁷ Moreover, empirical evidence conducted in Germany did not justify a movement towards ‘treatment nihilism’.⁹⁸ Instead it was argued that treatment techniques should be refined and improved, in the belief that resocialisation strategies could only be adequately measured if given the time and resources to prove themselves.

For comparative purposes, it is less important whether these academic arguments in defence of resocialisation are persuasive. Rather, it is vital to note that the majority of German penologists, for various reasons, actively defended resocialisation as a penal strategy. For, as already indicated above,⁹⁹ the approach taken by the academy was central in shaping the dominant language of penal reform. While academic support alone might have validated resocialisation as a strategy, penological arguments were made weightier through recourse to constitutional rights and principles. The relationship between the prisoner’s legal status and the *Rechtsstaatprinzip* had long been acknowledged, but it was Würtenberger’s writings in the late 1960s which established the crucial connection between the Social State Principle and resocialisation. Würtenberger argued that a

⁹⁴ ‘Neoklassismus - ein transatlantisches Mißverständnis’ (note 75 above) 804.

⁹⁵ ‘Resozialisierung und Zeitgeist’ (note 72 above) 369; ‘Die Entwicklung des Strafvollzugs seit 1945 - Tendenzen und Gegentendenzen’ (note 75 above) 23.

⁹⁶ See for example G Blau ‘Die Entwicklung des Strafvollzugs seit 1945 - Tendenzen und Gegentendenzen’ in H Schwind and G Blau *Strafvollzug in der Praxis* (Walter de Gruyter Berlin 1976) 30.

⁹⁷ ‘Resozialisierung und Zeitgeist’ (note 72 above) 369; ‘Die Entwicklung des Strafvollzugs seit 1945 - Tendenzen und Gegentendenzen’ (note 75 above) 23.

⁹⁸ ‘Die Entwicklung des Strafvollzugs seit 1945 - Tendenzen und Gegentendenzen’ (note 75 above) 23.

⁹⁹ See p. 70 above.

constitutionally acceptable prison administration must be ‘suffused with the spirit of the Social State principle’.¹⁰⁰ As a result the prisoner’s legal status should be framed not only as a negative rights status (*Abwehrstatus*) but in the positive sense of a ‘social integration status’ (*Soziale Integrationsstatus*). In this way, Würtenberger argued that the prisoner’s status would reflect the conception of freedom as ‘social freedom’ under the German *Sozial- und Rechtsstaat*.¹⁰¹

Würtenberger’s argument, after being picked up by Schüler-Springorum in 1969 and Müller-Dietz in 1970, quickly became the standard position of penologists.¹⁰² The central idea that prisoners held both negative rights against State intervention and positive rights to State assistance in their social reintegration became commonplace in the penological parlance of the early 1970s. It was hardly surprising, then, that these ideas were picked up by the *Strafvollzugskommission* and gained the legal approval of the Federal Constitutional Court in the *Lebach* decision of 1973.¹⁰³ Once this had occurred, the drafters of the Prison Act were compelled to give legislative expression to Würtenberger’s arguments: a clear example, again, of the influence of legal writings on the shape of German law.

If the academic and constitutional authority favoured resocialisation in the 1970s, so did the broader political climate. The post-war prison reform movement had always been committed to the achievement of resocialisation as an aim of prison administration. Set in opposition to National Socialist administrative aims of retribution and deterrence (*Vergeltung- und Abschreckungsvollzug*), resocialisation came to embody the values of humanisation and the aims of ‘denazification’.¹⁰⁴ It signalled also a ‘restoration’ of the ideals of the Weimar period, which had come close to implementing ‘correction’-oriented prison legislation in the late 1920s. With the entry into power of the Social-Liberal coalition in 1969, the resocialisation of offenders was elevated from a reform ideal to a

¹⁰⁰ T Würtenberger ‘Reform des Strafvollzuges im sozialen Rechtsstaat’ (1967) *JZ* 233.

¹⁰¹ T Würtenberger ‘Freiheit und Zwang im Strafvollzug’ (1969) *NJW* 1747, 1748.

¹⁰² H Müller-Dietz *Strafvollzugsgesetzgebung und Strafvollzugsreform* (Heymanns Köln 1970) 93–100; H Schüler-Springorum *Strafvollzug im Übergang* (Schwarz Verlag Göttingen 1969) 169; See in general K Koepsel *Strafvollzug im Sozialstaat* (Dissertation Hamburg 1985) 2–10.

¹⁰³ See ch. 1, pp. 46–50.

¹⁰⁴ M Walter *Strafvollzug* (Boorberg Stuttgart 1991) 32; ‘Die Entwicklung des Strafvollzugs seit 1945 - Tendenzen und Gegentendenzen’ (note 75 above) 19

governmental policy.¹⁰⁵ On the one hand, the Social-Liberal coalition was committed to the *Rechtsstaat* tradition which had marked German political culture since 1945 and which underlined the call for clearly entrenched prisoners' rights. On the other hand, the coalition was distinct from its governmental predecessors in that it sought to bolster the impact of the constitutional Social State principle through legal reform, which included support for resocialisation.¹⁰⁶ In these ways the coalition aimed to fulfil both its liberal and welfarist agendas.

The Social-Liberal support for resocialisation reflected also a long-standing historical affinity between Social-Liberal politics and the resocialisation ideal. This close alliance was manifest in von Liszt's Modern Criminal Law School and International Association of Criminal Law which, in the 1880s, argued that criminal sanctions should follow the social purpose (*Zweck*¹⁰⁷) of 'special prevention', in particular the correction (*Erziehung*) of the criminal offender.¹⁰⁸ Viewed as the father of the modern resocialisation tradition in Germany,¹⁰⁹ von Liszt's view of crime as a 'social disease' and his belief that punishment should fulfil a 'social purpose' were permeated by an ideal of 'justice in the sense of social equalisation'.¹¹⁰ Such a position, Radzinowicz argues, stemmed from von Liszt's 'sincere and firm dedication' to Social Liberalism.¹¹¹ In the Weimar period, the relationship between Social Democratic ideals and the aim of resocialisation was reinforced in the work of Gustav Radbruch, von Liszt's eminent disciple. Radbruch remains one of the major legal theorists of the Social Democratic tradition.¹¹² His ideas, which founded the

¹⁰⁵ H-J Vogel '10 Jahre sozialliberale Rechtspolitik' (1980) *ZRP* 1, 2.

¹⁰⁶ '10 Jahre sozialliberale Rechtspolitik' (note 105 above) 1.

¹⁰⁷ L Radzinowicz *The Roots of the International Association of Criminal Law and their Significance* (MPI Freiburg i. Br. 1991) ch. 9.

¹⁰⁸ Von Liszt distinguished between three kinds of offenders: occasional offenders (*Augenblickstäter*) who could be dealt with by individual deterrence, offenders capable of correction (*Besserungsfähige*) who should be corrected through punishment (*Besserungsstrafe*); and offenders who could not be corrected (*Nicht Besserungsfähig*) who should be incapacitated (*Unschädlichmachung*). See: H Jescheck and T Weigend *Lehrbuch des Strafrechts: Allgemeiner Teil* (5th edn Duncker and Humblot Berlin 1996) 4–7.

¹⁰⁹ 'Resozialisierung und Zeitgeist' (note 72 above) 359; A Schönke and H Schröder *Strafgesetzbuch Kommentar* (25th edn Beck München 1997) 1; *Lehrbuch des Strafrechts: Allgemeiner Teil* (note 108 above). While commonly viewed as the originator of the resocialisation ideal, Von Liszt ideas were not entirely original. Notions of prisoner correction had already been championed by Theodor Fliedner (1800–1864) and Johann-Heinrich Wichert (1808–1881) in Germany long before this. See M Walter *Strafvollzug* (Boorberg Stuttgart 1991) 21–29.

¹¹⁰ *The Roots of the International Association of Criminal Law and their Significance* (note 107 above) 48.

¹¹¹ *The Roots of the International Association of Criminal Law and their Significance* (note 107 above) 48. Radzinowicz goes on to argue that Von Liszt was also influenced by the insights of Social Darwinism and theories of Social Defence.

¹¹² '10 Jahre sozialliberale Rechtspolitik' (note 105 above) 2–4.

resocialisation-oriented reforms of the Weimar period,¹¹³ continued to be invoked by Social Democrats after 1945.¹¹⁴ This was the case despite a shift from the nineteenth century concept of resocialisation as ‘correction’ (*Erziehung*) to the post-1945 conception of ‘treatment for social reintegration’ (*Behandlung*).¹¹⁵

There can be little doubt that the strength of this post-war commitment to resocialisation owed much to the historical affinity between the Social-Liberal conception of justice and resocialisation as an aim of punishment. On the one hand, the Social Democrats were keen to revive the ideals of the Weimar period which represented a ‘golden age’ in the party’s history. On the other hand the fundamental Social-Liberal picture of law as an instrument of ‘social justice’,¹¹⁶ lent itself to the view that punishment must have a ‘social purpose’. In the words of Radbruch, ‘the improvement of the criminal law should manifest itself not in a better criminal law, but rather in a right to ‘correction’, which would be better than the criminal law itself’.¹¹⁷

In sum, at the time when the Prison Act was being drafted, a complex web of academic, reformist, judicial and political opinion favoured resocialisation as an aim of prison administration just when the ideal of rehabilitation was being abandoned in the outside world. The strength of support for resocialisation was a signal of Germany’s legal and political culture, contingent upon a particular historical context. If the general aim of resocialisation enjoyed broad support, however, the specific meaning of its legal implementation remained to be settled. This was one of the central issues which had to be resolved in the legislative drafting of the Prison Act, a process which the following section examines.

¹¹³ See p. 63 above.

¹¹⁴ ‘10 Jahre sozialliberale Rechtspolitik’ (note 105 above) 2–3.

¹¹⁵ G Blau ‘Die Entwicklung des Strafvollzugs seit 1945 - Tendenzen und Gegentendenzen’ in H Schwind and G Blau *Strafvollzug in der Praxis* (Walter de Gruyter Berlin 1976) 29. While ‘correction’ connoted the ‘moral improvement’ of the prisoner in order to create an ‘ideal type’ or ‘middle class’ law-abiding citizen, *Behandlung* was concerned with assisting the offender in his social reintegration by remedying personality and socialisation defects through social therapeutic methods.

¹¹⁶ This ideal was enshrined explicitly in the Social Democratic ‘Godesburg Programm’ in 1891. ‘10 Jahre sozialliberale Rechtspolitik’ (note 105 above) 1.

¹¹⁷ G Radbruch *Rechtsphilosophie* (Koehler Verlag Stuttgart 1950) 269.

2. Political compromise

Whilst the foundations of the Prison Act and much of its content were shaped by the prison reform ideals discussed above and the deeper constitutional principles set out in chapter one, the Act was equally formed by political compromises made in the final stages of legislative drafting.

The central preoccupation of legislators was the legal implications of the resocialisation ideal. The opacity of the resocialisation concept invited diverse interpretations from reformers and legislators. No sooner had the Prison Administration Reform Committee and Government Legislative Drafts appeared, than the Alternative Draft of the Prison Act was published by the Working Group of German and Swiss Professors alongside various other contributions.¹¹⁸ If the Government Draft represented a moderate and pragmatic view, the Alternative Draft represented the ‘idealist’ position.¹¹⁹ The Government, in line with the Prison Administration Reform Committee, saw the Prison Act as a means of liberalisation, humanisation and legalisation of prisons through a clear recognition of the prisoner’s negative basic rights while providing concrete positive rights to resocialisation. The emphasis was on maintaining prisoners’ relationship to the outside world and on reinforcing their capacity to live a crime-free life through rights to access to the outside world, to home leave, to regime relaxation, to open prisons and to work.¹²⁰ But a concrete and comprehensive commitment to resocialisation involved guarantees on State spending which the Federal Government was anxious to side step. Thus the Government toned down the Prison Administration Reform Committee’s proposals to make compulsory State provision of professional education, remunerated work, social assistance and unemployment insurance for prisoners. In order to pre-empt opposition from State administrations, the Government used transitional clauses (*Übergangsregelungen*) to

¹¹⁸ J Baumann et al, (edd), *Alternativ-Entwurf eines Strafvollzugsgesetzes* (Arbeitskreis deutscher und schweizerischer Strafrechtslehrer Tübingen 1973); H Müller-Dietz *Probleme des modernen Strafvollzuges* (Vol 45 Schriftenreihe der Juristischen Gesellschaft e.V. Berlin 1974) 7f.; G Kaiser *Begriff, Ortbestimmung und Entwicklung des Strafvollzugs* in G Kaiser et al *Strafvollzug* (Müller Karlsruhe 1974) 1; H Jung and H Müller-Dietz, (edd), *Vorschläge zum Entwurf eines Strafvollzugsgesetzes* (2nd edn Fachausschuß I ‘Strafrecht und Strafvollzug’ des Bundeszusammenschlusses für Straffälligenhilfe 1974); *Stellungnahme zum Entwurf eines Strafvollzugsgesetzes* (Bund der Strafvollzugsbediensteten Deutschlands e.V. 1974).

¹¹⁹ H Müller-Dietz *Strafvollzugsrecht* (Walter De Gruyter Berlin 1977) 55.

¹²⁰ *Strafvollzugsrecht* (note 119 above) 53f.

defer the implementation of these more progressive and cost-intensive measures to a later date.¹²¹

The idealist view of the Alternative Draft was unhampered by the imperatives of political viability. It proposed a social-therapeutic prison administration based on the ideal of a ‘problem-solving community’ where inmates were actively included in institutional decision-making.¹²² While acknowledging that the humanisation and liberalisation of prisons were worthy aims, it maintained that the central purpose of the Prison Act should be to give prisoners the capacity to live in freedom and to avoid coming into conflict with the law. ‘This necessitated a far more extensive offer of help which, shaped by the newest results of behavioural sciences, could influence the offender’s proclivity towards criminal behaviour’.¹²³ Social and behavioural therapy and education were thus viewed as integral to the organisation of prison administration and at the heart of the idealist conception of resocialisation.¹²⁴

Both the idealist and the moderate visions of the Prison Act were challenged in the final stages of legislative drafting as the imperatives of German federalism led to the creation of a compromised Act (*Kompromißgesetz*).¹²⁵ Federalism has always been a central feature of modern Germany’s political structure, being born of the constitutional settlement of German unification in 1871 and reinforced in the Weimar Constitution and, post-1945, in the Basic Law. With respect to prison reform, federalism gave rise to painstaking political compromise between State and Federal interests.¹²⁶ As Feest correctly warns: ‘to understand the German prison system, it is necessary to understand federalism - German style’.¹²⁷ Under the constitutional Federal State principle (*Bundesstaatsprinzip*),¹²⁸ the Federal Parliament had competence to legislate on penal

¹²¹ R Calliess and H Müller-Dietz *Strafvollzugsgesetz* (C. H. Beck München 1998) 5f.

¹²² *Strafvollzugsrecht* (note 119 above) 54f.

¹²³ *Alternativ Entwurf eines Strafvollzugsgesetzes*. (note 118 above) 3.

¹²⁴ G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 52.

¹²⁵ K Rotthaus ‘Die Bedeutung des Strafvollzugsgesetz für die Reform des Strafvollzugs’ (1987) *NStZ* 1; *Strafvollzugsrecht* (note 119 above) 75; K Laubenthal *Strafvollzug* (Springer Berlin 1995) 22.

¹²⁶ ‘Die Bedeutung des Strafvollzugsgesetzes für die Reform des Strafvollzugs’ (note 125 above) 1.

¹²⁷ J Feest *Imprisonment and the Criminal Justice System in the Federal Republic of Germany* (Arbeitspapiere des Forschungsschwerpunktes, Soziale Probleme: Kontrolle und Kompensation, Nr. 8 Bremen 1982) 9.

¹²⁸ Basic Law, Article 20 (1).

measures¹²⁹ while State executives had the responsibility of administering prisons.¹³⁰ Thus the Prison Act, while legislated and enacted by the Federal Parliament (*Bundestag*), was subject to the consent of the Federal Council (*Bundesrat*), which consisted of representatives of each State government. It was therefore constitutionally classified as a consent Act (*Zustimmungsgesetz*). The final version of the Act was thus indelibly marked by the conflict between State and Federal representatives: the Federal Council sought to protect State financial interests and administrative flexibility,¹³¹ while the Federal Government promoted its reform ideals and the administrative and legal benefits of federally applicable legislation.¹³² This contest was played out in the twenty-seven sittings of the Select Committee for Criminal Law Reform (*Sonderausschuß für Strafrechtsreform*),¹³³ and finally in the Mediation Committee called by the Federal Council to settle the final draft of the Act.¹³⁴

Administrators in the Federal Council, backed by the Christian Democratic Union and Christian Social Union minority in the Federal Parliament,¹³⁵ were anxious that the entrenchment of a unitary purpose of resocialisation in the Act would be too restrictive of prison administration. On the one hand, they wished to promote administrative flexibility by incorporating general aims of punishment in the statement of the purpose of prison administration.¹³⁶ This threatened the central reform aim of the Act which was to create a unitary purpose of resocialisation,¹³⁷ and was therefore met with strong resistance. On the other hand, opponents of the Act were concerned about the impact it would have on the maintenance of security in prisons. This was heightened by anxiety about the threat posed by prisoners who belonged to the Red Army Faction.¹³⁸ Moreover the economic climate

¹²⁹ Basic Law, Article 74 point 1.

¹³⁰ Basic Law, Article 30 and 83.

¹³¹ See *Gesetzesvorschlag des Bundesrates* 1973 (BT-Dr. VII/918) 107f.

¹³² 'Die Bedeutung des Strafvollzugsgesetzes für die Reform des Strafvollzugs' (note 125 above) 1.

¹³³ See *Protokolle der Sitzungen des Bundestags-Sonderausschusses für die Strafrechtsreform* (Deutscher Bundestag 7 Wahlperiode Stenographischer Dienst 1975).

¹³⁴ See BT-Dr. VII/4662.

¹³⁵ See statement of Eyrich in Select Committee for Criminal Law Reform, *Protokolle der Sitzungen des Bundestags-Sonderausschusses für die Strafrechtsreform* (note 133 above) 1733.

¹³⁶ See *Gesetzesvorschlag des Bundesrates* (note 131 above) 108.

¹³⁷ See ch. 1, p. 43–46.

¹³⁸ F Dünkel 'Die Rechtstellung von Strafgefangenen und Möglichkeiten der rechtlichen Kontrolle von Vollzugsentscheidungen in Deutschland' (1996) *GA* 518, 519.

during the mid-1970s meant that State budgets were significantly restricted.¹³⁹ In this frugal fiscal climate, State executives were keen to exploit the legislative leeway given in the *St. Pauli-Nachrichten* case that prison reform should be effected ‘within reason’.¹⁴⁰

As a result of these factors some of the most progressive provisions in the Act were weakened in last-minute compromises.¹⁴¹ Importantly, anxiety about security led to late insertions into the wording of the purpose of prison administration, and a broadening of the extent of the possible infringements on prisoners’ basic rights through a catch-all security clause.¹⁴² Moreover, concern with administrative flexibility led to the inclusion of a high level of administrative discretion in the special provisions of the Prison Act.¹⁴³ Most damaging, however, was the insertion of a number of transitional provisions (*Übergangsregelungen*) at the end of the Act, which allowed for deferred implementation or indefinite suspension of costly measures within each State.¹⁴⁴ These were designed to give State administrations time to adapt their prison policies and administrations in line with the more radical elements of the Act. In practice, however, the implementation of some of the central reforms of the Act were significantly delayed or indefinitely shelved. This included *inter alia* delaying the provisions on the level of remuneration for prison work (paragraph 200 Prison Act) and the indefinite suspension of the presumption in favour of placing inmates in open prisons (paragraph 201 Prison Act). Walter therefore states that ‘in order to find out which provisions are valid one must read the Act from the back to the front’.¹⁴⁵

In sum, many of the aims expressed during the process of prison reform were undermined in the final stages of legislative drafting where the imperatives of German federalism and consensus politics prevailed. It should be noted, however, that while opponents of the Act were able to strike a number of compromises on the wording of specific provisions in the Act, they could not destroy the spirit of the Act. The Act had been underpinned by deep political and penological ideals and, more importantly, clearly enunciated constitutional

¹³⁹ ‘Die Bedeutung des Strafvollzugsgesetzes für die Reform des Strafvollzugs’ (note 125 above) 2.

¹⁴⁰ *BVerfGE* 40, 276. See ch.1, p. 50–52.

¹⁴¹ *Imprisonment and the Criminal Justice System in the Federal Republic of Germany* (note 127 above) 9–11.

¹⁴² See ch. 3, p. 109–112.

¹⁴³ J Feest and W Lesting *Totale Institution und Rechtsschutz* (Westdeutscher Verlag Opladen 1997) 16.

¹⁴⁴ See Prison Act, §§ 198 and 201.

principles. These underlying principles are central to the survival of the Prison Act and the continuing development of prisoners' rights under German law which will be examined in chapter three.

3. Postscript: the Prison Act in a changing criminal political climate.

The 1970s represented the high point of social liberal values within criminal justice politics in Germany. The congruence and weight of opinion found at this time around the foundations of criminal and prison law has since been eroded. Starting in the late 1980s, the general consensus around the ideal of minimum state intervention through criminal law (*ultima ratio Strafrecht*) and the ideal of resocialisation has consistently been challenged. Signals of these challenges can be seen in the shifting contours of the criminal law, namely the extension of powers of State intervention in the name of criminal prevention, the creation of new crimes and the sharpening of criminal sanctions for particular crimes. These challenges to the ideals of the 1970s reforms have been linked to increasing anxiety about the state of 'law and order' or 'internal security' (*Innere Sicherheit*) within Germany:¹⁴⁶ an anxiety based on fears about the rise of recorded crime generally and organised crime in particular as well as a decrease in clear-up rates.¹⁴⁷ The result, as Hassemer declares, is an increasing identification of 'criminal politics' with 'security politics', a weaker political commitment to the protection of basic rights, and a shift from a coherent purpose-based conception of the criminal law to the use of criminal law as an 'instrument of crisis intervention'.¹⁴⁸

With respect to prison law the careful coalition around the notion of resocialisation has been challenged from various quarters. On the one hand there are continuing political moves to achieve a plural purpose prison administration which reinforces security and makes allowance for retributive considerations in prison administration.¹⁴⁹ On the other

¹⁴⁵ M Walter *Strafvollzug* (Boorberg Stuttgart 1991) 250.

¹⁴⁶ On the different meanings of 'Law and Order' and *Innere Sicherheit* see L Zedner 'In Pursuit of the Vernacular: Comparing Law and Order Discourse in Britain and Germany' (1995) *S & LS* 517.

¹⁴⁷ W Hassemer 'Aktuelle Perspektiven der Kriminalpolitik' (1994) *StV* 333, 334.

¹⁴⁸ 'Aktuelle Perspektiven der Kriminalpolitik' (note 147 above); W Hassemer 'Zero tolerance' - Ein neues Strafkonzzept? in H Albrecht *Internationale Perspektiven in Kriminologie und Strafrecht: Festschrift für Günther Kaiser* (Duncker und Humblot Berlin 1998) 793, 796.

¹⁴⁹ See in detail ch. 3, p. 95–101.

hand there has been dissension as to the desirability of a resocialisation-based prison administration from within the academy. This has come from alternative criminologists in particular who, inspired by Foucauldian theories of punishment, have criticised the oppressive potential of the resocialisation purpose.¹⁵⁰ Within this changing criminal political environment the Prison Act has remained firmly entrenched. Its continuing survival, which will be examined in chapter three, is linked to its deep constitutional underpinnings, the continued reinforcement of the rights and principles contained in the Act by the Federal Constitutional Court and the active commitment to its ideals from those in political and academic forums who were responsible for its creation. Nevertheless, as chapter three will also show, this changing climate is a constant challenge to the survival of the Act and the development of prisoners' rights thereunder.

4. Conclusion

The Prison Act is the compromised realisation of competing imperatives. Importantly, the Act fulfilled, after nearly a century of reform attempts, the goal of the codification of prison administration. This 'codification impulse' grew out of the desire to create 'unity' within the criminal law and to fulfil what reformists identified as the legal imperatives of the *Rechtsstaatsprinzip*. After 1945, codification became bound up with the humanisation of the criminal justice system. This humanisation project was the objective of reformists, whose claims were strengthened by recourse to constitutional principles, and finally the clear demand of the Federal Constitutional Court. The timing of the Act was tied up with the dynamics of the broader reform of the criminal law, a process accelerated by an aggressively reformist Social Liberal Government whose criminal justice politics were reflected in the content of the Prison Act. The codification impulse and the ideals of the Act were also inspired by a powerful criminological academy which actively supported resocialisation as a guiding principle of prison administration just at the time when many in the Anglo-American context had abandoned it. The ideals expressed by the reform movement were entrenched by the Federal Constitutional Court in the creation of the 'constitutional resocialisation principle'. Ultimately, however, the Act was weakened by a Federal Council concerned to ensure administrative flexibility, fiscal restraint and public security. In this sense, the ideals of the Act were undermined by the power of the

¹⁵⁰ R-P Callies *Strafvollzugsrecht* (Beck München 1992) 25.

federalist consensus built into the German Constitution. Moreover, the ideals now entrenched in the Act continue to face challenges in a contemporary criminal political environment characterised by a growing concern with '*Innere Sicherheit*' and hostility to the Act's welfarist and humanist ideals.

Having set out, in this chapter, the broader context within which the Prison Act was formed, the following chapter will examine the interpretation and implementation of the Act in some detail. In doing so it will seek to demonstrate how the Act's continuing interpretation and development has been shaped by the foundational constitutional and reform principles which marked its creation.

The German Prison Act: Principles and Special Provisions

This chapter will examine the development of the prisoner's legal status under the German Prison Act. This examination does not pretend to be exhaustive. The size of the Act, the considerable number of cases which it has generated,¹ and the length of time for which it has been in force precludes any such consideration. The primary aim here will be to shed light on the central area of enquiry in this thesis, namely the method and manner of conceiving of the prisoner's legal status in Germany and England and the broader context in which this has taken place.

As chapter two has shown, the German Prison Act is a compromised piece of legislation (*Kompromißgesetz*).² It was meant to regulate all aspects of prison administration and the prisoner's **administrative** status in line with the Federal Constitutional Court's particular interpretation of constitutional rights and principles. It was required to give life to society's general interest in and the prisoner's substantive right to resocialisation, as well as clearly to define the negative limits of prisoners' basic rights.³ As explained, however, the Act was also shaped by State executives who were concerned with administrative flexibility, fiscal restraint and the maintenance of security.⁴ The construction of the Act thus reflects a compromise between the ideal of strengthening prisoners' rights and the political imperative of retaining administrative discretion in prisons. This compromise has weakened the prisoner's legal status under the Prison Act and has made it vulnerable to attack in a criminal justice environment increasingly hostile to the reform ideals of the 1970s.⁵

¹ Proceedings brought by prisoners under the Prison Act range from 1100 to 1600 per annum. G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 40.

² K Rotthaus 'Die Bedeutung des Strafvollzugsgesetz für die Reform des Strafvollzugs' (1987) *NStZ* 1.

³ See ch. 1, p. 56–59.

⁴ See ch. 2, pp. 79–83.

As a result of these problems, the Prison Act has received mixed reviews from German penal observers.⁶ Whilst these observers accept that the Prison Act represents a significant advance on the past, they argue that many provisions in the Act and their judicial and administrative application have fallen short of the constitutional and reform ideals which the Act was meant to fulfil.⁷ English comparative scholars have been quick to latch on to these local German criticisms as evidence that the German Prison Act is a failure for prisoners' rights.⁸ But these comparative analyses have failed to place local criticisms of the Act in their proper cultural context. The constitutional and reform ideals articulated in the 1970s continue to provide a most ambitious benchmark against which prison law is measured and a secure platform from which penal observers can exercise criticism and stir up debate. Local criticism must thus be read both as signals of the strength and ambitiousness of these ideals, as well as an indication of the shortcomings of prison law. The vitality of penal debate in Germany should also not be underestimated. One need only look at the mass of publications on the subject of prisoners' rights and prison law in order to establish the dynamism of this debate.⁹ Neither should one underestimate the impact of critical debate on the shape and development of prison law. As has already been indicated, and as this chapter will continue to show, there is a strong relationship between penal research, legal scholarship and judicial action in Germany.

In short, prison law and the prisoner's legal status is not static. It is continuously developed by the courts in response to critical legal opinion and in line with the deeper reform and constitutional principles upon which this criticism is based.¹⁰ While judicial development of prison law is at times uneven and remains incomplete, it is nevertheless evident that the deeper principles enunciated in the 1970s continue to provide an

⁵ See ch. 2, pp. 83–84.

⁶ See pp. 125–132 below. It is interesting that local criticism of the Prison Act is more virulent when applying the principles of the Federal Constitutional Court and the drafters of the Prison Act than when the Act is compared to other jurisdictions in Europe (see Introduction, pp. 8–12).

⁷ H Müller-Dietz '20 Jahre Strafvollzugsgesetz - Anspruch und Wirklichkeit' (1998) *ZfStrVo* 12; F Dünkel and A Kunkat 'Zwischen Innovation und Restauration. 20 Jahre Strafvollzugsgesetz - eine Bestandsaufnahme' (1997) *NK* 24.

⁸ J Vagg *Prison Systems* (OUP Oxford 1994) ch.8; R Prowse et al 'Rights in Prisons in Germany: Blueprint for Britain?' (1992) 20 *IJSL* 111.

⁹ A crude comparison of the length of bibliographies in the standard prison law textbooks in Germany and England proves this point. G Kaiser H-J Kerner H Schöch *Strafvollzug* (CF Müller Heidelberg 1992) has a bibliography of 65 pages. S Livingstone and T Owen *Prison Law* (2nd edn OUP Oxford 1999) has a bibliography of 9 pages.

¹⁰ M Walter *Strafvollzug* (2nd edn Boorberg Stuttgart 1999) 373.

important normative compass in this ongoing process. This chapter will examine the legal development of the Prison Act in some detail. This examination will take into account the broader interpretative environment in which the Act is placed and the critical exchange which shapes its development. It is this broader environment which this chapter will first discuss.

1. The broader environment of the Prison Act

The legal application and development of the Prison Act is shaped by general principles of constitutional, criminal and administrative law,¹¹ and marked by a distinctive legal community.

Constitutional law has a ubiquitous influence over prison law. Under Article 1 (3) of the Basic Law all public bodies are bound to promote and protect the rights and principles enshrined in the Constitution. Courts, at every level of the legal hierarchy, therefore have a duty to apply constitutional principles and respect basic rights, while administrators are obliged not only to respect the legal limits of their discretion but also properly to consider fundamental rights and principles in each decision making process. As a legislative basis for limitations of basic rights, the Prison Act is amended, interpreted and applied in line with the constitutional development of these rights. Moreover, the principle of *Verfassungs- und Grundrechtskonforme Auslegung* (constitutional interpretation of law) obliges prison administrators and judges to interpret the law in line with its constitutional foundations.¹² This is not only crucial where legislation is drafted ambiguously but also in defining and structuring decisions made pursuant to the Act.

The Federal Constitutional Court (FCC) does not exercise exclusive control over the implementation and development of the Prison Act. It can only intervene where the issue at hand is shown to have constitutional dimensions such as the violation of basic rights or constitutional principles. Where the issue in question relates to the mere application or interpretation of the Prison Act (*einfaches recht*) it falls under the competence of non-

¹¹ H Müller-Dietz *Strafvollzugsrecht* (Walter de Gruyter Berlin 1977) 25.

¹² BVerfGE 8, 28; B Pieroth and B Schlink *Grundrechte - Staatsrecht II* (13th edn Müller Heidelberg 1997) 20f.

constitutional courts.¹³ Nevertheless, given the centrality of constitutional principles to the construction of the Prison Act and the definition of the prisoner's legal status, the potential for the Court to exercise corrective power and influence is considerable.¹⁴ Moreover, the symbolic and institutional power of the FCC and its relative independence from public opinion has placed it in a strong position to develop the basic principles of prison law. The potential for the FCC to develop these principles is enhanced, in no small measure, by the regular appointment of senior academics as judges of the FCC who are highly receptive to the opinion of the penal academy. The FCC has had ample opportunity to develop principles of Prison Law. Since the Prison Act came into force, it has passed down 96 decisions on matters of prison law.¹⁵ The jurisprudence of the FCC will be discussed in detail in section 4 below, although the influence of the Court will be evident throughout this chapter.

The relationship between prison law and criminal law has already been examined in chapter one.¹⁶ Strictly classified as criminal law, prison law falls outside the jurisdiction of administrative courts. This is viewed as a mixed blessing. On the one hand, criminal court jurisdiction to oversee the administration of punishment is said to follow as a consequence of their competence to impose and determine punishment.¹⁷ This is said to reflect the 'internal relationship' between criminal law and prison law. Institutional and legal expertise regarding criminal sanctions are said to be best concentrated in courts charged both with determining questions surrounding the imposition and execution of the custodial sentence as well as those regarding the administration of prisons. On the other hand, the Prison Act is meant to regulate the exercise of prison administrative discretion and as a result administrative law concepts are recognised as being integral to the development of prison law.¹⁸ Substantive administrative law principles thus apply to the decision making process under the Prison Act, and determine the use and application of administrative

¹³ M Walter *Strafvollzug* (2nd edn Boorberg Stuttgart 1999) 374.

¹⁴ J Feest, (ed), *Kommentar zum Strafvollzugsgesetz* (4th edn Luchterhand Neuwied 2000) 8; see further, section 4, pp. 132–148 below.

¹⁵ This is my own count which accords with the number of published Federal Constitutional Court cases on the Prison Act which are recorded in the German JURIS database. This database records all legal decisions published in Germany.

¹⁶ See pp. 43–46.

¹⁷ H Müller-Dietz 'Die Strafvollstreckungskammer als besonderes Verwaltungsgericht' in Präsident des Landgerichts Saarbrücken, (ed), *150 Jahre Landgericht Saarbrücken* (Heymanns Köln 1985) 335, 338.

¹⁸ 'Die Strafvollstreckungskammer als besonderes Verwaltungsgericht' (note 17 above) 340.

guidelines drawn up by States.¹⁹ In addition, provisions regulating prisoners' access to legal redress are said to be best regulated by administrative procedural concepts.²⁰ Moreover the structural organisation of the prison administration service is said to reflect general principles of 'administration organisation law' (*Verwaltungsorganisationsrecht*).²¹ It has therefore been argued that prison law should be classified as 'a special type of administrative law'.²² Given this, it is seen as problematic that prison law is under the jurisdiction of courts which, while well versed in criminal law and procedure, lack the requisite administrative law expertise.²³ Those seeking to enhance court control of prison administration thus continue to call for courts to integrate better principles of administrative law in the interpretation and application of prison law.²⁴ This issue will be examined in more detail in section 3.2.2 below.²⁵

As already suggested in chapter two, Germany is distinct from England in that academic opinion has substantial influence within the legal community.²⁶ This not only applies to the shape of the law in question but also to its legal interpretation and development. Academic writings are admissible legal sources in court and are frequently cited in judgements on prison law. The most influential academic sources are legal commentaries on the Prison Act which are used as standard reference texts by administrators, judges and lawyers. In these regularly updated commentaries,²⁷ the Act, judicial decisions, legislative amendments, changing theoretical legal arguments and new empirical-criminological insights are summarised, interpreted and explained.²⁸ The breadth of the sources examined in these commentaries is important. The authors are all equally trained in law and penology and they aim to provide guidance on the application of the law within a broader

¹⁹ See pp. 122–125 below.

²⁰ G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 11.

²¹ H Müller-Dietz *Strafvollzugsrecht* (Walter de Gruyter Berlin 1977) 26.

²² J Feest, (ed), *Kommentar zum Strafvollzugsgesetz* (4th edn Luchterhand Neuwied 2000) 1.

²³ 'Die Strafvollstreckungskammer als besonderes Verwaltungsgericht' (note 17 above) 340.

²⁴ U Kamman *Gerichtlicher Rechtsschutz im Strafvollzug* (Centaureus Pfaffenweiler 1991) 206 and 336; K-G Kösling *Die Bedeutung verwaltungsprozessualer Normen und Grundsätze für das gerichtliche Verfahren nach dem Strafvollzugsgesetz* (Centaureus Pfaffenweiler) 278f.

²⁵ See pp. 125–128 below.

²⁶ See ch. 2, p. 70.

²⁷ R-P Callies and H Müller-Dietz *Strafvollzugsgesetz* (Beck München 1998) (henceforth Callies/Müller-Dietz); H-D Schwind and A Böhm *Strafvollzugsgesetz* (Walter de Gruyter Berlin 1999) (henceforth Schwind/Böhm); J Feest, (ed), *Kommentar zum Strafvollzugsgesetz* (4th edn Luchterhand Neuwied 2000) (henceforth Feest). See Citation Conventions, p. iv.

penal context. In these texts, one is just as likely to find guidance on technical questions of administrative procedure as one is able to find reference to the damaging institutional effects of ‘total institution’ culture.

The status and influence of academic commentaries rests on a strong tradition in Germany of ‘close co-operation between courts and legal writers in developing the law’.²⁹ Again this stands in strong contrast to England’s ‘strong tradition of judge created law’ where the writings of penal or legal academics are rarely referred to in courts.³⁰ This difference will become evident in chapter five of this thesis which deals with the judicial development of prisoners’ rights in England. There, judicial reference to the writings of academic prison lawyers or penologists will be conspicuous for its absence. Aside from the status of academic opinion in the legal community in Germany, commentaries have a high persuasive influence over administrative and judicial practice for practical reasons. The Prison Act foresees the creation of a criminological service in each State whose function is to conduct research aimed at enhancing the ‘treatment methods’ of prison administrators.³¹ Prison administrators are thus obliged by the Act to keep abreast of a significant amount of criminological research.³² In addition to criminological research, the high number of judicial decisions makes it difficult for courts and administrators to retain an overview. In this context, commentaries that summarise case law and empirical research on prisons are essential.

The focus and influence of academic commentaries is not uniform, however. The Callies/Müller-Dietz commentary places the most emphasis on developing existing legal doctrine and is written by one of the leading prison reformers of the 1970s. This commentary has a significant influence on prison law jurisprudence.³³ The Schwind/Böhm commentary is oriented towards prison administrative practice and is made up of

²⁸ D Frehsee ‘Neuere Tendenzen in der aktuellen Kommentar- und Lehrbuchliteratur zum Strafvollzug’ (1993) *NStZ* 165.

²⁹ R Zimmerman in W Ebke and M Finkin, (edd), *Introduction to German Law* (Kluwer The Hague 1996) 22.

³⁰ J Allison *A Continental Distinction in the Common Law* (OUP Oxford 2000) 25–29; M Forster ‘The Significance and Function of Legal Citations: Comparative-law efforts to Standardize Citation Practice’ in V Gessner et al, (edd), *European Legal Cultures* (Dartmouth Aldershot 1996) 128. See also ch. 4, pp. 183–190.

³¹ Prison Act, § 166.

³² Calliess/Müller-Dietz § 166.

³³ A Böhm ‘Zur ‘Verrechtlichung des Strafvollzugs’ (1992) *ZfStrVo* 37.

contributions from leading members of State justice and prison administrations. The Alternative Commentary, is the most critical of the Prison Act and offers the most provocative interpretations and suggestions for change. It has less influence on the daily practice of judges and administrators but provides a useful forum for academic and political debate and has increasingly been referred to in judgements of the FCC. Aside from legal commentaries, standard prison law textbooks also have some influence,³⁴ while journal articles are usually only consulted by the highest courts and the academy. Both these sources find their main exposure to the broader legal community through inclusion in commentaries on the subject.

With no formal system of binding precedent in Germany, judicial decisions on the Prison Act are solely binding on the instant parties. The only formal authority which judges and administrators are bound to follow is the norm itself and certain decisions of the FCC.³⁵ Judicial decisions, like academic commentaries, are therefore formally viewed as persuasive material. The extent of the persuasiveness of each decision is dependant on its position within the court hierarchy. The Federal Supreme Court (*Bundesgerichtshof* - *BGH*) is of such a high status that its decisions amount to legal authority in practice. This court's primary function is the achievement of legal uniformity (*Rechtseinheitlichung*) across the States. It will thus be called upon to make a final determination in non-constitutional questions of prison law³⁶ where a judgement of a Higher State Court deviates from previous decisions of other Higher Regional Courts or from that of the Federal Supreme Court. Given this important position, the Federal Supreme Court also has a significant influence on the meaning and application of the Prison Act and has made 64 decisions on prison law since the Act came into force.³⁷ The remaining courts are divided into hierarchies within each State, with the Higher Regional Courts (*Oberlandesgericht* - *OLG*) at the peak and the Regional Courts (*Landgericht* - *LG*) below them. Higher Regional Court decisions have a high measure of persuasiveness and form a significant part of the

³⁴K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998); G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992); M Walter *Strafvollzug* (2nd edn Boorberg Stuttgart 1999); RP Calliess *Strafvollzugsrecht* (Beck München 1992).

³⁵ Constitutional Court Act, § 31.

³⁶ Matters of non-constitutional law are termed ordinary law (*Einfaches Recht*). C Creifelds *Rechtswörterbuch* (Beck München 1978). Any constitutional matter is ultimately decided upon by the Federal Constitutional Court.

³⁷ This figure is taken from the JURIS database.

body of prison law.³⁸ All Higher Regional Court decisions will have persuasiveness nationally but in practice they will have a greater legal weight in their home State or region. The first instance Prison Courts (*Strafvollstreckungskammer*) are chambers of the Regional Courts.³⁹ As Courts of first instance, these decisions carry a low measure of legal persuasiveness. However, they deal with by far the highest number of prisoners' claims, and there remain a variety of legal questions which have only been addressed by these Courts.⁴⁰

Finally, it is worth noting that courts and academics can draw on published debates, committee reports and other preparatory materials which were produced during the legislative drafting of the Prison Act. As a result, there is frequent recourse to the arguments presented in the process of legislative reform in the 1970s.⁴¹ These are used to support interpretations of Prison Act provisions and invoked to reiterate its the conceptual roots and ideals. Interpretations of the Prison Act are thus also framed by the distinctive political and intellectual tone of its original drafters.

To sum up: The Prison Act stands against the background of a distinctive interpretive community and broader principles of constitutional, administrative and criminal law. The influence of these factors on the development of the prisoner's legal status will become evident in the remainder of this chapter which will examine the Act in more detail. Section 2 of this chapter will deal with the interpretive conflicts surrounding the substantive principles of the Act. Section 3 will deal with the special provisions of the Act and the concerns which have been raised as regards the enforcement of substantive prisoners' rights. Section 4 will deal with the more recent jurisprudence of the FCC which has attempted to remedy many of the weaknesses of the Prison Act and to address the concerns of the penal academy which have been raised over the last 25 years.

³⁸ JURIS records 1235 published Higher Regional Court decisions on matters of prison law since 1976.

³⁹ The small single-judge chambers are responsible for checking the exercise of prison administration on the basis of the Prison Act. The larger chambers, with three judges present, determine questions of sentence execution and parole on the basis of substantive and procedural criminal law.

⁴⁰ JURIS records 217 published Regional Court decisions since 1976.

⁴¹ A good example can be found in the dissenting opinion of Judge Mahrenholz in BVerfGE 64, 261 at 285.

2. The Prison Act: fundamental substantive principles

In a style characteristic of a legal code, the Prison Act is framed by guiding principles set out in paragraphs 2–4. These regulate the statutory purpose of imprisonment, the basis of prison administration and the legal status of the prisoner. The detailed provisions contained in the remainder of the Act are systematic and comprehensive concretisations of these principles. The Prison Act is meant to be interpreted purposively and logically in line with these foundational principles.⁴² Given the centrality of these principles to the Prison Act and the prisoner's legal position, much hinges on their legal meaning. The following sections will therefore examine these principles and the interpretative conflicts which have arisen around them.

2.1 The statutory purpose of imprisonment

The statutory resocialisation purpose of the Prison Act, enshrined in paragraph 2, shapes the exercise of prison administration in a general and particular sense. In a general sense, it provides a strong interpretative guide to the rest of the Act and an ultimate criterion upon which administrative decisions are made. Under paragraph 155 (1) the prison administration is duty bound to observe and safeguard the purpose set out in paragraph 2. Accordingly, under paragraph 154 all prison administrative agents are obliged to work together towards the resocialisation of offenders and prison officers should work in close co-operation with, amongst others, parole officers, social workers and employment agencies. Equally under paragraph 151 (2) Prison Act prison inspectors are advised to work with specialists when inspecting treatment and other measures implemented in prisons. Furthermore, the Act encourages each State justice administration (*Landesjustizverwaltung*) to establish a 'criminological service' which, together with academic penal research institutions, should develop and refine treatment methods in

⁴² K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 123.

order to further the aim of resocialisation.⁴³ Thus in a general sense, ‘the prison climate must be conducive to resocialisation (*Resozialisierungsfreundlich*)’.⁴⁴

In a particular sense, the resocialisation purpose is concretised in numerous provisions of the Act determining the rights of prisoners, the organisation of the prisoner’s sentence, as well as the structure and organisation of the prison administration.⁴⁵ In particular, provisions regulating the ‘treatment examination’ of the prisoner and the staged organisation of the prisoner’s sentence plan;⁴⁶ the prisoner’s eligibility for open prison, regime relaxation measures and prison leave;⁴⁷ prison work, education and training;⁴⁸ access to the outside world;⁴⁹ and social assistance and therapeutic treatment⁵⁰ are all viewed as expressions of the statutory purpose of resocialisation and are meant to be read in its light. The legal interpretation of paragraph 2 Prison Act is therefore fundamental to the exercise of prison administration and the prisoner’s experience of imprisonment. It is also a crucial indicator of the extent to which the Act fulfils the prisoner’s constitutional right to resocialisation.

2.1.1 A unitary resocialisation purpose?

As a result of the statutory and constitutional importance of resocialisation, the primary aim of reformers was that the Prison Act entrench a unitary resocialisation purpose of prison administration. The final wording of the Act was ambiguous on this issue, however. The purpose of prison administration in paragraph 2 of the Prison Act is stated as follows:

In the administration of the prison sentence, the prisoner should become capable of leading a socially responsible life free of criminal activity (aim of imprisonment). The administration of the prison sentence also serves the protection of society from further criminal offences.

⁴³ Prison Act, § 166.

⁴⁴ Schwind/Böhm §2 mn 10.

⁴⁵ Callies/Müller-Dietz §2 mn 3; K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 52; M Walter *Strafvollzug* (2nd edn Boorberg Stuttgart 2000) 57 mn 53.

⁴⁶ Prison Act, §§ 6 and 7.

⁴⁷ Prison Act, §§ 10, 11, 13.

⁴⁸ Prison Act, §§ 37–52.

⁴⁹ Prison Act, §§ 23–36.

⁵⁰ Prison Act, §§ 9 and 70–75.

Amended to allay security fears,⁵¹ the wording of paragraph 2 raises two potentially conflicting purposes of prison administration: that of resocialisation and the protection of the public from crime. With some exceptions,⁵² however, the majority in the legal community argue that paragraph 2 enshrines resocialisation as the primary aim of prison administration.⁵³ Given its form and context, it is generally argued that paragraph 2 sentence 2 does **not** represent an additional positive aim of imprisonment which is equal to resocialisation. The latter is viewed, not as a purpose, but as reference to the intrinsic incapacitation (*Sicherung*) function of the prison.⁵⁴ When interpreting paragraph 2, commentators point to the words ‘aim of imprisonment’ placed in parentheses at the end of the first sentence, the word ‘also’ in the second sentence which, it is said, implies a hierarchy between the resocialisation aim and the incapacitation function of imprisonment, the governmental guidance and opinions expressed during legislative drafting and the view of the FCC that the prisoner holds a constitutional right to resocialisation. This categorical constitutional guidance,⁵⁵ which has continued after the implementation of the Prison Act,⁵⁶ bolsters the general consensus that ‘the earlier competition between the resocialisation aim and the aim of public security no longer exists’.⁵⁷

What then is the relationship between resocialisation and public security? The most influential view on this issue is presented in the Callies/Müller-Dietz commentary:

While the aspect of imprisonment elucidated in sentence 2 is to be considered when pursuing the *sole* stated purpose of imprisonment in sentence 1, it does not present an independent aim of imprisonment. This is because the function (*Aufgabe*) of the protection of the public, while

⁵¹ See ch. 2, p. 79–83.

⁵² T Grunau and E Tiesler *Strafvollzugsgesetz* (Heymanns Köln 1977) §2 mn 1.

⁵³ G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 136–7 and 140; M Walter *Strafvollzug* (2nd edn Boorberg Stuttgart 2000) 271; Callies/Müller-Dietz §2 mn 1f; Schwind/Böhm §2 mn 7 and 10ff; Feest §2 mn 6; K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 55; H Schwind ‘Zum Sinn der Strafe und zum Ziel(Zweck) des (Straf-) Vollzugs’ (1981) 23 *Bewährungshilfe* 351; G Bemma ‘Im Vollzug der Freiheitsstrafe soll der Gefangene fähig werden, künftig in sozialer Verantwortung ein Leben ohne Straftaten zu führen’ (1988) 12 *StV* 549; *BVerfGE* 35, 202; 40, 276; 45, 187; *BVerfG Beschl.* (1998) *NJW* 3337; (1998) *NStZ* 430; (1998) *StV* 434; *LG Frankfurt* (1987) *StV* 301.

⁵⁴ Callies/Müller-Dietz §2 mn 1; Schwind/Böhm §2 mn 16.

⁵⁵ *BVerfGE* 35, 202; 40, 276.

⁵⁶ *BVerfGE* 45, 187; *BVerfG Beschl.* (1993) *NJW* 3188; (1998) *NJW* 3337; (1998) *NStZ* 430; (1998) *StV* 434.

⁵⁷ ‘Zum Sinn der Strafe und zum Ziel(Zweck) des (Straf-) Vollzugs’ (note 53 above).

belonging to the nature (*Wesen*) of imprisonment, is neither its aim (*Ziel*) nor its purpose (*Zweck*).⁵⁸

By this interpretation we are to understand that protection of the public, while inescapably part of imprisonment, is not its ultimate purpose. Rather, protection of the public is a necessary function of imprisonment which can temper the primary aim of resocialisation. This intricate relationship is best explained by example. The Prison Act contains various regime-relaxation⁵⁹ provisions aimed at enhancing prisoners' relationship with the outside world and thereby their chances of reintegrating into society after release. The realisation of prisoners' rights under these provisions are, however, made contingent upon establishing that there is no danger that prisoners would misuse their rights in order to commit further crimes (*Mißbrauchgefahr*) outside the prison. Thus, before placing prisoners in open prisons,⁶⁰ relaxing their sentence regime⁶¹ or granting leave from prison,⁶² prison officials must be satisfied that there is no 'danger of misuse'. According to the Callies/Müller-Dietz interpretation of paragraph 2, these special provisions should be construed in favour of resocialisation. Thus, prison officials when exercising their discretion in these cases must show clearly that a 'danger of misuse' and risk to public security exists and, thus, give reasons for their decisions **not** to grant the prisoner leave. Deviation from the achievement of the resocialisation purpose on the grounds of protecting the public from further crimes must therefore be justified by the prison official whereas the achievement of the resocialisation purpose does not.

Schwind/Böhm are less optimistic about the legislative balance between resocialisation and public security. While agreeing that the wording of paragraph 2 implies a primacy of resocialisation over public security, they argue that regime relaxation provisions give priority to security in that they allow for the 'danger of misuse' to disqualify a prisoner from being afforded their rights. On this basis, they argue that 'the legislator should have faced up to this unavoidable conflict of aims and been more courageous with respect to

⁵⁸ Callies/Müller-Dietz §2 mn 1 (emphasis added). Supported by: D Haberstroh 'Grundlagen des Strafvollzugsrechts' (1982) *Jura* 617, 619; K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 66; Feest §2 mn 13.

⁵⁹ The term 'regime relaxation' refers here to transfer to open prison and various forms of leave, this is distinct from the usage of the term *Lockerung* (relaxations) under the Prison Act which strictly refers to leave measures under § 11.

⁶⁰ Prison Act, § 10

⁶¹ Prison Act, § 11.

⁶² Prison Act, § 13.

the balancing process between them in each individual case'.⁶³ Callies/Müller-Dietz and others insist however that the Schwind/Böhm fail to distinguish between the resocialisation 'purpose' and the security 'function' of imprisonment and thus fail to appreciate the presumption in the Act's general and special provisions in favour of resocialisation.⁶⁴ The Callies/Müller-Dietz perspective, which is consistent with the constitutional entrenchment of the prisoner's right to resocialisation, has recently been reinforced in a number of FCC decisions dealing with decisions regarding regime relaxation.⁶⁵ The latter now appears therefore to the most legally authoritative position.

There was also a high level of controversy in the 1980s on the question of whether paragraph 2 Prison Act precluded prison administrators from following general aims of punishment, in particular retribution. The controversy arose despite the clear wording of paragraph 2, which at no stage suggests the applicability of these aims. The problems began, shortly after the Act came into force, when Higher Regional Courts had to consider the legality of decisions to decline applications for prison leave from life-sentenced prisoners convicted for 'inconceivably cruel' murder of Jews during the Third Reich.⁶⁶ These Courts held that a decision not to grant leave from prison under paragraph 13 Prison Act to particular categories of life-sentenced prisoners, could be justified by reference to the seriousness of the original crime committed. Despite its ongoing support of the 'constitutional resocialisation principle',⁶⁷ the FCC accepted in 1983 that the gravity of the original offence could be considered where the crimes committed were particularly 'heinous'.⁶⁸ Notwithstanding a strong dissenting opinion in this judgement,⁶⁹ and widespread opprobrium from academic writers,⁷⁰ Higher Regional Courts continued

⁶³ Schwind/Böhm § 2 mn 8.

⁶⁴ Calliess/Müller-Dietz § 2 mn 1; K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 67; G Kaiser H-J Kerner and H. Schöch *Strafvollzug* (Müller Heidelberg 1992) 141.

⁶⁵ *BVerfG Beschl.* (1998) *NStZ* 430; (1998) *StV* 434; (1998) *NJW* 1133. See further section 4.1, pp. 132–136 below.

⁶⁶ *OLG Karlsruhe* (1978) *JR* 213; *OLG Frankfurt* (1979) *NJW* 1173; *OLG Nürnberg* (1980) *ZfStrVo* 122; *OLG Frankfurt* (1981) *NStZ* 157; *OLG Hamm* (1981) *NStZ* 495.

⁶⁷ The principle was reconfirmed immediately after the Prison Act came into force by *BVerfGE* 45, 187. In this decision the Court explicitly endorsed the resocialisation purpose of new Prison Act and held that the 'right to resocialisation' was held by all prisoners, including those sentenced to life. This meant that life sentenced prisoners had to be given a realisable chance of regaining their freedom.

⁶⁸ *BVerfGE* 64, 261.

⁶⁹ Dissenting opinion from Judge Mahrenholz *BVerfGE* 64, 261, 285.

⁷⁰ P Meier-Beck 'Schuld und Generalprävention im Vollzug der Freiheitsstrafe' (1984) *MDR* 447; W Hill 'Tatschuld und Strafvollzug: Analyse eines Beschlusses des Bundesverfassungsgericht' (1986) *ZfStrVo*

to apply the ‘gravity of original offence’ principle to an even wider category of prisoners and dispositions under the Prison Act. Not only was it accepted that all life-sentenced prisoners be judged on this basis,⁷¹ but also fixed-term prisoners who had committed heinous crimes.⁷² Equally, Courts applied the gravity of offence principle to other provisions in the Act such as further regime relaxation measures,⁷³ transferral provisions,⁷⁴ and rights to information under the Act.⁷⁵

While highly controversial, this judicial trend was not uniform nationally. Certain Higher Regional Courts stated explicitly that the seriousness of the original offence was only relevant to leave applications from a narrow class of prisoners whose personal guilt was exceptionally high.⁷⁶ These decisions were in line with the class of offenders foreseen by the FCC in 1983.⁷⁷ Other courts noted that the gravity of offence was merely one element, amongst many, which could be taken into account in the exercise of discretion under the Act.⁷⁸ Other courts restated the resocialisation purpose and directly opposed the application of the gravity of offence principle.⁷⁹ The more controversial judicial tendency was, however, picked up by State administrations who began lobbying to amend the Prison Act in order to reinstate a plural prison administration purpose. Had such an amendment gone through, the States would have succeeded in ‘reshaping the law’.⁸⁰ After some debate, however, these proposals were later dropped from the Bill for the Amendment of the Prison Act which was presented by the Federal Council in 1988.⁸¹

Needless to say, this controversial judicial activity and the threat of legislative amendment gave rise to extensive academic debate.⁸² Most academics argued that

139; H Müller-Dietz ‘Schuldschwere und Urlaub aus der Haft’ (1984) *JR* 353; H Müller-Dietz ‘Strafvollzug, Tatopfer und Strafzwecke’ (1985) *GA* 147; H Beckmann ‘Anmerkung’ (1984) *StV* 165.

⁷¹ *OLG Nürnberg* (1984) *ZfStrVo* 114; *OLG Stuttgart* (1984) *NStZ* 525; *OLG Karlsruhe* (1989) *NStZ* 247.

⁷² *OLG Frankfurt* (1983) *NStZ* 140; *OLG Nürnberg* (1984) *NStZ* 92.

⁷³ *OLG Nürnberg* (1980) *ZfStrVo* 1122; *OLG Stuttgart* (1984) *NStZ* 525; *OLG Stuttgart* (1986) *ZfStrVo* 117.

⁷⁴ *OLG Frankfurt* (1983) *NStZ* 140.

⁷⁵ *LG Hamburg* (1977) *ZfStrVo* SH 33; *OLG München* (1979) *ZfStrVo* SH 67.

⁷⁶ *OLG Celle* (1984) *ZfStrVo* 251.

⁷⁷ *BVerfGE* 64, 261.

⁷⁸ *OLG Stuttgart* (1984) *NStZ* 525.

⁷⁹ *OLG Stuttgart* 1985 *StV* 466; *LG Heilbronn* (1986) *StV* 259; *LG Heilbronn* (1986) *MDR* 697.

⁸⁰ G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 144.

⁸¹ *Konferenz der Justizminister und-senatoren, Beschlußprotokoll von 4.6. 1987* (BT VII/3218) 7.

⁸² K Peters ‘Beurlaubung von zu lebenslanger Freiheitsstrafe Verurteilten’ (1978) *JR* 177; R Scholz ‘10 Jahre Strafvollzugsgesetz (1986) *Bewährungshilfe* 361; W Bayer et al ‘Tatschuldausgleich und vollzugliche

paragraph 2 Prison Act represented an exhaustive regulation of the purpose of prison administration and argued vehemently against a return to a plural conception of this purpose. Their arguments drew on the preparatory legislative materials in the run up to the Prison Act, the wording of paragraph 2, the continued recognition of the ‘constitutional resocialisation principle’ by the FCC and the three-pillar and dialectical unification theory. It was argued that there was a clear distinction between ‘status’ and ‘administrative’ decisions. ‘Status’ decisions are based on the retributive purpose of punishment: a purpose met by the imposition of the custodial sentence itself and taken into account in the determination of the date of release. ‘Administrative’ decisions are governed by the Prison Act in which the legislator had clearly entrenched a unitary resocialisation purpose of prison administration.⁸³

In addition, the academy argued that the decision of the Federal Council to withdraw their proposed amendment in 1988 reconfirmed the legislator’s original intention that the Prison Act entrench a unitary purpose. Given this clear legislative intention it was proposed that the controversial line of cases were *contra legem*. In particular the FCC’s 1983 decision was branded as undermining the doctrine of parliamentary sovereignty by reading into the Prison Act that which the legislature had expressly intended to exclude. Moreover, academics pointed to the dissenting opinion in this judgement and argued that it was too weak to undermine the clear and ongoing commitment of the FCC to the ‘constitutional resocialisation principle’.⁸⁴

Entscheidungen’ (1987) *MschrKrim* 167; H Schüler-Springorum ‘Tatschuld im Strafvollzug’ (1989) *StV* 262; F Arloth ‘Strafzwecke im Strafvollzug’ (1988) *GA* 403; F Arloth ‘Aufgaben des Strafvollzugs’ (1990) *ZfStrVo* 329; G Bemmman ‘Im Vollzug der Freiheitsstrafe soll der Gefangene fähig werden, künftig in sozialer Verantwortung ein Leben ohne Straftaten zu führen’ (1988) *StV* 549; H Schwind et al *10 Jahre Strafvollzugsgesetz: Resozialisierung als alleiniges Vollzugsziel?* (Kriminalistik Verlag Heidelberg 1988); A Böhm ‘Strafzwecke und Vollzugsziele’ in M Busch and E Krämer, (edd), *Strafvollzug und Schuldproblematik* (Centaurus Pfaffenweiler 1988) 129; A Böhm ‘Vollzugslockerungen und offener Vollzug zwischen Strafzwecken und Vollzugszielen’ (1986) *NStZ* 201; W Vorndran ‘Zur kriminalpolitischen Situation des Strafvollzugs’ in Gesellschaft für Rechtspolitik, Trier *Bitburger Gespräche, Jahrbuch 1986/2* (Beck München 1986) 1; C Mitsch *Tatschuld im Strafvollzug* (Doctoral Dissertation Frankfurt am Main 1990); H Müller-Dietz ‘Die Aufgaben des Strafvollzugs - kritisch gesehen’ (1985) *ZfStrVo* 212; H Müller-Dietz ‘Schuldschwere und Urlaub aus der Haft’ (1984) *JR* 353; H Müller-Dietz ‘Strafvollzug, Tatopfer und Strafzwecke’ (1985) *GA* 147; P Meier-Beck ‘Schuld und Generalprävention im Vollzug der Freiheitsstrafe’ (1984) *MDR* 447; W Hill ‘Tatschuld und Strafvollzug: Analyse eines Beschlusses des Bundesverfassungsgericht’ (1986) *ZfStrVo* 139.

⁸³ See ch. 1, pp. 43–46 where the distinction between ‘status’ and ‘administrative’ decisions is explained.

⁸⁴ K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 72; P Meier-Beck ‘Schuld und Generalprävention im Vollzug der Freiheitsstrafe’ (1984) *MDR* 447; W Hill ‘Tatschuld und Strafvollzug: Analyse eines Beschlusses des Bundesverfassungsgericht’ (1986) *ZfStrVo* 139; H Müller-Dietz

The outcome of this controversy was that an exceptional and small category of offenders sentenced to life for extremely heinous crimes had their right to resocialisation weakened.⁸⁵ Nevertheless the view that paragraph 2 entrenches a unitary resocialisation purpose for prison administration in general remains that of the majority in the legal community.⁸⁶ As Kaiser states: ‘of 19 Higher Regional Courts only 5 have had the opportunity to make explicit statements on this issue, while - as far as can be seen - State prison administrations apply the relevant administrative guidelines in line with the overwhelming academic opinion on this matter’.⁸⁷ Notwithstanding, the controversy is instructive for a number of reasons. First, it revealed the fragility of the political consensus around the unitary entrenchment of the resocialisation purpose. Secondly, it highlighted the powerful role of the academy in the ongoing development of prison law and policy and in the reinforcement of the ‘constitutional resocialisation principle’. Thirdly, it demonstrated how recourse to constitutional principles strengthened the academy’s position and thereby provided a normative compass in the turbulent world of penal politics.

2.2 The guiding principles of prison administration

Reformers of the Prison Act were particularly concerned to see the creation of administrative guidelines aimed at countering the damaging institutional effects of imprisonment and the entrenched culture of prison administration. This reform aim is signalled in the ‘guiding principles of prison administration’ (*Gestaltung des Vollzuges*) which are set out under paragraph 3 Prison Act. These stipulate that:

- (1) Life in prison should, as far as possible, reflect the general relationships of the outside world.
- (2) Administrators should work to limit the damaging effects of imprisonment.
- (3) The administration of prison is to be aimed at assisting the prisoner to adapt to life in freedom.

‘Schuldschwere und Urlaub aus der Haft’ (1984) *JR* 353; H Müller-Dietz ‘Strafvollzug, Tatopfer und Strafzwecke’ (1985) *GA* 147; H Beckmann ‘Anmerkung’ (1984) *StV* 165.

⁸⁵ M Walter *Strafvollzug* (2nd edn Boorberg Stuttgart 2000) 58 mn 58; Feest § 11 mn 5; Schwind/Böhm §13 mn 43.

⁸⁶ Schwind/Böhm § 2 mn 6; Callies/Müller-Dietz § 2 mn 1f.; Feest § 2 mn 6; K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 72; M Walter *Strafvollzug* (2nd edn Boorberg Stuttgart 2000) 89; G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 145; RP Calliess *Strafvollzugsrecht* (Beck München 1992) 28, 31.

⁸⁷ G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 145.

The paragraph has been interpreted as establishing three guiding principles. The first ‘adjustment’ principle (*Angleichungsgrundsatz*), obliges administrators to organise prisons in such a way that the difference between the prison institution and the outside world is no greater than is absolutely necessary. The second, ‘counter measures’ principle (*Gegensteuerungsgrundsatz*) places a duty on administrators to work against the negative effects of imprisonment. The third, ‘integration’ principle (*Integrationsgrundsatz*) compels the administration to design the prison regime in order to reintegrate the prisoner into society.⁸⁸ It is argued that these principles do not give rise to directly enforceable prisoners’ rights, but are broad guidelines on the general behaviour of prison administrators, basic minimum standards on the treatment of prisoners and criteria for the interpretation and application of further provisions in the Act.⁸⁹

While its broad drafting has led to varied interpretation,⁹⁰ the substantive aim of paragraph 3 Prison Act is in general argued to be two-fold: to promote a humane prison environment and to counter the negative effects of ‘total institution’⁹¹ culture.⁹² With respect to the former aim, the standards reinforce the protection of the prisoner’s human dignity (Article 1 (1) Basic Law) and intimate sphere (Article 2 Basic Law).⁹³ With respect to the latter aim, the obligations on the prison administration raised by paragraph 3 are viewed as limiting the prisoner’s loss of personal autonomy and privacy; learnt helplessness; sensory, sensual, emotional and material deprivation; loss of future perspective and prison acculturation or sub-acculturation.⁹⁴ In particular, paragraph 3 is viewed as a counter to the security consciousness of the prison administration.⁹⁵ The Courts have been influenced by the academic interpretations of paragraph 3. They have used paragraph 3 to impose duties on prison officers to: knock before entering the prisoner’s cell unless the risk to

⁸⁸ Callies/Müller-Dietz § 3 mn 1f.

⁸⁹ Feest §3 mn 1f; K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 70; Callies/Müller-Dietz § 3 mn 2; Schwind/Böhm § 3 mn 1.

⁹⁰ F Arloth ‘Der Angleichungsgrundsatz des § 3 Abs. 1 StVollzG: Gestaltungsprinzip oder Leerformel?’ (1987) *ZfStrVo* 328.

⁹¹ E Goffmann ‘On the Characteristics of Total Institutions: the Inmate World’ in D Cressey *The Prison: Studies in Institutional Organisation and Change* (Holt, Rinehart and Winston New York 1961).

⁹² Callies/Müller-Dietz § 3 mn 1; K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 70ff; Feest §3 mn 1f.

⁹³ ‘Der Angleichungsgrundsatz des § 3 Abs. 1 StVollzG: Gestaltungsprinzip oder Leerformel?’ (note 90 above); Callies/Müller-Dietz § 3 mn 7f; Feest §3 mn 5; K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 71.

⁹⁴ Callies/Müller-Dietz § 3 mn 1; K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 70ff; Feest §3 mn 3f.

security is so high as to make not doing so unavoidable,⁹⁶ avoid the general use of spy holes in prison cell doors,⁹⁷ and provide casual, non-institutional, clothing for use in the prisoner's free time.⁹⁸ They have not as yet picked up on the suggestion of commentators, however that paragraph 3 places duties on prison guards to avoid using an authoritarian tone when addressing prisoners and to provide proper crockery instead of the commonly used tin and plastic variety.⁹⁹

Equally, where prisoners' rights enshrined in the Act are subject to the discretion of the prison administration, the guiding principles of paragraph 3 create a presumption in favour of granting these rights. The courts have relied heavily on paragraph 3 to reinforce the prisoner's discretionary right¹⁰⁰ to furnish his cell with his own possessions where the prison administration has maintained that these either involve undue administrative burdens or might present risks to security.¹⁰¹ In addition, paragraph 3 is said to reinforce the Act's prison regime relaxation and 'outlet measures', rights to information and general access to the outside world (media, telephone, correspondence).¹⁰² Moreover, courts have relied on paragraph 3 in emphasising the importance on accommodating prisoners near to their homes.¹⁰³ Finally, paragraph 3 has been used to reinforce the prison administrator's duty to 'encourage' prisoners to make use of therapeutic counselling opportunities, alongside occupational therapy, vocational training, further education possibilities and social assistance.¹⁰⁴

⁹⁵ Callies/Müller-Dietz § 3 mn 3; *LG Frankfurt* (1987) *StV* 301.

⁹⁶ *LG Bielefeld* (1986) *NStZ* 189; *OLG Celle* (1993) *StV* 488; *OLG Saarbrücken* (1993) *NStZ* 207; B Schaaf 'Anklopfen an Haftraumtür vor Betreten durch Vollzugsbedienstete' (1994) *ZfStrVo* 145.

⁹⁷ *BGH* (1991) *NStZ* 452f; *OLG Koblenz* (1991) *NStZ* 54; *OLG Hamm* Beschl. v. 11.6.1987–1 Vollz (Ws) 140/87; *KG* Beschl. v. 7.7. 1989–5 Ws 83/88 Vollz.

⁹⁸ Prison Act, § 20, *OLG Celle* (1978) *ZfStrVo* 20.

⁹⁹ Callies/Müller-Dietz § 3 mn 1.

¹⁰⁰ Prison Act, § 19.

¹⁰¹ CD Player and Radio: *OLG Celle* v. 20.3. 1981–3 Ws 498/80 [StrVollz]; *OLG Frankfurt* (1989) *ZfStrVo* 245; Pets: *OLG Saarbrücken* (1994) *ZfStrVo* 1994 See also E Vogelgesang 'Kleintierhaltung in Strafvollzug' (1994) *ZfStrVo* 67; Reading Lamp: *OLG Celle* (1981) *NStZ* 238; Day Blanket: *OLG Koblenz* (1979) *ZfStrVo* 85; Daily Newspaper: *OLG Nürnberg* (1993) *ZfStrVo* 116.

¹⁰² Prison Act, §§ 11, 13, 15, 23, 24, 32, 33, 36, 68, 69. See *OLG Celle* (1985) *StV* 333; *OLG Hamm* *NStZ* (1985) 189.

¹⁰³ *OLG Hamm* (1985) *NStZ* 573.

¹⁰⁴ Callies/Müller-Dietz § 3 mn 3ff; Feest §3 mn 4ff; K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 77; *LG Lüneberg* (1983) *StV* 24.

Despite the significant number of decisions drawing on paragraph 3 commentators continue to express dissatisfaction.¹⁰⁵ Arguing, that there has not yet been ‘systematic interpretation’ of prison administrative discretion ‘in the light of these principles’,¹⁰⁶ the academy continues to urge courts to utilise these principles more frequently as a means of guiding prison administrative discretion.

2.3 The legal status of the prisoner

The Prison Act was not only designed to fulfil the ‘constitutional resocialisation requirement’ and to vindicate prisoners’ rights to resocialisation, but also to protect the negative aspect of prisoners’ basic rights and the allied imperatives of the *Rechtsstaatsprinzip*. It was clear however that a central tension between prisoners’ negative freedoms (*Abwehrrechte*) and the authorities power to limit basic rights (*Eingriffsbefugnisse*) required resolution. While prison authorities were given a legitimate basis for basic rights infringements by the ‘constitutional resocialisation requirement’, it remained moot to what extent such limitations could be made. Resocialisation could theoretically involve highly invasive measures. How then, was this invasive potential to be limited in line with the protection of prisoners’ basic rights and in accordance with the principles of the *Rechtsstaatsprinzip*?¹⁰⁷

Equally, it was unclear to which extent prison authorities could limit basic rights on other institutional grounds such as security, discipline and order. In sum, it remained to be clarified where the line would be drawn between constitutionally justified State coercion and constitutional protection of individual rights. These tensions are reflected in paragraph 4 which sets out both the ‘social integration status’ (paragraph 4 (1)) and ‘negative rights status’ (paragraph 4 (2)) of the prisoner.¹⁰⁸ In this provision the groundwork for the careful, if precarious, balance between the empowering and invasive elements of the Act is laid out. Commentators and courts continue to strive towards the proper achievement of this balance.

¹⁰⁵ W Lesting ‘Normalität ins Gefängnis? Zum Umgang der Gerichte mit sozialwissenschaftlichen Erkenntnissen’ (1988) *ZfRSoz* 259.

¹⁰⁶ M Walter *Strafvollzug* (2nd edn Boorberg Stuttgart 1999) 375.

2.3.1 The voluntary co-operation requirement

In paragraph 4 (1) the Act attempts to limit the coercive potential of resocialisation by stipulating that:

The prisoner works with the authorities on the shaping of his treatment and on the achievement of the prison administration aim. His readiness to do so is to be stimulated and encouraged.

Commentators argue that the primary aim of this paragraph is to entrench the prisoner's **active** participation in his own treatment and in the realisation of the resocialisation aim: what Callies/Müller-Dietz refer to as a *Mitwirkungsnotwendigkeit* (voluntary co-operation necessity).¹⁰⁹ Alongside the practical benefits to be gained from the prisoner's active co-operation in the treatment process, the 'co-operation necessity' is viewed as upholding the constitutional protection of the prisoner's free will in that it makes him the subject, as opposed to the object, of his 'treatment'.¹¹⁰

The word 'treatment' is undefined in the Act, but in line with the Report of the Select Committee for Criminal Law Reform, is commonly taken to include 'particular therapeutic and general administration measures which, through education and training, advice on personal and financial problems and participation in the common purposes of the prison, draws the prisoner into social and economic life and serves the removal of criminal inclinations'.¹¹¹ From this definition it is fair to say that 'treatment' represents all measures aimed at the realisation of the prisoner's resocialisation. 'Treatment' and 'resocialisation' are therefore indistinguishable and equally broadly defined.¹¹²

Such broad definitions were seen by the Select Committee for Criminal Law Reform and most subsequent commentators as both realistic and desirable. They are meant to stimulate the scientific development of new treatment measures, while recognising the

¹⁰⁷ See ch. 1, pp. 52–56.

¹⁰⁸ See also ch. 1, p. 56.

¹⁰⁹ Callies/Müller-Dietz § 4 mn 5.

¹¹⁰ Callies/Müller-Dietz § 4 mn 3. See also ch. 1, p. 52–56.

¹¹¹ *Bericht und Antrag des Sonderausschusses für die Strafrechtsreform zu dem von der Bundesregierung eingebrachten Entwurf eines Gesetzes über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung - Strafvollzugsgesetz* (BT 7/3998) 45.

¹¹² H Jung 'Behandlung als Rechtsbegriff' (1987) *ZfStrVo* 38.

flowing and dynamic nature of research and the need for broad professional discretion and personalised treatment. As Heike Jung correctly points out, however, such imprecision precludes the characterisation of ‘treatment’ or ‘resocialisation’ as legally practicable concepts and make them problematic for the purpose of defining the limitations of basic rights.¹¹³ In particular, such terms are said to run counter to the constitutional ‘clarity principle’.¹¹⁴

In the face of this legal imprecision, and in light of the potential force which can be brought to bear in closed institutions such as prisons in the name of resocialisation or treatment, commentators insist that treatment should be viewed as an ‘offer’ and not as an imposition.¹¹⁵ Only in this way is the prisoner’s free will respected in line with Articles 1 (1) and 2 (1) and the ‘essence guarantee’ of Article 19 (1) of the Basic Law. Most commentators therefore promote the view of resocialisation as ‘*Angebotsresozialisierung*’ (offer-resocialisation)¹¹⁶ or ‘*Chancenvollzug*’ (prison administration offering chances).¹¹⁷ This is an approach best characterised by Ostendorf’s maxim that ‘we do not punish to resocialise, rather when we already have to punish then we try to resocialise’.¹¹⁸ Central to *Angebotsresozialisierung* is the avoidance of imposing coercion on the prisoner to co-operate. For this reason academic commentary,¹¹⁹ parliamentary reports¹²⁰ and case law,¹²¹ interpret paragraph 4 (1) as deliberately **avoiding** a duty on the prisoner to work with the authorities in the process of his treatment. Rather, paragraph 4 (1) is said to place a duty on the prison authorities to ‘stimulate and encourage’, but not to force, the prisoner’s

¹¹³ ‘Behandlung als Rechtsbegriff’ (n 112 above).

¹¹⁴ See ch. 1, p. 52–56.

¹¹⁵ Feest § 4 mn 3; Callies/Müller-Dietz § 4 mn 6; ‘Behandlung als Rechtsbegriff’ (n 112 above); B Haffke ‘Gibt es ein verfassungsrechtliches Besserungsverbot’ (1975) 4/5 *MschKrim* 246, 251; H Ostendorf *Kommentar zum Jugendgerichtsgesetz* (Luchterhand Neuwied 1987) § 91 mn 11. See on the other hand Schwind/Böhm § 4 mn 7, who argue that it is not enough merely to ‘offer’ resocialisation as many prisoners lack the motivation to make use of such a possibility.

¹¹⁶ Feest § 2 mn 10; *Kommentar zum Jugendgerichtsgesetz* (n 115 above) § 17 mn 11.

¹¹⁷ Callies/Müller-Dietz § 4 mn 6.

¹¹⁸ *Kommentar zum Jugendgerichtsgesetz* (n 115 above) § 91 mn 11.

¹¹⁹ Callies/Müller-Dietz § 4 mn 3; Feest § 4 mn 5; G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 163; K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 83.

¹²⁰ *Bericht des Sonderausschusses für die Strafrechtsreform* (n 111 above) 6; *Protokolle der Sitzungen des Sonderausschusses für die Strafrechtsreform in Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden maßregeln der Besserung und Sicherung* (Deutscher Bundestag Abteilung Wissenschaftliche Dokumentation Parlamentsarchiv Veröffentlichte Materialien 1976) 1969.

¹²¹ *OLG Nürnberg* (1980) *ZfStrVo* 250; *OLG Celle* (1980) *ZfStrVo* 184.

readiness to co-operate.¹²² In general, therefore, the prisoner's failure actively to co-operate cannot be punished by disciplinary sanctions or indirect means such as loss of home leave. Moreover, the prisoner's permission is required by the Act with respect to regime relaxation measures, therapeutic treatment, further education and/or training, work in a private business, or carrying out a sentence in open prison.¹²³

However, the prisoner does not have the right to be left alone.¹²⁴ This is reflected in provisions markedly out of sync with the 'co-operation necessity'. For one, the prisoner is under a duty to work which is explicitly justified on resocialisation grounds.¹²⁵ Expressly permitted under Article 12 (3) Basic Law,¹²⁶ the duty to work, and the use of disciplinary sanctions in response to a failure to fulfil it, has been upheld by the Constitutional and lower courts.¹²⁷ Commentators are critical of the work duty. They argue that it contradicts the tenor of paragraph 4 (1) Prison Act and, due to its humiliating and de-motivating effects, endangers the basic commitment to resocialisation in the Act. Equally, the work duty is said to undermine the constitutional protection of the prisoner's free will and the prohibition on making the prisoner the object of State action.¹²⁸ Callies/Müller-Dietz have attempted to ameliorate the coercive implications of paragraph 41 (1) Prison Act by arguing that paragraph 4 (1) places an additional duty on prison officers to strive to obtain the voluntary co-operation of prisoners in their fulfilment of the duty to work.¹²⁹ Such subtle interpretations, however, cannot resolve the essential tension between the Act's stated commitment to 'voluntary co-operation' and the duty on the prisoner to work. Given the doubtful nature of the work duty, it is to be welcomed that the Constitutional Court has recently intervened to improve prisoner pay on the grounds that inadequate remuneration for prison work contradicts the 'constitutional resocialisation principle'.¹³⁰

¹²² Schwind/Böhm § 4 mn 7.

¹²³ Prison Act, §§ 9 (1), 10 (1), 11 (2).

¹²⁴ Schwind/Böhm § 4 mn 4.

¹²⁵ Prison Act, §§ 37 (1), 41 (1).

¹²⁶ Basic Law, Article 12 (3) states: 'Forced labour may only be imposed on people deprived of their liberty by court sentence'.

¹²⁷ Callies/Müller-Dietz § 41 mn 2; *BVerfG Beschl.* (1998) *NJW* 3337.

¹²⁸ Feest § 41 mn 1–6.

¹²⁹ Callies/Müller-Dietz § 41 mn 2.

¹³⁰ *BVerfG Beschl.* (1998) *NJW* 3337. See further p. 132f below.

Additional problems with respect to the ‘voluntary co-operation’ requirement are raised by the ambiguous wording of paragraph 101 Prison Act which carefully side-steps a prisoner’s right to refuse medical treatment or examination. Drafted at the time of the Baader-Meinhof hunger strikes, paragraph 101 represents an unsatisfactory compromise between recognition of the prisoner’s rights to self-determination and political protest and the Social State duty to provide medical care for prisoners.¹³¹ While the paragraph holds that the State’s duty to forcibly treat a dying prisoner no longer exists where the prisoner can consciously resist, it avoids a right on the prisoner’s part against such treatment in general. Furthermore, a State’s duty forcibly to treat prisoners does exist where they are unconscious and unable to express their position on the matter. The vagueness of the provision has been justified on the grounds that the doctor performing the treatment would have to make the final decision according to her own professional ethical position. Nevertheless, it remains evident that prisoners can be treated without their ‘voluntary co-operation’ or permission.¹³² Given this possibility, Bemann argues that the provisions in paragraph 101 are ‘incompatible with the prisoner’s right to self-determination’.¹³³

Finally, paragraph 4 (1) does not help prisoners whose rights to resocialisation are limited by the resocialisation requirement. Thus, prisoner consent is not required where they are transferred to another prison,¹³⁴ their visiting and correspondence rights are limited¹³⁵ or their access to newspapers and possessions are curtailed,¹³⁶ on the grounds of enhancing their resocialisation. In these cases, the ‘co-operation necessity’ is said to be meaningless.¹³⁷ In sum, while paragraph 4 (1) Prison Act attempts to reconcile the invasive elements of resocialisation with the fundamental protection of the prisoner’s free will, the balance is undermined by paragraphs 43, 101 Prison Act and the powers of special rights restriction afforded by resocialisation under further provisions of the Act. Thus, commentators have argued that the Act’s stated commitment to the protection of the free will of the prisoner might have been better served if it had contained no grounds for limitations of rights, or the creation of prisoner duties, on the grounds of

¹³¹ J Wagner ‘Die Neuregelung der Zwangsernährung’ (1976) *ZRP* 1; Callies/Müller-Dietz § 101 mn 2.

¹³² Feest § 101 mn 4.

¹³³ G Bemann ‘Strafvollzug im sozialen Rechtsstaat’ in G Bemann and I Manodelakis *Probleme des Staatlichen Strafens unter besonderer Berücksichtigung des Strafvollzugs* (Nomos Baden Baden 1989) 35.

¹³⁴ Prison Act, § 8 (1) (1).

¹³⁵ Prison Act, §§ 25 (2) and 28 (2) (1) .

¹³⁶ Prison Act, §§ 68 (2) and 70 (2) (1) .

resocialisation. Thus calls have continued for Courts to take a highly restrictive view of the powers of rights limitations afforded by resocialisation under the special provisions of the Act. As section 4.3 below will show, the FCC has been sensitive to these concerns.

2.3.2 The prisoner's negative rights status

In paragraph 4 (2) Prison Act the prisoner's negative rights status is regulated:

The prisoner is subject to the limitations of his freedom as outlined in this Act (sentence one). As far as this Act does not include a particular regulation, the prisoner is only liable to further restrictions of his freedom where these restrictions are essential to the maintenance of security or the prevention of a serious disruption of the order of the prison institution (sentence two).¹³⁸

Paragraph 4 (2) sentence one

Paragraph 4 (2) sentence one clearly reflects the *Rechtsstaat* principles of the 'legal proviso' (*Gesetzesvorbehalt*) and 'respect for basic rights' (*Grundrechtsbindung*) by stipulating that prisoners bear all basic rights except where these are expressly limited by the Act.¹³⁹ Paragraph 4 (2) sentence one therefore gives the prisoner the general right to administrative power being executed within the limits of, and in line with, the general aims and specific provisions of the Act, and, importantly, with respect for his basic rights.¹⁴⁰ In this way the provision is an explicit rejection of the 'special authority relationship' (*Besondere Gewaltsverhältnis*) which had, for so long, negated the full basic rights status of the prisoner.¹⁴¹

Paragraph 4 (2) sentence two

Paragraph 4 (2) sentence two was inserted by the special committee of the Federal Council at the last moment. The committee was concerned that the clauses dealing with

¹³⁷ Schwind/Böhm § 4 mn 3.

¹³⁸ The sentence numbers inserted in parentheses are not part of the legislation but are the author's own insertion.

¹³⁹ See ch. 1, p. 38–42 where these concepts are explained.

¹⁴⁰ See also the conclusion of ch. 1 (p. 56) which shows how the administration is bound by the *Rechtsstaatsprinzip* to respect, apply and obey primary statute law.

prison security in the Act were not sufficient to cover all possible circumstances in practice.¹⁴² It therefore insisted on a residual power of rights intervention for extreme circumstances. As a consequence the clause has come to be known amongst the legal community as the ‘anxiety clause’ (*Angstklause*).¹⁴³ On its face, the wording of sentence 2 raises serious problems with respect to the extent of the infringements of prisoners’ basic rights and the extent and nature of the threat to security which could give rise to these infringements. If read broadly it violates the constitutional ‘clarity principle’ and contradicts the Constitutional Court’s stipulation that ‘general clauses’ giving broad powers to infringe upon rights be avoided.¹⁴⁴

Commentators all argue, therefore, for an extremely restrictive interpretation of sentence two. Invoking the principles of ‘constitutional interpretation of statutory law,’ and the *Rechtsstaat* ideal of *in dubio pro libertate*, commentators argue that the clause is only to be invoked as an absolute last resort (*ultima ratio klause*). This means that it can only justify basic rights restrictions where the restriction is ‘essential’ to the maintenance of ‘security and order’ and that the ‘threat to security and order’ must be so grave as to threaten the ‘very function of prison administration’. Moreover it is argued that the clause cannot be used to extend administrative power where the issue at hand has already been regulated by a special provision in the Prison Act. The ‘anxiety clause’ should therefore only be used where a threat to security was **not** foreseen by the Act. On this basis, commentators argue that the ‘anxiety clause’ is superfluous in an Act which already contains a panoply of provisions regulating security and order. In addition, commentators argue that the words ‘security and order’ in this context refer only to the ‘internal security and order of the prison’ and cannot be more broadly interpreted to mean the ‘protection of the public at large’. Finally, they argue that sentence two is to be viewed as secondary to sentence one of paragraph 4 (2) and that the presumption should therefore be in favour of

¹⁴¹ Schwind/Böhm § 4 mn 12. See ch. 1, (p. 39) on the ‘special authority relationship’.

¹⁴² BT-Dr. 7/918, 109.

¹⁴³ Schwind/Böhm § 4 mn 19.

¹⁴⁴ *BVerfGE* 33, 1, 11. See quote on p. 41 of ch. 1.

restricting administrative acts to those specified and regulated by the detailed provisions of the Prison Act.¹⁴⁵

Prison administrators have indeed attempted to use the ‘anxiety clause’ to legitimate rights restrictions not foreseen by the Act, but courts have in general followed the restrictive line of commentators on this issue.¹⁴⁶ This is particularly the case where prison administrators have used paragraph 4 (2) sentence 2 in order to side-step more detailed and restrictive regulations already contained in the Act. Courts have thus stopped prison administrators from using paragraph 4 (2) sentence 2 in order to: introduce glass screens in visits between prisoners, their lawyers and other private visitors;¹⁴⁷ make prisoners wear visible identity cards during their recreation time;¹⁴⁸ sanction a prisoner for work avoidance by excluding him from common recreational activities;¹⁴⁹ stop two prisoners from setting up a common bank account;¹⁵⁰ take obligatory urine samples for the purpose of establishing whether prisoners have taken drugs;¹⁵¹ reject a life-sentenced prisoner’s application to have his wife artificially inseminated with his sperm;¹⁵² impose blanket restrictions on correspondence between prisoners within the same prisons;¹⁵³ impose blanket restrictions on the transfer of low value goods between prisoners which are punishable with disciplinary sanctions;¹⁵⁴ impose a blanket requirement, in the absence of concrete evidence of a threat to security in the individual case, that spy holes on prison doors be left open or that prisoners be restrained from covering such spy holes from the inside of the cell;¹⁵⁵ and entering a prison cell without knocking and without regard for the prisoner’s intimate sphere, the resocialisation purpose (paragraph 2 Prison Act) and the

¹⁴⁵ Callies/Müller-Dietz § 4 mn 16f; Feest § 4 mn 9f; Schwind/Böhm § 4 mn 21f; G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 161ff; K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 94.

¹⁴⁶ Callies/Müller-Dietz § 4 mn 19.

¹⁴⁷ BGH 30, 38; OLG Saarbrücken (1983) NStZ 94; LG Augsburg (1986) ZfStrVo 318; OLG Hamm (1993) ZfStrVo 309; BVerfGE 89, 315.

¹⁴⁸ KG (1981) NStZ 77; OLG Koblenz (1985) ZfStrVo 56.

¹⁴⁹ OLG Nürnberg (1980) ZfStrVo 250.

¹⁵⁰ OLG Nürnberg (1981) ZfStrVo 57.

¹⁵¹ OLG Koblenz (1990) ZfStrVo 51; LG Hamburg (1997) ZfStrVo 108.

¹⁵² LG Bonn (1989) NStZ 138.

¹⁵³ LG Zweibrücken published in OLG Zweibrücken (1984) ZfStrVo 178.

¹⁵⁴ BVerfG Beschl. (1996) StV 499.

¹⁵⁵ BGHSt 37, 380; OLG Saarbrücken (1985) ZfStrVo 374; OLG Hamm (1987) ZfStrVo 368; LG Koblenz (1982) StV 26.

‘adjustment’ principle (*Angleichungsgrundsatz*) of paragraph 3 Prison Act.¹⁵⁶ Despite this substantial record, the courts’ have not always been as restrictive of prison administrative practice as many commentators would have liked. Thus, courts have accepted the prison administration’s use of paragraph 4 (2) sentence 2 in order to: stop a violent prisoner from painting images which glorified violence;¹⁵⁷ stop the commercial delivery of goods to a prisoner in order to avoid a potential fraud being committed;¹⁵⁸ and stop mail connected with a prisoner’s business enterprise which was being run from inside a closed prison.¹⁵⁹ All three of these judgements have been criticised by the academy for side-stepping existing norms, both within the Prison Act itself or within the general criminal law, that regulated the areas in question.¹⁶⁰

Overall, however, the controversial insertion of the ‘anxiety clause’ in paragraph 4 may not have achieved the level of administrative flexibility that the Federal Council would have liked. The academy have overwhelmingly argued, and the courts have predominantly shown, that mere invocation of ‘security and order’ cannot amount to administrative carte blanche in prisons. Paragraph 4 (2) sentence two of the Prison Act cannot be understood therefore outside of the broader legal and constitutional constraints on its interpretation.

2.4 Interim conclusion

The principles contained in paragraph 2–4 Prison Act flesh out the legal conception of the prisoner’s rights status as set out in chapter one.¹⁶¹ They are marked by the legislative trade off, described in chapter two, between the vindication of prisoners’ rights and the concern for administrative flexibility and prison security.¹⁶² It is evident, however, that the legal impact of the principles under paragraphs 2–4 Prison Act can only be measured in the broader context within which they are interpreted. This is a context dominated by

¹⁵⁶ *BVerfG Beschl.* (1996) *NJW* 2643; *OLG Frankfurt* (1995) *StV* 428.

¹⁵⁷ *OLG Nürnberg* (1989) *ZfStrVo* 374.

¹⁵⁸ *OLG Hamm* (1988) *NStZ* 525.

¹⁵⁹ *LG Bonn* (1988) *NStZ* 245.

¹⁶⁰ Calliess/Müller-Dietz § 4 mn 19.

¹⁶¹ See ch. 1, p. 56.

¹⁶² See ch. 2, pp. 79–83.

constitutional principles, entrenched penological ideals and shaped by a distinctive legal community. While the openings in the Prison Act continue to be stretched by those seeking greater administrative flexibility or more punitive treatment of prisoners, there can be little doubt that its constitutional foundations have played a large part in the survival of the Act's foundational principles. In short, the constitutional foundations of the prisoner's legal status have been a crucial element in the face of the legislative ambiguity or generality contained in the Prison Act. In addition, the academy's continued commitment to the reform ideals of the 1970s and their strong interpretative influence contributes in large measure to the longevity of the Act and courts' continuing commitment to its penological and constitutional ideals.

The above elaboration of the principles underpinning the Prison Act, is not intended solely to demonstrate the dynamics of German legal and penal culture, however. The legal meaning of these principles is also central to the protections afforded to prisoners by the special provisions in the Act. This is particularly the case where prisoners' rights are subject to administrative discretion. The following section will attempt to elaborate on some of the issues arising around the implementation and interpretation of the special provisions of the Prison Act.

3. The special provisions of the Prison Act

The Prison Act contains approximately 175 special provisions which regulate the process of prison administration. These special provisions are viewed as the comprehensive and systematic exposition of the substantive foundations laid out in paragraphs 2–4 Prison Act, and are meant to be read purposively in line with these general principles. The provisions regulate the organisation, structure and responsibilities of the different agencies involved in prison administration,¹⁶³ the course of the prisoner's sentence and the rights of prisoners in its administration,¹⁶⁴ the administration of women's prisons,¹⁶⁵

¹⁶³ Prison Act, §§ 154–166. This includes § 160 which places a duty on prison administrators to enable prisoners to participate in, and take co-responsibility for, the organisation of the prison.

¹⁶⁴ Prison Act, §§ 5–75.

¹⁶⁵ Prison Act, §§ 76–80.

security, order and discipline in prisons,¹⁶⁶ the procedures and rights regarding the prisoner's legal redress and informal complaint rights,¹⁶⁷ various specialised forms of prison administration,¹⁶⁸ and the prisoner's rights to social welfare and unemployment insurance.¹⁶⁹

Commentators mostly acknowledge that the special provisions of the Prison Act represent a significant advance for the legalisation (*'verrechtlichung'*) of prison administration and the proper definition of the prisoner's legal status.¹⁷⁰ It is generally agreed that the last 25 years have seen the development of a rich and dynamic body of prison law jurisprudence in Germany. This jurisprudence is said to have strengthened the prisoner's legal status through the detailed clarification of the powers and duties of the prison administration under the Act.¹⁷¹ Yet while the legalisation of prison administration has been advanced by the Act, commentators also express disquiet. Their concern is that the courts' treatment of the Act's special provisions fall short of the broader reform and constitutional ideals underpinning the Act.¹⁷² Much like the debates regarding the interpretation of the Act's foundational principles, penal observers continue to push for the full realisation of the ambitious ideals expressed in the 1970s. The following section will first examine some of the problems identified with the implementation and interpretation of the special provisions of the Prison Act. Thereafter it will examine the response of the FCC to the calls of the penal community.

3.1 Access to justice and legal complaints

The clearest signal of the 'legalisation' of prison administration lies in the Act's strong protection of prisoners' complaint rights. The prisoner has an individual right of informal

¹⁶⁶ Prison Act, §§ 81–107.

¹⁶⁷ Prison Act, §§ 108–121.

¹⁶⁸ Prison Act, §§ 122–153, 167–178.

¹⁶⁹ Prison Act, § 195.

¹⁷⁰ F Dünkel 'Die Rechtsstellung von Strafgefangenen und Möglichkeiten der rechtlichen Kontrolle von Vollzugsentscheidungen in Deutschland' (1996) *GA* 518, 520; G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 107; K Rotthaus 'Die Bedeutung des Strafvollzugsgesetzes für die Reform des Strafvollzugs' (1987) *NStZ* 1.

¹⁷¹ G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 40.

¹⁷² See pp. 125–132 below in detail.

complaint to a Prison Board (*Anstaltsbeirat*),¹⁷³ the prison governor, a representative of the Prison Inspectorate (*Aufsichtsbehörde*) and, in addition, the right to make a formal complaint about the conduct of officials (*Dienstaufsichtbeschwerde*) to the prison authorities.¹⁷⁴ Moreover, the prisoner's constitutional right¹⁷⁵ to petition members of State and Federal Parliaments as well as the European Commission for Human Rights is tacitly acknowledged in the Act that protects such petitions, alongside all legal correspondence, from surveillance by prison authorities.¹⁷⁶

The prisoner's informal complaint rights have, in general, been seen as a success. According to a survey done in Nordrhein-Westfalen up to one third of these complaints are successful.¹⁷⁷ A broad range of complaints can be brought through these informal procedures. Prisoners' concerns need not be specifically related to a breach of a rule under the Prison Administration Act, but can encompass suggestions, wishes and complaints of a broader kind relating not only to administrative action in breach of the Act, but also the general behaviour of prison officers. These internal complaint procedures have therefore been praised by commentators for their potential as an informal means of resolving disputes.¹⁷⁸

Informal complaint mechanisms are supplemented by the right of individual complaint to a court and the right to a legal remedy.¹⁷⁹ Where prisoners individual rights have been violated, they can challenge the execution, refusal or omission of a measure relevant to the individual case.¹⁸⁰ Prisoners can ask the court for relief from a measure (*Anfechtungsantrag*),¹⁸¹ to enforce a measure which has been refused (*Verpflichtungsantrag*),¹⁸² to enforce an omitted measure (*Vornahmeantrag*),¹⁸³ to prevent the enforcement or repetition of a measure (*Unterlassungsantrag*) and to declare a

¹⁷³ Prison Act, § 164.

¹⁷⁴ Prison Act, § 108.

¹⁷⁵ Basic Law, Article 17.

¹⁷⁶ Prison Act, § 29.

¹⁷⁷ F Dünkel, 'Die Rechtsstellung von Strafgefangenen und Möglichkeiten der rechtlichen Kontrolle von Vollzugsentscheidungen in Deutschland' (1996) *GA* 524.

¹⁷⁸ G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 249.

¹⁷⁹ Prison Act, § 109 (2).

¹⁸⁰ Prison Act, § 109 (1) Sentence 1.

¹⁸¹ Prison Act, §§ 109 (1) sentence 1; 115 (2) sentence 2.

¹⁸² Prison Act, § 109 (1) sentence 2.

¹⁸³ Prison Act, §§ 109 (1) sentence 2; 113.

measure illegal where it has already been enforced (*Feststellungsantrag*).¹⁸⁴ Moreover, the Act provides for interim legal protection where this is required.¹⁸⁵ In the first instance, prisoners exercise their legal rights in Prison Courts (*Strafvollstreckungskammern*) which were set up to determine questions of prison administration under the Prison Act.¹⁸⁶ The Prison Court proceeding is conducted without an oral hearing,¹⁸⁷ although the court has the discretion to call an oral hearing where this would clarify the case at hand.¹⁸⁸ Prisoners can appeal the decisions of the Prison Courts in the Criminal Chamber of the Higher Regional Courts. These courts are obliged to grant leave to appeal where the decision would contribute to the general development of prison law or to the uniformity of prison law nationally.¹⁸⁹ If a Higher Regional Courts wishes to deviate from the decisions of other Higher Regional Courts or the Federal Supreme Court then, by law, they must refer the matter to the Federal Supreme Court for clarification.¹⁹⁰ Finally, prisoners have a subsidiary right of complaint to the FCC if they can show that their basic rights have been violated and that they have exhausted all other legal avenues.¹⁹¹

While it is clear that prisoners' access to legal redress is well developed in the Prison Act, observers identify a number of difficulties involved in the enforcement of their substantive rights in the courts. These problems can be characterised as falling into two categories which are mutually reinforcing: a) problems inherent to the legal construction of the Prison Act and in its interpretation b) institutional obstacles to substantive rights enforcement. The following sections will deal with both in turn.

¹⁸⁴ Prison Act, § 115 (3); See in general K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 309.

¹⁸⁵ Prison Act, § 114.

¹⁸⁶ H Müller-Dietz 'Die Strafvollstreckungskammer als besonderes Verwaltungsgericht' in Präsident des Landgerichts Saarbrücken, (ed), *150 Jahre Landgericht Saarbrücken* (Heymanns Köln 1985) 335.

¹⁸⁷ Prison Act, § 115 (1).

¹⁸⁸ Feest § 115 mn 9; Callies/Müller-Dietz § 115 mn 4.

¹⁸⁹ Prison Act, § 116

¹⁹⁰ Constitution of Courts Act, § 121 (2).

¹⁹¹ Basic Law, Article 93 (1) (4a) in connection with Federal Constitutional Court Act, §90 (1).

3.2 Substantive rights enforcement and problems with the Prison Act.

The problem of legal protection in prisons lies less with any deficit in access to courts of law than in the definition of the prisoner's legal rights.¹⁹²

A primary aim of the legislators of the Prison Act was to afford prisoners positive and negative rights which fulfilled the constitutional resocialisation purpose, realised the imperatives of the 'legal proviso' and showed fidelity to the principle of binding basic rights. As chapter two explained however, substantive rights afforded to prisoners were also shaped by State executives who were concerned with administrative flexibility, fiscal restraint and the maintenance of security.¹⁹³ The special provisions in the Act thus embody a trade-off between the ideal of strengthening prisoners' rights and the political imperative of retaining prison administrative discretion. This section will set out how prisoners' substantive rights have been shaped by this legislative trade-off.

The largest part of the Prison Act regulates the relationship between prisoners and the prison administration and sets out all aspects of the prisoner's sentence and daily routine.¹⁹⁴ The precise legal position of the prisoner is set out in detailed regulations concerning the planning of the prison sentence and sentence relaxation measures (Prison Act, paragraphs 5–16); accommodation and diet (Prison Act, paragraphs 17–22); contact with the outside world (Prison Act, paragraphs 23–36); work, education and training (Prison Act, paragraphs 37–52); religious practices (Prison Act, paragraphs 53–55); health services (Prison Act, paragraphs 56–66); recreation (Prison Act, paragraphs 67–70); social services (Prison Act, paragraphs 70–75); security and order (Prison Act, paragraphs 81–93); the circumstances where direct force may be used on prisoners (Prison Act, paragraphs 94–101) and disciplinary offences and sanctions (Prison Act, paragraphs 102–107).

Each of these sections begins with a statement of principle (*Grundsatz*) which assert prisoners' general rights and obligations and/or refers to the foundational principles of the Act or to further constitutional principles. For example, paragraph 23 Prison Act states

¹⁹²F Dünkel 'Die Rechtsstellung von Strafgefangenen und Möglichkeiten der rechtlichen Kontrolle von Vollzugsentscheidungen in Deutschland' (1996) *GA* 518, 524.

¹⁹³ See ch. 2, pp. 79–83.

¹⁹⁴ Prison Act, §§ 5–107.

that ‘the prisoner has the right to communicate and relate with persons outside the prison within the framework of this law. Such communication with persons outside the prison is to be encouraged’. Whilst paragraph 37 Prison Act states that ‘work, occupational therapy, education and training serve in particular the purpose of promoting the prisoner’s capacity to undertake gainful employment after release’. The statement of principle with respect to security and order is a particularly clear example of an attempt to balance the maintenance of security with the protection of the prisoner’s basic rights. This states:

(1) The prisoner’s sense of responsibility for good order and co-existence within the prison is to be instilled and promoted. (2) The duties and limitations placed on the prisoner in pursuit of security and order in the prison should be proportional to their purpose and should not encroach upon the prisoner for longer than is absolutely necessary.¹⁹⁵

These statements of broader principles are followed in each section by detailed provisions setting out a) the specific duties of the prison administration and the administration’s powers of rights intervention (*Eingriffsbefugnisse*) and b) prisoners’ individual duties and rights.

Duties placed on the prison administration give rise to correlative rights for prisoners. For example under paragraph 5 (2) Prison Act it is stated that ‘the prisoner is to be informed about his rights and duties’. Equally, in paragraph 6 Prison Act the prison authorities are obliged to undertake a ‘treatment examination’ of the prisoner and to discuss with the prisoner the content of his ‘sentence plan’ (*Vollzugsplan*). Many of these duties are however subject to discretion resulting in a correlative discretionary right on the part of the prisoner. Thus, paragraph 11 (1) Prison Act states that: ‘In order to relax the regime of the prisoner the following provisions **may** be ordered’.¹⁹⁶ Moreover, the exercise of these duties are often subject to stipulated conditions which will vest the prisoner with a correlative conditional discretionary right. Hence, paragraph 11 (2) Prison Act states that ‘regime relaxation measures may be arranged with the permission of the prisoner when it is not feared that the prisoner will use such measures to escape from prison or misuse such measures in order to commit further crimes’.

‘Powers of rights intervention’ (*Eingriffsbefugnisse*) set out what prison officials may do

¹⁹⁵ Prison Act, § 81.

to prisoners and thereby stipulate the conditions under which prisoners must forbear limitations of their basic rights. For example, paragraph 84 (1) sentence one Prison Act states that ‘the prisoner’s possessions and cell may be searched’. These ‘powers of rights intervention’ are usually subject to limitations which vest prisoners with correlative rights. Thus, paragraph 84 (1) sentence two and three of the Prison Act state that: ‘the search of male prisoner cells is to be conducted by men, the search of female prisoner cells to be conducted by women. A sense of shame is to be spared.’ Other ‘powers of rights intervention’ are subject to conditions which also vest prisoners with correlative rights. Hence, paragraph 84 (2) sentence one Prison Act states: ‘only where there is a danger arising out of delay, or on the order of the prison governor in the individual case, is it permissible to undertake a full body search of the prisoner’.

Prisoners’ duties are expressed in unambiguous terms. For example, paragraph 41 sentence one Prison Act states that ‘the prisoner is under an obligation to undertake work, occupational therapy or other occupations that he is physically capable of undertaking’. Some of these duties have exemptions attached to them under which prisoners can claim to fall. Thus, paragraph 42 Prison Act sets out the conditions whereby a prisoner can claim exemption from the duty to work.¹⁹⁷ However, most duties are not subject to any such exemptions; particularly those concerning security and order.¹⁹⁸ If, after an oral hearing and a full clarification of the facts of the case,¹⁹⁹ it is established that a prisoner ‘knowingly’ breached any of these duties the prison governor can order a disciplinary sanction against him.²⁰⁰ The Act states that governors must discuss their disciplinary decisions with persons responsible for the treatment of the prisoner,²⁰¹ and that such sanctions are not to be awarded where a warning would suffice.²⁰² Prison governors have a number of sanctions at their disposal, the harshest of which is segregation within the prison of up to four weeks which the Act stipulates can only be imposed in the most severe cases or where disciplinary offences have repeatedly been committed.²⁰³ Arrest is

¹⁹⁶ Emphasis added.

¹⁹⁷ W Pfister ‘Freistellung des Gefangenen von der Arbeitspflicht (§ 42 StVollzG)’ (1988) *NSrZ* 117.

¹⁹⁸ Prison Act, § 82.

¹⁹⁹ Prison Act, § 106 (1).

²⁰⁰ Prison Act, § 102 (1).

²⁰¹ Prison Act, § 106 (2).

²⁰² Prison Act, § 102 (2).

²⁰³ Prison Act, § 103 (2).

executed in solitary confinement, although the prison governor has the discretion to allow prisoners to remain in their own cells.²⁰⁴ All disciplinary sanctions may also be imposed as a whole or in part as suspended sentences of up to 6 months.²⁰⁵ Not included in the list of disciplinary sanctions, however, are any powers to extend the length of the prisoner's sentence.²⁰⁶ Such a power, which is afforded to prison governors in England, would amount to a transgression of the German distinction between rights limitations pursuant to judicial 'status' decisions and rights limitations arising from the 'administrative decisions' of prison officials.²⁰⁷

Finally, a number of provisions are expressed as prisoners' rights and not as duties on the prison administration which give rise to correlative rights. These are expressed in a number of ways. Prisoners may be vested with clear rights (*Rechtsansprüche*). For example, paragraph 28 (1) Prison Act states that 'a prisoner has the right to receive and send an unlimited amount of correspondence'. Such rights are often subject to limitations which afford the prison authorities additional 'powers of rights encroachment'. Thus, paragraph 28 (2) Prison Act states that 'the prison governor can forbid correspondence with particular persons where (1) the security and order of the prison is endangered (2) with persons not included in the family where the correspondence would have a damaging influence on the prisoner's resocialisation. Prisoners might also bear discretionary rights. For example, paragraph 32 Prison Act states that 'a prisoner **may** receive telephone calls and telegrams'. Again, such discretionary rights can be restricted where the prison authorities can show a threat to security and order, or resocialisation. Many other provisions vest prisoners with conditional discretionary rights. Thus, whilst paragraph 13 Prison Act states that 'a prisoner **may** receive leave from prison of up to 21 days a year' this is made conditional on the absence of a 'danger of misuse' on the part of the prisoner. Prisoners' rights might also be qualified by words which give rise to discretion or evaluative leeway. This can be found in paragraph 19 (1) Prison Act which states that the prisoner may furnish his cell 'to an appropriate extent'.

²⁰⁴ Prison Act, § 104 (5), Callies/Müller-Dietz § 104 mn 2.

²⁰⁵ Prison Act, § 104 (2).

²⁰⁶ Callies/Müller-Dietz §103 mn 4.

²⁰⁷ See ch. 1, pp. 43–46.

Some prisoners' rights are subject to 'transitional provisions' (*Übergangsregelungen*).²⁰⁸ This is the case with paragraph 10 (1) Prison Act which creates a 'conditional discretionary right' in favour of placing prisoners in open prisons and then makes this subject to the broad discretion of the administration in a transitional provision. Thus, while paragraph 10 (1) states that the prisoner 'should be placed in an open prison where he gives his consent, fulfils the requirements of open prisons and is therefore not likely to flee from or misuse his environment to commit further crimes', this is subject to transitional provision paragraph 201 No. 1 Prison Act, under which the prisoner can be placed in closed prison on 'accommodation, personnel or organisation grounds'.

The special provisions of the Prison Act are concretised in administrative regulations (*Verwaltungsvorschriften*). These detailed criteria guide prison administrators in the exercise of their discretion under the Act.²⁰⁹ The States have agreed on federally applicable administrative regulations such as the Administrative Guidelines on the Prison Act (*Verwaltungsvorschriften zu Strafvollzugsgesetz*), the Service and Security Guidelines for Prison Administration (*Dienst- und Sicherheitsvorschriften für den Strafvollzug*) and the Prison Standing Rules (*Vollzugsgeschäftsordnung*). In addition, individual States have developed their own detailed internal regulations. A number of these administrative regulations have been criticised for taking a restrictive view of the rights afforded to prisoners under the special provisions of the Act.²¹⁰

To sum up: individual provisions under the Prison Act provide prisoners with differing degrees of legal protection. They might provide clear rights, discretionary rights, conditional discretionary rights and qualified discretionary rights. Moreover some of these rights are subject to transitional provisions which afford further layers of administrative discretion and thus weaken the prisoner's legal position. In addition, administrative guidelines which supply detailed guidance on the special provisions in question might also take a restrictive view of the prisoner's right in question. In the absence of a clear right, the prisoner's legal position depends on the extent to which the

²⁰⁸ See ch. 2, p. 82.

²⁰⁹ There are two types of provisions: interpretive guidelines (*Auslegungs-richtlinien*) and discretion guidelines (*Ermessensrichtlinien*). H Müller-Dietz 'Die Rechtsprechung der Strafvollstreckungskammern zur Rechtsgültigkeit der VVStVollzG' (1981) *NStZ* 409, 417.

²¹⁰ K Koepsel 'Das Vollzugskonzept des Strafvollzugsgesetzes und seine Veränderung durch Verwaltungsvorschriften und Erlasse der Landesjustizverwaltungen' (1992) *ZfStrVo* 46.

courts will check the discretion of the prison administration. The following section will provide a brief elaboration on the legal principles involved in the judicial control of prison administrative discretion in Germany.

3.2.1 The control of discretion and ‘evaluative leeway’

Under German law discretion can arise in two forms. Either as discretion (*Ermessen*) or as what Germans call ‘evaluative leeway’ (*Beurteilungsspielraum*). The distinction flows from the German conception of the structure of a statutory norm. Under this conception, a norm is divided between the statutory conditions for administrative action (*Tatbestand*) and the legal consequences of these statutory conditions (*Rechtsfolge* *seiner Norm*). Where a legal term is included in the legal consequences of the statutory conditions (*Rechtsfolge* *seiner Norm*), and where this term gives rise to the possibility of an administrative decision being made (e.g. ‘can’ or ‘may’), a measure of administrative discretion will be said to arise.²¹¹ Where an indeterminate legal term (*Unbestimmte Rechtsbegriff*) is included in the statutory conditions for administrative action (*Tatbestand*) the court can either claim full judicial control over the interpretation of this term and the substance of the decisions made pursuant to it or it might decide that a measure of ‘evaluative leeway’ has arisen on the part of the administrator over which the court has more restricted control.²¹²

A significant number of Prison Act provisions contain indeterminate legal terms which form part of the conditions for administrative action. These either qualify prisoners’ rights or make their enforcement conditional. Many of these terms and the decisions made pursuant to them have been subjected to the full control of the courts. This includes all of the indeterminate legal terms included in ‘powers of rights restriction’ as well as many provisions affording qualified or conditional rights.²¹³ But the Federal Supreme Court has decided that ‘evaluative leeway’ arises where an indeterminate legal term requires an administrative prognosis or predictive evaluation of facts which could give rise to a

²¹¹ See H Maurer *Allgemeines Verwaltungsrecht* (11th edn Beck München 1997) 119–129.

²¹² *Allgemeines Verwaltungsrecht* (note 211 above) 129–139.

²¹³ Feest § 115 mn 33; Schwind/Böhm § 115 mn 21; Calliess/Müller-Dietz § 115 mn 18; D Justen *Unbestimmte Rechtsbegriffe mit ‘Beurteilungsspielraum’ im Strafvollzugsgesetz* (Dissertation Mainz 1995) 70–71.

number of different but, from a legal point of view, equally valid decisions.²¹⁴ This is particularly the case where the decision requires a prognostic evaluation of the likelihood of the prisoner attempting to escape or abusing his freedom to commit further crimes (*Mißbrauchsgefahr*). Courts have thus held that ‘evaluative leeway’ arises in decisions to place a prisoner in an open prison,²¹⁵ grant a regime relaxation measure,²¹⁶ grant a prisoner leave from prison,²¹⁷ or to place a prisoner under exceptional security measures.²¹⁸ Furthermore, ‘evaluative leeway’ is said to arise in deciding whether to segregate a prisoner during work hours,²¹⁹ in determining the ‘appropriate extent’ to which a prisoner can spend his own money²²⁰ and in determining whether a prisoner is suitable for further education or training.²²¹

The principles governing judicial control of discretion and ‘evaluative leeway’ differ slightly. Both forms of discretion allow for restricted judicial scrutiny, although it would be unduly pessimistic to suggest that the prisoner is without legal safeguards in both instances.²²² Where discretion arises the prisoner has a right to the faultless exercise of discretion (*Recht auf fehlerfrei Ermessensgebrauch*) under paragraph 115 (5) Prison Act. This provision states that the court can control whether the decision maker has stayed within the bounds of their legal discretion (*Ermessensüberschreitung*) or whether the decision maker has made a decision which goes outside the ‘statutory purpose’ of the discretion given (*Ermessensfehlgebrauch*). The latter will arise where the decision maker has failed to use their discretion, taken into account irrelevant factual or legal considerations, taken criteria into account which do not reflect the statutory purposes of the norm in question, failed to take into account relevant criteria and/or incorrectly weighed up relevant criteria.²²³ The concept of ‘purpose’ is a broad one, in that it refers both to the purpose of the individual provision and the general purposes of the Prison Act.

²¹⁴ BGHSt 30, 320. This is similar to the collateral fact doctrine in England. See P Craig *Administrative Law* (4th edn Sweet & Maxwell London 1999) 463–465.

²¹⁵ Prison Act, § 10; OLG Karlsruhe (1985) ZfStrVo 245; OLG Frankfurt (1983) ZfStrVo 379.

²¹⁶ Prison Act, § 11; BGHSt 30, 320.

²¹⁷ Prison Act, § 13; BGHSt 30, 320.

²¹⁸ Prison Act, § 88; OLG Saarbrücken (1985) ZfStrVo 58.

²¹⁹ Prison Act, § 17 (3); OLG Nürnberg (1981) NStZ 78.

²²⁰ Prison Act, § 22 (3); BGHSt 35, 101.

²²¹ Prison Act, § 37 (3); OLG Celle (1988) INFO 27.

²²² Schwind/Böhm § 115 mn 22.

²²³ *Allgemeines Verwaltungsrecht* (note 211 above) 124–128.

Thus courts can insist upon the proper consideration of paragraphs 2 and 3 Prison Act in each decision making process.²²⁴ In addition, it is generally accepted that a fault in the exercise of discretion also arises where the decision violates basic rights and general principles of administrative law, in particular the principles of proportionality (*Verhältnismäßigkeitsgrundsatz*) and the constitutional prohibition on arbitrary decision-making (*Willkürverbot*).²²⁵

In the case of ‘evaluative leeway’ under the Prison Act, the Federal Supreme Court has stipulated that the principles regarding the control of discretion under paragraph 115 (5) Prison Act apply. In addition, it has stated that ‘Prison Courts should consider whether the prison official has decided on the basis of a relevant and complete factual base, if the decision-maker has applied appropriate standards and if the decision-maker has stayed within the bounds of their ‘evaluative leeway’. Moreover, it stated that where the court finds that the decision-maker has failed to fulfil any of these conditions it must specify the facts to be taken into account, the standards to be adopted and the legal boundaries of the ‘indeterminate legal term’ and ask the decision-maker to make a new decision on the basis of its instructions. The Federal Supreme Court emphasised that the court must on no account replace the official decision with its own. It took the view that courts were not in a position to make prognostic decisions which involved both ‘objective standards as well as subjective evaluations’.²²⁶ Nevertheless, the decision is said to establish the principle that where ‘evaluative leeway’ arises, judicial scrutiny should be more exacting, and the onus on decision-makers to justify their decisions will be greater, than when discretion arises.²²⁷

When controlling both discretion and ‘evaluative leeway’ the courts will often have to deal with the administrative guidelines relevant to the provision. Under German law all administrative regulations are classified as Internal Law (*Innenrecht*) and, while internally binding on the administration, are not binding on the courts.²²⁸ Thus, strictly speaking,

²²⁴ Feest § 115 mn 50.

²²⁵ *Allgemeines Verwaltungsrecht* (note 211 above) 128; Feest § 115 mn 50.

²²⁶ BGHSt 30, 320, 325 and 327.

²²⁷ B Volckart ‘Anmerkung zu BGHSt 30, 320’ (1982) *NStZ* 174.

²²⁸ K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 12; *Allgemeines Verwaltungsrecht* (note 211 above) 596. On the concept of ‘*Innenrecht*’ see ch. 1, p. 39 note 50.

administrative guidelines are classified as ‘orientation and decision assistance’ only.²²⁹ As a matter of law these guidelines are not meant to be applied generally at the expense of concrete consideration of each individual case (*Einzelfallprüfung*),²³⁰ or in such a way that limits basic rights further than provided by the Act.²³¹ Prisoners can not directly challenge administrative guidelines, however, as court consideration of their conformity with the Prison Act can only be incidental to their control of administrative decisions taken under the Act. Nevertheless, in the process of this incidental check, courts can strike down guidelines which contradict the spirit of the provision or the Act.²³² Finally, it is worth pointing out that the courts’ scrutinising function is reinforced by the duty on prison officials to give a full account of their decision making process.²³³

On the basis of these standards of review, there is substantial scope for the judicial scrutiny of administrative discretion and for the strengthening of the prisoner’s legal position. Courts have not been shy to scrutinise official discretion and ‘evaluative leeway’ and to set out standards clarifying the prisoner’s legal position.²³⁴ Nevertheless, points of criticisms remain. The following section will set these out.

3.2.2 Criticisms of the control of administrative discretion under the Prison Act

In the late 1980s, the penal academy shifted its focus from the protection and maintenance of the foundational principles of the Prison Act to the problem of the legal enforcement of individual prisoners’ rights. Despite the general acceptance that the courts had significantly advanced the prisoner’s legal status under the Prison Act,²³⁵ a number of concerns remained. One of the main concerns has been the courts’ continuing recognition of ‘evaluative leeway’ on the part of the prison administration. Despite the fact that courts have held that the majority of ‘indeterminate legal terms’ in the Act are subject to full

²²⁹ OLG Zweibrücken (1977) *ZfStrVo* SH 13; OLG Saarbrücken (1978) *ZfStrVo* 182; OLG München (1979) *ZfStrVo* SH 25.

²³⁰ OLG Frankfurt (1981) *ZfStrVo* 122; Callies/Müller-Dietz § 2 mn 27.

²³¹ Schwind/Böhm § 4 mn 14.

²³² H Müller-Dietz ‘Die Rechtsprechung der Strafvollstreckungskammern zur Rechtsgültigkeit der VVStVollzG’ (1981) *NStZ* 409.

²³³ Feest § 115 mn 47.

²³⁴ G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 40.

²³⁵ M Walter *Strafvollzug* (2nd edn Boorberg Stuttgart 1999) 373; G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 40.

judicial control,²³⁶ controversy has arisen as regards those provisions where courts have recognised ‘evaluative leeway’ on the part of the prison administration. While some commentators argue that it is necessary to allow prison administrators a measure of evaluative freedom in certain areas,²³⁷ many critics argue that the continued recognition of ‘evaluative leeway’ by the Higher Regional Courts and Federal Supreme Court threaten the ‘de-legalisation’ (*Ver-un-rechtlichung*) of prison administration and thus to undermine the reform aims of the Prison Act.²³⁸ The concern is particularly strong where courts recognise ‘evaluative leeway’ in provisions central to the realisation of the resocialisation aim such as prison leave, regime relaxation and accessibility to open prison.²³⁹ It is argued that despite the exacting standards stipulated by the Federal Supreme Court, Prison Courts and Higher Regional Courts define ‘evaluative leeway’ too generously and are not sufficiently rigorous in their scrutiny of the factual basis upon which decisions are made.²⁴⁰ As a consequence, prison administrators are given ample scope in practice to undermine prisoners’ positive rights to resocialisation and to conceal their reasons for doing so.²⁴¹ The resultant unpredictability which prisoners experience in the vindication of these positive rights is said to exacerbate prisoners’ alienation from the prison administration and to undermine their general readiness to co-operate in their resocialisation.²⁴²

Critics argue that many of the indeterminate legal terms under the Prison Act which are held to give rise to ‘evaluative leeway’ should be made amenable to full judicial supervision.²⁴³ In particular, they point to the contradiction that Prison Courts are required

²³⁶ D Justen *Unbestimmte Rechtsbegriffe mit ‘Beurteilungsspielraum’ im Strafvollzugsgesetz* (Dissertation Mainz 1995) 70–71.

²³⁷ K Laubenthal *Strafvollzug* (2nd edn Springer Berlin 1998) 324; Schwind/Böhm §115 mn 22.

²³⁸ U Kamman ‘Der Beurteilungsspielraum und sein Einfluß auf die Ver-un-rechtlichung des Strafvollzuges’ (1994) *ZRP* 474.

²³⁹ U Dopslaff ‘Abschied von den Entscheidungsfreiräumen bei Ermessen und unbestimmten Rechtsbegriffen mit Beurteilungsspielraum im Strafvollzugsgesetz’ (1988) *ZStW* 567, 567–569.

²⁴⁰ ‘Der Beurteilungsspielraum und sein Einfluß auf die Ver-un-rechtlichung des Strafvollzuges’ (note 238 above), 477; *Unbestimmte Rechtsbegriffe mit ‘Beurteilungsspielraum’ im Strafvollzugsgesetz* (note 236 above) 73–138.

²⁴¹ H Preusker ‘Erfahrungen der Praxis mit dem Strafvollzugsgesetz’ (1987) *ZfStrVo* 11, 14; ‘Der Beurteilungsspielraum und sein Einfluß auf die Ver-un-rechtlichung des Strafvollzuges’ (note 238 above), 476–477.

²⁴² ‘Abschied von den Entscheidungsfreiräumen bei Ermessen und unbestimmten Rechtsbegriffen mit Beurteilungsspielraum im Strafvollzugsgesetz’ (note 239 above) 569.

²⁴³ ‘Abschied von den Entscheidungsfreiräumen bei Ermessen und unbestimmten Rechtsbegriffen mit Beurteilungsspielraum im Strafvollzugsgesetz’ (note 239 above) 585.

by law to make a prognosis on the offenders likelihood of committing further crimes when considering their eligibility for parole under paragraph 57 (1) Penal Code, but are not viewed by the Higher Courts as being capable of making the same prognostic decision as regards prison leave or regime relaxation measures.²⁴⁴ Moreover, it is a matter of concern that Prison Courts are out of line with the growing tendency of administrative law courts to assume full judicial control of indeterminate legal terms and to recognise ‘evaluative leeway’ only in exceptional circumstances.²⁴⁵ This trend has been echoed by the FCC which argues that the density of control over indeterminate legal terms should be higher where basic rights are at stake and that ‘evaluative leeway’ should only be recognised where the decision is so ‘specialised’ or ‘complex’ that its control by a court would not be possible.²⁴⁶ There are therefore ongoing calls for the Prison Courts and Higher Regional Court to come into line with trends in general administrative law on this issue.

In addition, Higher Regional Courts have also come under criticism for failing to take a more active control of discretion and ‘evaluative leeway’ through the assertion of the foundational principles of the Act. As previously indicated, commentators are particularly concerned that courts have not fully utilised the administrative guidelines afforded under paragraph 3 Prison Act.²⁴⁷ On the other hand, the academy has congratulated the Higher Regional Courts and Federal Supreme Court for their readiness to strike down restrictive administrative guidelines, for downplaying the application of these guidelines in the decision making process and for emphasising the importance of full consideration of each individual case (*Einzelfallgerechtigkeit*).²⁴⁸

Finally, there is continued alarm at the ongoing application of ‘transitional provisions’ in the Act. Many of these provisions continue to apply despite the fact that the dates stipulated in these provisions have long since past. It is argued that the realisation of important positive rights of prisoners and thereby the resocialisation aims of the Act have

²⁴⁴ A Böhm ‘Zur ‘Verechtlichung’ des Strafvollzugs’ (1992) *ZfStrVo* 37.

²⁴⁵ *Allgemeines Verwaltungsrecht* (note 211 above) 133–134; ‘Der Beurteilungsspielraum und sein Einfluß auf die Ver-un-rechtlichung des Strafvollzugs’ (note 238 above); G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 174.

²⁴⁶ *BVerfGE* 84, 34 and 59.

²⁴⁷ See pp. 101–104 above.

²⁴⁸ M Walter *Strafvollzug* (2nd edn Boorberg Stuttgart 1999) 376.

been significantly undermined by the continued reliance on transitional provisions by States. Müller-Dietz has thus warned that the prison reform ideals of the 1970s could be ‘ruined’.²⁴⁹

3.3 Institutional obstacles to the enforcement of prisoners’ rights.

3.3.1 Failings of the Prison Courts (*Strafvollstreckungskammern*)

Introduced in 1975 after the success of the specialised Juvenile Courts, the Prison Courts (*Strafvollstreckungskammern*) were touted as a ‘fundamental element of prison reform’.²⁵⁰ They were intended to work in close, yet impartial, co-operation with all elements of the prison institution, display criminological and penological expertise, and provide a constructive conflict resolution forum for prisoners and prison administration.²⁵¹ The courts have, however, failed to fulfil the high expectations of reformers.²⁵² The judges view their work as low status and the courts are too overloaded to deal with any of the cases adequately.²⁵³ A study conducted in 1985 showed that approximately 57% of all prisoners exercise their legal rights at first instance, resulting in the case quota of the smaller Prison Courts being 26 times that of a normal first instance Criminal Court.²⁵⁴ Judicial specialisation is also undermined by the organisation of the court system in which there is a high turnover of prison court judges and where judges are allocated to courts on the basis of need rather than interest. Thus, judges with interest in prison law are often not

²⁴⁹ Calliess/Müller-Dietz § 198 mn 1.

²⁵⁰ H Müller-Dietz ‘Die Strafvollstreckungskammer als besonderes Verwaltungsgericht’ in Präsident des Landgerichts Saarbrücken, (ed), *150 Jahre Landgericht Saarbrücken* (Heymanns Köln 1985) 335.

²⁵¹ G Blau ‘Die Strafvollstreckungskammer’ in H Schwind and G Blau *Strafvollzug in der Praxis* (Walter de Gruyter Berlin 1988) 339; K Rotthaus ‘Die Zusammenarbeit zwischen Justizvollzugsanstalt und Strafvollstreckungskammer’ in H Schwind, (ed), *Festschrift für Günter Blau* (Walter de Gruyter Berlin 1985) 327.

²⁵² ‘Die Zusammenarbeit zwischen Justizvollzugsanstalt und Strafvollstreckungskammer’ (note 251 above); R Northoff ‘Strafvollstreckungskammer: Anspruch und Wirklichkeit’ (1987) *ZfStrVo* 207; H Dünkel, ‘Die Strafvollstreckungskammer - weiterhin ein unbeliebter Torso?’ (1992) *Bewährungshilfe* 196; U Kamann, ‘Der Richter als Mediator im Gefängnis: Idee, Wirklichkeit und Möglichkeit’ (1993) *KrimJ* 13; D Eschke *Mängel im Rechtsschutz gegen Strafvollstreckungs und Strafvollzugsmaßnahmen* (R v Decker’s Heidelberg 1993, 120f.

²⁵³ ‘Strafvollstreckungskammer: Anspruch und Wirklichkeit’ (note 252 above).

²⁵⁴ ‘Strafvollstreckungskammer: Anspruch und Wirklichkeit’ (note 252 above).

allocated to Prison Courts, whereas those who are allocated are often less interested in their role.²⁵⁵

The result is that Prison Court judges tend to process prisoners' applications on a formal basis only, having neither the time, expertise, nor inclination to act as informal prison mediators or to check carefully the substance of each case.²⁵⁶ This tendency is worsened by the fact that the judges make decisions on the papers in the first instance, as no oral hearing is required as a matter of course.²⁵⁷ Moreover, the restrictive interpretation of the higher courts as regards the possibility of substantive control of 'evaluative leeway' has provided a useful excuse for overloaded Prison Courts to take a more hands-off approach where possible.²⁵⁸

Alarm at the above is also fuelled by the fact that prisoners are successful in their applications to Prison Courts in only 5% of cases, with nearly half of these applications failing at the outset for purely formal reasons.²⁵⁹ In addition, it is shown that while 9 out of 10 appeals to the Higher Regional Courts are permitted, only 8% of these applications are successful. As a result, Feest and Selling argue that the overall success rate of prisoners' legal applications is as low as 1%.²⁶⁰ There is some controversy, however, as to how these statistics should be interpreted. Certain commentators argue that the low success rate is due to the shortcomings of the Prison Courts and the permissive approach to 'evaluative leeway' in the Higher Regional Courts.²⁶¹ Others argue that the statistics display the extent to which the prison administration is acting in accordance with the

²⁵⁵ M Walter *Strafvollzug* (2nd edn Boorberg Stuttgart 1999) 385.

²⁵⁶ 'Die Strafvollstreckungskammer - weiterhin ein unbeliebter Torso?' (note 252 above).

²⁵⁷ K Rotthaus 'Der Schutz der Grundrechte im Gefängnis' (1996) *ZfStrVo* 1, 9.

²⁵⁸ U Kamman, 'Die Blindheit der Justitia oder: die reaktionäre Entwicklung im Strafvollzug' (1996) *NK*, 14.

²⁵⁹ U Kamann *Gerichtlicher Rechtsschutz im Strafvollzug: Grenzen und Möglichkeiten der Kontrollen vollzuglicher Maßnahmen am Beispiel der Strafvollstreckungskammer beim Landgericht Arnsberg* (Centaureus Pfaffenweiler 1991) 180f.

²⁶⁰ J Feest and P Selling 'Rechtstatsachen über Rechtsbeschwerden - Eine Untersuchung zur Praxis der Oberlandesgerichte in Strafvollzugssachen' in G Kaiser et al *Kriminologischen Forschung in den 80er Jahren* (MPI Freiburg 1988) 259.

²⁶¹ *Gerichtlicher Rechtsschutz im Strafvollzug: Grenzen und Möglichkeiten der Kontrollen vollzuglicher Maßnahmen am Beispiel der Strafvollstreckungskammer beim Landgericht Arnsberg* (note 259 above) 180f; 'Rechtstatsachen über Rechtsbeschwerden - Eine Untersuchung zur Praxis der Oberlandesgerichte in Strafvollzugssachen' (note 259 above); F Dünkel 'Die Rechtsstellung von Strafgefangenen und Möglichkeiten der rechtlichen Kontrolle von Vollzugsentscheidungen in Deutschland' (1996) *GA* 518, 526.

Prison Act and the guidance of the courts.²⁶² Another factor here is the problem of querulous and litigious prisoners taking advantage of the variety of legal complaint rights available.²⁶³ Nevertheless, the figures have prompted continuing calls for the better protection of prisoners' rights in first instance Prison Courts and Higher Regional Courts.²⁶⁴

3.3.2 Prison administration

Prison administrators, under the auspices of each State administration, are fully bound by the Prison Act. This is a direct outcome of the *Rechtsstaat* principle of 'legality of administration' (*Gesetzmäßigkeit der Verwaltung*).²⁶⁵ Despite this, administrative culture in German prisons remains characterised by widespread institutional resistance to legal regulation.²⁶⁶ This manifests in delayed implementation of legal judgements as well as the hindrance of prisoners' access to avenues of legal redress, in particular interim legal protection. One problem identified here is that the Prison Act does not include administrative law regulations on the enforcement of judgements, but rather refers to Criminal Law Procedure. As a result prison officials cannot be fined where they fail to execute the judgements of the Prison Courts in good time.²⁶⁷ The problem of 'refractory prison officials' (*renitente Strafvollzugsbehörde*) has thus been highlighted by penal observers who are concerned that prisoners' rights are being undermined in this way. Calls continue for increased court vigilance, as well as institutional reforms, regarding the behaviour of refractory prison officials.

²⁶² G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 40.

²⁶³ G Kaiser H-J Kerner and H Schöch *Strafvollzug* (Müller Heidelberg 1992) 251; A Böhm 'Zur Verrechtlichung des Strafvollzugs' (1992) *ZfStrVo* 37, 38.

²⁶⁴ For summaries of these criticisms see M Walter *Strafvollzug* (2nd edn Boorberg Stuttgart 1999) 385; K Laubenthal *Strafvollzug* (2nd edn Springer 1998) 332–333.

²⁶⁵ Explained in more detail in ch. 1, p. 57.

²⁶⁶ See in general: W Lesting and J Feest 'Renitente Strafvollzugsbehörden. Eine rechtstatsächliche Untersuchung in rechtspolitischer Absicht' (1987) *ZRP* 390; J Feest et al *Totale Institutionen und Rechtsschutz* (Westdeutscher Verlag Opladen 1997); U Kammann 'Die Erweiterung des Renitenzbegriffs im Strafvollzug' (1993) *ZfStrVo* 206; T Ullenbruch 'Vollzugsbehörde contra Strafvollstreckungskammer' (1993) *NSiZ* 517.

²⁶⁷ F Dünkel 'Die Rechtsstellung von Strafgefangenen und Möglichkeiten der rechtlichen Kontrolle von Vollzugsentscheidungen in Deutschland' (1996) *GA* 518, 527.

3.3.3 Legal assistance and legal aid

In addition to the problems created by overloaded Prison Courts and ‘refractory prison officials’, observers have identified weaknesses with respect to prisoners’ access to legal information and legal aid. The Prison Act places a duty on prison officials to inform prisoners of their rights and duties.²⁶⁸ The Higher Regional Court of Celle has held that officials must at the very least give a spoken explanation and hand over a copy of the Prison Act to the prisoner.²⁶⁹ Nevertheless, it has been shown that prison officials often fail to fulfil this minimum standard and that prisoners are frequently ill informed.²⁷⁰ These problems have been exacerbated for prisoners who cannot speak German as there are no translated texts of the Prison Act available and often no translators present at interviews.²⁷¹ While prisoners have the right to receive visits from their lawyers at any time,²⁷² their access to legal aid is dependant on the likely success of their case.²⁷³ This often works to the prisoner’s disadvantage in placing a legal claim. In addition, it is commonly acknowledged that German lawyers are uninterested in prison law work due to the low fees involved.²⁷⁴ Given the inequality between the level of legal advice available to prisoners relative to that of the prison administration, critics argue all the more for Prison Courts to assist prisoners in their applications, and if needs be, call an oral hearing for clarification of the claim.²⁷⁵ Needless to say, the tendency for Prison Courts to decline prisoners’ applications on the basis of formal legal errors is viewed as highly problematic in this context.

²⁶⁸ Prison Act, § 5 (2).

²⁶⁹ *OLG Celle* (1987) *NStZ* 44.

²⁷⁰ Feest § 5 mn 10.

²⁷¹ Feest Exkurs II before § 5 mn 7.

²⁷² Prison Act, § 26.

²⁷³ Civil Procedure Code, §§ 114 ff; Prison Act, § 120 (2).

²⁷⁴ ‘Die Rechtsstellung von Strafgefangenen und Möglichkeiten der rechtlichen Kontrolle von Vollzugsentscheidungen in Deutschland’ (note 267 above) 531.

²⁷⁵ Feest § 115 mn 10.

4. The Federal Constitutional Court and the survival of the Prison Act

The ongoing concerns regarding the protection of prisoners' substantive rights have not escaped the attention of the FCC. In contrast to its more tentative line in the 1980s,²⁷⁶ the FCC has taken a highly activist stance since the early 1990s and has attempted to resolve many of the challenges identified by the penal academy. Of the 96 decisions which the FCC has made on the question of prison law since the Prison Act came into force, approximately 70 of these have been passed down over the last 10 years. Unlike the broad based foundational decisions of the 1970s, these more recent decisions have been highly specific attempting to root the individual rights protections of the prisoner in the broader constitutional foundations of the Prison Act. The specificity of these decisions and the activist approach of the FCC has not gone unnoticed. Commentators universally agree that the FCC has made the single most important contribution to the development of prisoners' rights since the Act came into force.²⁷⁷

The FCC has made contributions in a number of different areas that will be dealt with in turn.

4.1 Positive rights and the 'constitutional resocialisation principle'

The FCC has advanced prisoners' positive rights in a number of cases in which it has called upon the 'constitutional resocialisation principle'. The most well known of these is the decision in 1998 on the question of pay for prison work.²⁷⁸ This was a weighty decision in which empirical data was presented, the opinions of leading penologists were heard and the concept of resocialisation and work were discussed in detail.²⁷⁹ The FCC

²⁷⁶ E Niebler 'Die Rechtsprechung des Bundesverfassungsgerichts zum Strafvollzug' in W Fürst, R Herzog and D Umbach, (edd), *Festschrift für Wolfgang Ziedler* (Walter de Gruyter Berlin 1987) 1567.

²⁷⁷ K Rotthaus 'Der Schutz der Grundrechte im Gefängnis' (1996) *ZfStrVo* 3; K Kruis and G Cassardt 'Verfassungsrechtliche Leitsätze zum Vollzug von Straf- und Untersuchungshaft' (1995) *NStZ* 521; K Kruis and G Cassardt 'Fortschreibung der verfassungsrechtlichen Leitsätze zum Vollzug von Straf- und Untersuchungshaft' (1998) *NStZ* 593; M Walter *Strafvollzug* (2nd edn Boorberg Stuttgart 1999) 373; F Dünkel 'Die Rechtsstellung von Strafgefangenen und Möglichkeiten der rechtlichen Kontrolle von Vollzugsentscheidungen in Deutschland' (1996) *GA* 518, 527.

²⁷⁸ *BVerfGE* 98, 169.

²⁷⁹ F Dünkel 'Germany' in F Dünkel and D van Zyl Smit, (edd), *Prison Labour: Salvation or Slavery? International Perspectives* (Dartmouth Aldershot 1999) 77, 81–84.

took the view that the ‘duty to work’ under paragraph 41 Prison Act could only be viewed as an effective means of resocialisation if the work was remunerated in an appropriate manner. While such remuneration need not be financial, it must provide sufficient acknowledgement of the work done so as to reinforce the value of work to the prisoner as a means of forming an independent and crime free life in the future. As a result, the FCC held that paragraph 200 (1) Prison Act, a transitional provision that delayed planned reforms of prison work remuneration, was incompatible with the ‘constitutional resocialisation principle’. It gave the legislature until 31 December 2000 to bring a new law into effect which regulated prisoners’ pay in line with the guidelines provided by the Court. While this decision has been praised for sending a clear signal in favour of the ‘constitutional resocialisation principle’ in a time of increasing punitivism,²⁸⁰ it was not without its critics. The latter seek more radical solutions such as the abolition of the ‘duty to work’ as well as the elimination of other transitional provisions which prevent the full inclusion of prisoners in work and social security insurance.²⁸¹ Notwithstanding, the decision has been hailed as the single most important constitutional decision on prison law since the *Lebach* decision in 1973.²⁸² Moreover it has sent a signal to the States (*Länder*) that continuing reliance on ‘transitional provisions’ in the Act may not be tolerated by the FCC in the future.

Aside from the question of remuneration for work the FCC has made a number of decisions which fortify prisoners’ positive rights to resocialisation. The first of these was made in 1993 regarding prisoners’ sentence plans.²⁸³ The Prison Act stipulates that prisoners should, from the beginning to the end of their sentence, be placed on a staged ‘sentence administration plan’ (*Vollzugsplan*) towards the realisation of their resocialisation.²⁸⁴ This plan is to be conducted after a ‘treatment examination’ (*Behandlungsuntersuchung*). Prisoners have a right to this examination,²⁸⁵ and a right to discuss their treatment with the administration during this examination.²⁸⁶ The Act

²⁸⁰ G Britz ‘Leistungsgerechtes Arbeitsentgelt für Strafgefangene?’ (1999) *ZfStrVo* 195, 197–198.

²⁸¹ U Kamman ‘Das Urteil des Bundesverfassungsgerichts vom 1.7.1998 (StV 98, 438) zur Gefangenenentlohnung, ein nicht kategorischer Imperativ für den Resozialisierungsvollzug’ (1999) *StV* 438.

²⁸² ‘Germany’ (note 279 above) 84. On the *Lebach* decision see ch. 1, p. 46.

²⁸³ *BVerfG Beschl.* (1993) *NStZ* 301.

²⁸⁴ Prison Act, § 6 (2) and (3).

²⁸⁵ Prison Act, § 6 (1).

²⁸⁶ Prison Act, § 6 (3). Callies/Müller-Dietz, (1998), §6, m.n. 1 and 7.

prescribes that the plan must, at the very least, include concrete statements that are capable of being implemented²⁸⁷ on the placement of the prisoner in an open, closed or social therapeutic prison or social and therapeutic group, the proposed relaxation of the prison regime, measures to address the prisoner's special therapeutic needs, to promote the prisoner's vocational and further education, and to prepare for his release.²⁸⁸

A life-sentenced prisoner attempted to challenge his 'sentence administration plan' in its entirety, arguing that the plan did not fulfil the minimum requirements of the Prison Act and that he had not been given the opportunity to discuss his treatment before the plan was concluded. The Prison Courts had rejected his claim arguing that, as a matter of procedure,²⁸⁹ the prisoner was only allowed to challenge individual measures in the plan, but not the plan in its entirety. The FCC held that the Prison Court's narrow and formalistic interpretation of the prisoner's rights in this respect violated the basic right to effective legal protection under Article 19 (4) Basic Law. It stipulated clearly that the plan enjoys significant legal protection. It took the view that the plan was the 'individual concretisation' of the 'constitutionally protected resocialisation purpose' that serves as an 'orientation framework' for the prisoner and prison administration. The FCC argued that the Act placed a duty on the prison administration to work together both with prisoners and social workers to create a plan that reflected the minimum standards of the Prison Act and furthered the resocialisation of the prisoner. It therefore held that the plan in its entirety could be challenged in court, as well as the procedure by which it was executed. In addition, the FCC reinforced the general view of the academy that while prisoners do not have a clear right to the inclusion of a specific measure in the plan, they do have a right to the exercise of faultless discretion in the composition of the sentence plan.²⁹⁰

In a number of further decisions the FCC has strengthened the prisoner's positive rights to regime relaxation and prison leave.²⁹¹ It has done this by increasing the density of court control over 'evaluative leeway' as regards the determination of 'danger of misuse',

²⁸⁷ *BVerfG Beschl.* (1993) *NJW* 3188.

²⁸⁸ Prison Act, § 7 (2).

²⁸⁹ Prison Act, § 109.

²⁹⁰ *BVerfG Beschl.* (1993) *NStZ* 301.

²⁹¹ *BVerfG Beschl.* (1997) *NJW* 1133; (1998) *NStZ* 430; (1998) *ZfStrVo* 180; M Heghmanns 'Die neuere Rechtsprechung des Bundesverfassungsgerichts zur gerichtlichen Überprüfung der Versagung von Vollzugslockerungen - eine Trendwende?' (1999) *ZStW* 647; T Müller 'Offener Vollzug und Vollzugslockerungen (Ausgang, Freigang)' (1999) *ZfStrVo* 3.

which provide the conditions for refusal of applications for regime relaxation or prison leave.²⁹² While the FCC has accepted that it is constitutional to accept a measure of ‘evaluative leeway’ on the part of the prison administration, it has nevertheless imposed high standards of justification on the decision maker and indicated that the Prison Courts must improve the density of judicial scrutiny over decisions made in this context. The FCC has now repeatedly stated that refusal of prison leave and regime relaxation, and thereby the possibility of hindering the damaging effects of long term imprisonment and the chances of enhancing social reintegration, is a restriction of the constitutionally protected right to resocialisation.²⁹³ As a result, in evaluating the prisoner’s application for either of these measures, prison administrators must demonstrate that they have fulfilled the constitutional principle of proportionality and properly weighed up the prisoner’s right to resocialisation in their deliberation process. Moreover, prison administrators should set out ‘concrete facts’ which justify a fear of a ‘danger of misuse’ in the individual case. It is not sufficient for the decision maker to refer in an ‘abstract’ manner (*abstrakte Hinweise*) to ‘danger of misuse’, or to justify the decision to decline prison leave or regime relaxation on the basis of ‘mere generalised statements and undifferentiated evaluations’ (*bloße pauschalen Wertungen*). In addition, the FCC has drawn a relationship between regime relaxation, prison leave and eligibility for parole.²⁹⁴ Because courts are likely to view failure to obtain prison leave or regime relaxation as a negative indicator in their consideration of parole, the decisions to decline applications for leave and regime relaxation are viewed by the FCC as impinging upon prisoners’ basic right to personal freedom guaranteed under Article 104 Basic Law. This, along with the constitutionally protected right to resocialisation, underpins the general weight and presumption in favour of granting prisoners’ applications in these cases. These recent decisions reinforced the standards of the Federal Supreme Court in the determination of ‘evaluative leeway’ under the Prison Act²⁹⁵ and sent a clear message to Prison Courts and Higher Regional Courts that lack of vigilance in the scrutiny of ‘evaluative leeway’ would no longer be

²⁹² See p. 97 above.

²⁹³ BVerfG Beschl. (1997) NJW 1133; (1998) NStZ 430; (1998) ZfStrVo 180.

²⁹⁴ BVerfG Beschl. (1998) NJW 1133.

²⁹⁵ BGHSt 30, 320. See p. 122–125 above.

constitutionally accepted. This represents a welcome answer to the problems raised by the academy in this respect.²⁹⁶

Finally, the FCC has vindicated a life-sentenced prisoner's claim to psychiatric treatment outside the prison.²⁹⁷ This case concerned a prison court's interpretation of paragraph 65 (2) Prison Act which affords prisoners the right to be treated outside a prison or prison hospital where these do not provide the treatment required. The prison administration and lower Prison Court had held that the provision could not be used by the prisoner in order to receive psychiatric treatment that was designed to enhance the prisoner's suitability for life outside the prison. This interpretation was struck down by the FCC, which held that restricting the prisoner's access to such psychiatric treatment interfered with the prisoner's basic right to resocialisation. Moreover, because such psychiatric treatment was likely to improve his chances of gaining parole, the court held that the decision interfered with his right to personal freedom under Article 104 Basic Law.

4.2 Simplifying the enforcement of prisoners' rights

The FCC has made a concerted effort to shift the formalist approach of the Prison Courts and the refractory behaviour of prison officials. This has been done primarily by recourse to the prisoner's right to effective legal protection under Article 19 (4) Basic Law. In this context, the FCC is particularly conscious of the fact that many legal applications are written by the prisoners themselves in non-legal language and in a manner that falls short of the strict procedural requirements of the Prison Courts. The FCC was clearly responding here to the general concern that 50% of prisoners' legal applications were failing at the outset on purely formal grounds.²⁹⁸

A cluster of FCC decisions has thus established safeguards as regards prisoners' applications for emergency interim legal protection against the execution of disciplinary sanctions.²⁹⁹ It is held to be a violation of the right to effective legal protection for prison

²⁹⁶ See p. 125–128 above.

²⁹⁷ *BVerfG Beschl.* (1996) *NStZ* 614.

²⁹⁸ See p. 128–130 above.

²⁹⁹ *BVerfG Beschl.* (1993) *StV* 482; (1995) *ZfStrVo* 372; (1994) 3 *BlStVKunde* 6–7; (1994) *ZfStrVo* 245; (1994) *NJW* 3089.

officials immediately to execute a disciplinary sanction that the prisoner wished to challenge, without giving a court a chance to evaluate the prisoner's application for emergency interim legal protection. The FCC requires that prison officials ensure that the prisoner's application arrives at the court in good time for a decision to be made. Indeed, it suggested that the administration should fax the application to the court where this is required for the purposes of 'effective legal protection'. Moreover, Prison Courts have been told to decide prisoners' applications as quickly as possible, and not allow lack of clarity, technical mistakes or formal errors in a prisoner's application to get in the way of granting such protection. Thus, Prison Courts should clarify any confusion in the prisoner's application or seek to remedy any formal errors in as speedy a manner as possible. Again this could include telephoning the prisoner or the prison officials where clarification is required.

The FCC does not only view interim legal protection as a form of negative injunction. It also holds that effective legal protection should have been granted to temporarily reinstate an HIV infected prisoner to the workplace from which he had been dismissed on disciplinary grounds, and who was dependant on his work income to subsidise his medication.³⁰⁰ Equally in a decision dealing with non-disciplinary matters, a Prison Court was censured for taking a narrow and formalist view of a prisoner's application to be temporarily moved out of a cell that was being flooded with effluent emissions from a blocked toilet.³⁰¹ In this case the Prison Court's formalistic decision was held to violate both the prisoner's right to effective legal protection as well as his right to human dignity.

Beyond interim legal protection, Prison Courts have been censured by the FCC for taking a formalist or an obtuse approach to applications challenging administrative decisions, applications for legal aid and applications to reinstate a claim after the statutory time limit has expired.³⁰² These decisions have established the clear principle that it violates the right to equal and effective legal protection and the constitutional prohibition on arbitrary decision-making (*Willkürverbot*) to misinterpret the plain meaning of an application to the prisoner's procedural disadvantage. Rather the FCC takes the view that Prison Courts

³⁰⁰ *BVerfG Beschl.* (1994) *NStZ* 101.

³⁰¹ *BVerfG Beschl.* (1993) *StV* 487.

³⁰² *BVerfG Beschl.* 2 BvR 2989/95; (1990) *NStZ* 557; (1993) *NJW* 1380; (1993) *StV* 451; (1994) *StV* 201; (1996) *StV* 445.

should interpret generously the procedural provisions under the Prison Act and seek to remedy the prisoner's procedural mistakes so as to fulfil the prisoner's right to effective legal protection.

4.3 Restricting discretion and powers of rights intervention

The majority of FCC decisions over the last ten years deal with provisions granting powers of rights restrictions (*Eingriffsbefugnisse*) to the prison administration. The FCC has sought to restrict these powers and set exacting standards for the scrutiny of discretion exercised in this context. It has attempted to draw a balance between the purposes of the powers given and the protections of constitutional rights and principles.

4.3.1 Correspondence

The FCC has been particularly vigilant in the protection of prisoners' correspondence. While the Prison Act expressly protects prisoners' legal correspondence from any surveillance,³⁰³ prisoners' non-legal correspondence does not enjoy such immunity from surveillance. Furthermore, the Act allows the interception of letters on a number of grounds. Thus, prisoners' correspondence can be stopped where it endangers the aim of resocialisation and security and order, the prisoner officer would be committing a crime by delivering the letter, the letter includes 'gross misrepresentations' of relations within the prison or 'gross insults' against others, the letter might endanger the integration of other prisoners, or the correspondence is written in coded language or illegible writing.³⁰⁴ The FCC has been confronted by a number of challenges from prisoners regarding the interception of their non-legal correspondence. These prisoners argue that, in deciding to intercept their correspondence on any one of the above grounds, prison officials have failed to take properly into account their basic rights to freedom of expression and protection of correspondence under Article 5 (1) Basic Law and their right to freedom of the personality under Article 2 (1) and 1 (1) Basic Law. In addition, it is argued that, in

³⁰³ Prison Act, § 29.

³⁰⁴ Prison Act, § 31 (1).

scrutinising official decisions to intercept correspondence, the Prison Courts and the Higher Regional Courts have not sufficiently weighed up prisoners' basic rights.

While less inclined to accept these arguments during the 1980s,³⁰⁵ the FCC has been far more proactive since the early 1990s. In particular the FCC has been concerned to restrict the interception of correspondence on the grounds that it includes a 'gross insult' to others.³⁰⁶ In a number of cases the FCC has insisted that the interception of correspondence on this ground should not be used as a means of censoring the prisoner. Arguing that the provisions regarding correspondence had to be construed in the light of the resocialisation aim of imprisonment and prisoners' basic rights to freedom of the personality and freedom of expression, the FCC stressed the importance of unhindered correspondence with the outside world as a necessary outlet for offenders in conditions of confinement. Given this context, the FCC has been concerned to ensure that interception of correspondence should only occur in severe cases of 'gross insults' and not where the prisoner expressed his frustration with prison officials or judges.³⁰⁷ As a result the FCC argues that the standard of what amounts to a 'gross insult' should be higher as regards prisoners' correspondence than would otherwise be applied under the Penal Code to persons at liberty.³⁰⁸ The FCC has further justified this position by pointing to the fact that 'statements of frustration' only ever come to light due to the surveillance of the correspondence in question. As a result, the FCC has stated that interception of correspondence should only occur where the insult was sufficiently grave or where it was clear that the prisoner had purposefully aimed to insult persons involved in the surveillance of correspondence.³⁰⁹ The FCC has thus denied that accusing Higher Regional Court judges of being Nazis³¹⁰ or prison officials of being 'well known misanthropes',³¹¹ 'cretins', power hungry 'perverts' or 'concentration camp officials'

³⁰⁵ *BVerfG Beschl.* 2 BvR 250/81; 2 BvR 330/85.

³⁰⁶ *BVerfG Beschl.* (1993) *StV* 600; (1994) *NJW* 244; (1994) *NStZ* 403; (1995) *NJW* 1477; (1996) *NStZ* 55.

³⁰⁷ These principles are set out in *BVerfG Beschl.* (1994) *NStZ* 403 and in all of the decisions noted in note 306.

³⁰⁸ Penal Code, § 185 criminalizes 'gross insults'.

³⁰⁹ *BVerfG Beschl.* (1995) *NJW* 1477.

³¹⁰ *BVerfG Beschl.* (1993) *StV* 600.

³¹¹ *BVerfG Beschl.* (1996) *NStZ* 55.

amounted to a ‘gross insult’ for the purpose of intercepting prisoners’ correspondence with the outside world.³¹²

The FCC has however accepted that a highly exaggerated and critical representation of a prison institution in a prisoner’s letter published in a right wing magazine amounted to a ‘gross misrepresentation’ as well as a ‘gross insult’ under paragraph 31 Prison Act as well as under general criminal law. In this circumstance the FCC accepted that interception was additionally justified in order to show the prisoner the consequences of his criminal actions and further his resocialisation.³¹³ Moreover, the FCC has accepted that interception of correspondence between two convicted prisoners involved in the same crime could be justified where statements in the correspondence potentially threatened the chances of either prisoner’s social reintegration.³¹⁴

4.3.2 Right to information

While the FCC has been particularly protective of prisoners’ rights to correspondence, it has also set standards regarding restrictions of prisoners’ access to written information. This is regulated under paragraph 68 Prison Act which allows the restriction of newspapers or magazines if they threaten the resocialisation aim or security and order within the prison. The FCC has set standards regarding the application of this provision in the light of the right to freedom of information under Article 5 (1) Basic Law.³¹⁵ It stated that restrictions of magazines and newspapers could only occur where there was a ‘real and concrete danger to the prisoner’s resocialisation or to security and order in the individual case’ and where such restrictions were ‘suitable and necessary for the avoidance of this danger’.³¹⁶ In the first of two cases on this issue, the FCC accepted that the prison had fulfilled these constitutional standards when stopping an offender from reading a right wing magazine. The FCC accepted that this decision had been made on legitimate resocialisation grounds as the offender in question had committed his original

³¹² *BVerfG Beschl.* (1994) *NStZ* 403.

³¹³ *BVerfG Beschl.* (1994) *NJW* 244.

³¹⁴ *BVerfG Beschl.* (1996) *NStZ* 55.

³¹⁵ *BVerfG Beschl.* (1996) *ZfStrVo* 244; (1996) *ZfStrVo* 176.

³¹⁶ *BVerfG Beschl.* (1996) *ZfStrVo* 244.

offence due to his right wing beliefs.³¹⁷ In the second case, the FCC condoned the interception of an article for security reasons on the grounds that it contained highly exaggerated criticisms of the prison institution. However, the FCC indicated that it would not accept restrictions of ‘readily available media sources in which normal criticisms of the prison institutions were contained’. In the opinion of the FCC such restrictions would ‘patronize’ the prisoner.³¹⁸

4.3.3 Discipline

In a number of cases the FCC has set out rigorous standards regarding the imposition of disciplinary sanctions.³¹⁹ It has held that all disciplinary sanctions, like criminal sanctions, are subject to the principle of proportionality (*Schuldangemessenheit, Verhältnismäßigkeitsgrundsatz*) which is said to derive its constitutional importance from the *Rechtsstaatsprinzip* and the right to equality before the law under Article 3 Basic Law. As the FCC has stipulated in all these cases, this broad principle has a procedural and substantive dimension. The procedural dimension entails the full and proper consideration of the individual facts of each case in order to establish the level of the offender’s culpability. The substantive dimension entails that the sanction imposed is commensurate with the culpability of the offender and the harm caused. Equally, it entails that the sanction imposed must be the least possible invasion of prisoners’ basic rights in order to achieve the disciplinary purpose. In addition, the FCC argues that the decision **whether** to impose a disciplinary sanctions or the choice of disciplinary sanction is to be made in light of the resocialisation purpose set out in paragraph 2 Prison Act, the guiding principles of prison administration in paragraph 3 Prison Act and broader preventative goals.³²⁰ In this light, the added institutional pressures of imprisonment must be taken into account when weighing up the culpability of the offender.³²¹

On the basis of these principles, the FCC has struck down decisions to impose disciplinary sanctions on a prisoner whose breath smelt of alcohol but who had not

³¹⁷ BVerfG Beschl. (1996) ZfStrVo 176.

³¹⁸ BVerfG Beschl. (1996) ZfStrVo 244.

³¹⁹ BVerfG Beschl. (1993) NStZ 605; (1994) StV 473; (1995) NJW 1016; (1995) ZfStrVo 53; (1995) StV 651.

³²⁰ BVerfG Beschl. (1994) StV 473; (1995) NJW 1016.

undergone a breathaliser test and had no previous record of alcohol abuse,³²² a prisoner who had lost his temper and insulted a prison officer in breach of duties regarding prison behaviour under the Act,³²³ a prisoner who insulted prison officials in his complaint to the prison authorities (*Dienstaufsichtbeschwerde*),³²⁴ two prisoners who refused to work on health grounds even though a cursory doctor's examination had declared them fit to work.³²⁵ In all these judgements the decisions of the Prison Courts were criticised alongside those of the prison officials for failing to take full consideration of the rights and principles set out above.

4.3.4 Personal possessions

The FCC has also set a number of guidelines regarding decisions to grant prisoners' their right to retain their own personal possessions. This is regulated under paragraph 70 Prison Act, which states in section 1 that, 'the prisoner can retain an appropriate number of books and other personal articles for use in his free time'. In section 2 and 3 it is stipulated that permission to retain personal possessions can be 'refused' or 'withdrawn' if they are threatened with a criminal sanction or present a danger to the aim of prison administration or the security and order of the prison.

The FCC has set out standards regarding the refusal and withdrawal of permission to retain personal possessions. The FCC has stated that although it is constitutionally acceptable to decline permission to retain 'objectively dangerous objects' without further consideration of the prisoner's individual circumstances, discretion as regards other types of objects remains subject to the constitutional principles of proportionality and equality before the law.³²⁶ Thus, the FCC has struck down a decision to refuse an electronic keyboard to a prisoner on the grounds that the decision maker had failed to balance proportionately the importance of this object for the prisoner's further education and potential resocialisation against what the FCC saw as the 'relatively limited danger of the

³²¹ *BVerfG Beschl.* (1995) *NJW* 1016.

³²² *BVerfG Beschl.* (1993) *NStZ* 605.

³²³ *BVerfG Beschl.* (1995) *NJW* 1016.

³²⁴ *BVerfG Beschl.* (1994) *StV* 473.

³²⁵ *BVerfG Beschl.* (1995) *ZfStrVo* 53; (1995) *StV* 651.

³²⁶ *BVerfG Beschl.* (1994) *NStZ* 453; (1994) *ZfStrVo* 376; (1996) *StV* 683; (2000) *EuGrZ* 552.

object' to the security and order of the prison.³²⁷ Moreover, the FCC struck down a decision to refuse a prisoner's application to replace his broken watch with one of a similar value and restrict him to a watch of a much lower value. The FCC held this decision to be arbitrary, despite the justification offered by the prison administration that the ownership of expensive watches threatened the resocialisation purpose of prison administration through its potential to create sub-cultural trade and bartering systems.³²⁸

The FCC has also stipulated that where a personal possession has already been granted the decision to withdraw this object would additionally be subject to the more exacting principle of legitimate expectation (*Vertrauensschutz*).³²⁹ In Germany, this principle is derived from the *Rechtsstaatsprinzip* and Article 2 (1) Basic Law (freedom of the personality). It stipulates that where the citizen has been placed in a legal position by a decision-maker and relies on this position, they have a legitimate expectation which must receive full consideration in the authority's subsequent decisions.³³⁰ Where this is the case the official decision-maker must undertake a proportional balance between the citizen's right to have their legitimate expectations protected and the general interests of the public to have this position changed. According to the FCC, prisoners' legitimate expectations are also underpinned by the resocialisation principle. It has stated that:

The withdrawal of an object already granted to the prisoner, without clear evidence that the prisoner has himself created the reasons for such a course of action, is regularly experienced by prisoners as highly invasive and unjust and runs counter to the aim of prison administration namely the resocialisation or socialisation of the prisoner.³³¹

As a result, the FCC holds that where the prison administration wishes to withdraw objects for which prisoners have already obtained permission, there must be 'clear and concrete factors' or 'changes in the circumstances in the individual case' which justify the decision and outweigh prisoners' legitimate expectations in this regard.³³² On this basis the FCC has struck down decisions to withdraw permission for prisoners to retain a stereo set,³³³ stereo loudspeakers³³⁴ and a special day blanket.³³⁵ The FCC was, however, satisfied

³²⁷ BVerfG Beschl. (1996) StV 683.

³²⁸ BVerfG Beschl. (2000) EuGrZ 552.

³²⁹ BVerfG Beschl. (1994) StV 432; (1994) NStZ 100; (1996) StV 48; (1997) ZfStrVo 367.

³³⁰ See BVerfGE 59, 128, 164.

³³¹ BVerfG Beschl. (1996) StV 48.

³³² BVerfG Beschl. (1994) NStZ 100; (1996) StV 48; (1994) StV 432; (1997) ZfStrVo 367.

³³³ BVerfG Beschl. (1994) NStZ 100.

that the confiscation of an electric typewriter with a limited memory capacity was justified on the grounds of security, in that the prisoner could use this memory capacity to exchange information with other prisoners and the outside world which the prison administration could not properly control.³³⁶

4.3.5 Prison visits

The FCC had to consider whether the placement of a glass screen between prisoners and their visitors was constitutionally permissible.³³⁷ The Act permits surveillance of prisoners' visits on the grounds of security and order but does not stipulate explicitly whether this includes the use of glass screens.³³⁸ The FCC accepted that glass screens could be used for the purposes of 'surveillance' under paragraph 27 Prison Act, but argued strongly that this would only be permissible in 'individual cases' where there was 'concrete evidence of a real threat to security and order' in the prison. Each decision in this instance would be subject to a strict test of proportionality. The prison would therefore have to demonstrate that it had properly balanced the protections of the prisoner's basic right to the free exercise of the personality against the threat to security and order involved. Moreover, where the prison wished to use glass screens during visits with family the prison had to consider in addition the protections of Article 6 Basic Law (State protection of the family) and the prisoner's right to resocialisation and thereby the right to retain bonds with the family.

4.3.6 Prison cell

The FCC has ruled on whether entering a prisoner's cell without knocking on the door is a violation of Article 13 Basic Law (privacy of the home), Article 1 (1) Basic Law (human dignity) and Article 2 (1) Basic Law (freedom of the personality).³³⁹ The FCC

³³⁴ *BVerfG Beschl.* (1996) *StV* 48.

³³⁵ *BVerfG Beschl.* (1994) *StV* 432.

³³⁶ *BVerfG Beschl.* (1997) *ZfStrVo* 367.

³³⁷ *BVerfGE* 89, 315.

³³⁸ Prison Act, § 27.

³³⁹ *BVerfG Beschl.* (1996) *NJW* 2643.

held that such an action does not violate Article 13 Basic Law as the prison cell does not qualify as the prisoner's home. Nevertheless, the manner of entry into a prisoner's cell could amount to a violation of the prisoner's rights under Articles 1 (1) and 2 (1) Basic Law in some cases. It argued that the latter basic rights, the doctrine of proportionality and the constitutional prohibition on arbitrary decision making (*Willkürverbot*) obliged prison officials to enter the prison cell with sensitivity. Nevertheless, when considering whether any of these rights or principles had been violated, courts should take the surrounding circumstances into account, such as the necessity of entering a prison cell without prior notice. In addition, the FCC noted that in many cases the noise of the keys in the door would amount to a sufficient forewarning to the prisoner in order to protect his human dignity and intimate sphere. This particular FCC decision relates to the protections of prisoners' basic rights and does not negate a number of decisions by non-constitutional courts that paragraph 3 Prison Act gives rise to a general duty on prison officers to knock before entering the cell.³⁴⁰ In a closely related decision, the FCC also had to consider the question of whether placing the names of prisoners on cell doors was constitutionally problematic.³⁴¹ The FCC held that where such an action was necessary for the organisation of the prison, no constitutional objections could be made on the basis of the right to informational self-determination.³⁴²

4.3.7 Allocation and use of prisoners' income

The Act has a number of detailed regulations regarding the allocation and use of prisoners' income. A prisoner's income is made up of remuneration for work, pocket money or educational grants. The Prison Act stipulates that prisoners' income should be divided into three broad categories: a) income for personal purchasing use (*Hausgeld*); b) bridging money after release (*Überbrückungsgeld*) and c) personal savings (*Eigengeld*) if applicable.³⁴³ The FCC has had to deal with a number of complaints in this area.

³⁴⁰ See p. 103 note 96.

³⁴¹ *BVerfG Beschl. (1997) ZfStrVo 111.*

³⁴² This right is developed from Article 2 (1) Basic Law in connection with Article 1(1) Basic Law.

³⁴³ Prison Act, §§ 47–52.

The FCC struck down a decision to set procedural costs awarded against the prisoner in a number of prison court procedures against the prisoner's savings and his future pocket money allowance.³⁴⁴ The prison administration's decision went beyond the clear and detailed wording of the Prison Act, which stipulated that costs arising from legal proceedings could only be set against the prisoner's 'income for personal purchasing use' (*Hausgeld*) provided that at least 30 DM of the prisoner's *Hausgeld* was reserved for the prisoner.³⁴⁵ The FCC thus held that the decision and the subsequent approval thereof by the Prison Court and Higher Regional Court of Frankfurt, was a serious violation of the prisoner's basic right to freedom of the personality under Article 2 (1) Basic Law for which the administration had no legal basis. As a result the decision violated, in addition, the 'legal proviso' and the principle of the legality of administration (*Gesetzmäßigkeit der Verwaltung*).³⁴⁶

A further complaint regarded a prison administration's decision to refuse permission to a prisoner to have his own clothes washed by a private company and sent by parcel to the prison on the grounds that a person outside the prison was paying for this service. The prisoner was not able to work on health grounds, received minimal pocket money from the prison authorities, and had limited personal financial resources. The prison administration argued that it could not permit an outsider to pay for a service which the prisoner should pay for himself. The prison felt that permitting outsiders to pay for prisoners in this way would create a hierarchy within the prison between those who had wealthy relatives and those who did not and that this would lead to dependency relationships between poorer and richer prisoners. In any event, the prison argued, if the prisoner could not afford to have his own clothes washed he could always wear the clothes provided by the prison institution. The FCC held that this decision was arbitrary and violated the prisoner's basic right to equality under Article 3 Basic Law. It held that the administration's reasons for the decision were unsustainable in light of the fact that the prisoner could not afford the service through no fault of his own. Furthermore, the FCC suggested that the aim of avoiding wealth hierarchies within prisons might not be commensurate with the 'adaptation' principle (*Angleichungsgrundsatz*) under paragraph 3

³⁴⁴ BVerfG Beschl. (1996) NJW 3146.

³⁴⁵ Prison Act, § 121 (5).

³⁴⁶ See ch. 1, p. 57.

(1) Prison Act which stipulated that the prison environment should reflect the outside world as far as possible.³⁴⁷

Finally, the FCC has held that consideration of the prisoner's own private income in the determination of his monthly pocket money allowance was not a question of constitutional law.³⁴⁸ Moreover, the FCC held that making a prisoner pay unemployment insurance on his work income, even though the prisoner was to be deported to a country where he could not benefit from this insurance, did not violate his right to equality under Article 3 Basic Law.³⁴⁹

4.3.8 Placement of prisoners

In an unusual case, the FCC has held that a prisoner has a legitimate expectation to remain in a prison in which he had already been placed for over 2 years, even though the original decision to place the prisoner was not legally sound. The FCC argued that the prisoner's legitimate expectation was underpinned by his right to resocialisation which would be undermined by moving the prisoner and breaking the social bonds established within the prison.³⁵⁰

4.3.9 Security measures

Paragraph 85 Prison Act allows measures to secure containment of a prisoner where there is a 'heightened danger of escape or threat to security and order'. In a case challenging the constitutionality of an order to chain a prisoner under this provision, but which had been resolved before the matter could be decided, the FCC indicated that decisions to chain prisoners for security reasons would be subject to a rigorous proportionality test and to the heightened scrutiny of the courts in the future.³⁵¹

³⁴⁷ *BVerfG Beschl.* (1996) *StV* 681.

³⁴⁸ *BVerfG Beschl.* (1996) *ZfStrVo* 315.

³⁴⁹ *BVerfG Beschl.* (1995) 1 *BlStVKunde* 8.

³⁵⁰ *BVerfG Beschl.* (1993) *NStZ* 300.

³⁵¹ *BVerfG Beschl.* (1997) 3 *BlStVKunde* 6.

4.3.10 Prisoners' clothing

Paragraph 20 (1) Prison Act stipulates that prisoners will normally be required to wear prison institution clothing. Under paragraph 20 (2) Prison Act, however, the prison administration is given the discretion to permit prisoners to wear their own clothing where the prisoner is not expected to escape. These provisions do not specify whether the prisoner should be allowed to wear personal clothing before a court, but the FCC has indicated that a prisoner's basic rights to freedom of the personality under Article 2 (1) Basic Law and Article 1 (1) Basic Law could be violated where prisoners are not permitted to wear their own clothes during court proceedings. The FCC has stipulated that in making a decision in this respect the prison authorities would have to take full consideration of the prisoner's personality rights and balance these against the risk of escape.³⁵²

5. Conclusion

This chapter concludes the thesis's account of the method and manner of conceiving of the prisoners' legal status in Germany. This was an account, written for an audience foreign to Germany,³⁵³ which has sought to illuminate the broader cultural and legal context within which German prisoners' rights are to be understood. Chapter one highlighted the symbolic importance of constitutional rights within German legal and political culture and the distinctive way in which these rights are viewed. It explained how the prisoner's fundamental rights status and the constitutional resocialisation principle was shaped within the German constitutional environment. Chapter two examined the dynamics of the prison reform process. It highlighted the strength of the German impulse towards the codification of prison law and the entrenchment of prisoners' rights. Moreover, it examined and explained the congruence of political and academic opinion around the aim of resocialisation in Germany in the 1970s. Equally, however, it showed how the prisoner's legal status under the Prison Act was weakened by political compromises between a reformist Federal Government and resistant State administrations.

To conclude this account, this chapter has examined in some detail the substantive principles of prison administration and the prisoner's individual rights under the Prison Act. It has shown that the early promise of the Prison Act is yet to be properly fulfilled. It has shown that the prisoner's legal rights have been weakened by compromises made during the drafting of the Prison Act, the continued resistance of State administrations to the ideals of the Act, the initial restraint of the Higher Regional Courts in structuring and checking prison administrative discretion, the failure of Prison Courts to fulfil the expectation of reformers, the refractory culture of prison administrators and the lack of prisoners' access to legal support. Yet while this chapter has pointed to these difficulties, it has also told another story about the development of prisoners' rights under the Act. It has indicated how, despite the many obstacles in the way of its development, prisoners' rights continue to be strengthened by the deeper constitutional and reform ideals examined in chapters one and two. It has shown how these ideals have provided a normative compass in the face of the many obstacles in the way of the advancement of prisoners' rights. In addition, it has argued that the distinctive nature of the German legal community, characterised by an influential academy committed to the deeper ideals of the Act and a powerful and activist Constitutional Court receptive to the views of the academy, has bolstered the development of both the principles and special provisions of the Prison Act. In short, the prisoner's legal status in Germany continues to be shaped by the tension between the realisation of constitutional and penological principle and the institutional and political obstacles placed in the way of their realisation.

³⁵² *BVerfG Beschl.* (2000) *NStZ* 166.

³⁵³ See Introduction, p. 24–26.

Prison Law, Constitutional Culture and the Prisoner's Fundamental Rights Status in England

In the following two chapters the thesis will embark on an explicitly comparative exercise with respect to prisoners' rights in England. The leading question that this exercise seeks to answer is why, and in what way, is the English conception of the prisoner's legal status like or unlike that found in Germany?¹ This examination will take place in two stages. To begin, this chapter will identify in broad terms three important contrasts between Germany and England which underpin the treatment of prisoners' rights in these countries. Section one of this chapter will examine the shape and nature of prison law in England in light of German prison law. This will be done in the context of the broader criminal justice environment in which English prison law is placed. The section will show that, unlike prison law in Germany, which is concerned with defining the legal status of the prisoner and with establishing principles of prison administration, the legislature in England has paid little attention to the definition of the prisoner's legal status or to the creation of standards guiding the administration of prisons. Rather, prison law in England is centrally concerned with clarifying lines of political control and accountability over prisons.

Section two of this chapter will examine the place of fundamental rights in English constitutional culture over the last thirty years. It will show that, in contrast to Germany's faith in fundamental rights and its systemic and comprehensive approach to fundamental rights protection, England experiences a tension between an established tradition of rights scepticism and an emergent culture of rights. This ambivalent cultural attitude to fundamental rights in England will be identified as a significant dynamic in the judicial treatment of fundamental rights in general and prisoners' rights in particular. Finally, section three of this chapter will examine the differences between the English and

¹ See Introduction, p. 24–26.

German conception of the prisoner's fundamental rights status. It will be indicated that these differences in conception are fundamental to the differential treatment of prisoners' rights in Germany and England.

The next and final chapter of this thesis will examine in detail the judicial treatment of prisoners' rights in England. This examination will be conducted in the light of the broader background factors set out in the instant chapter.

1. Prison Law and prisoners' rights

This section will seek to show that the prisoner's legal status as defined by English statutory law stands in strong contrast to that found in Germany. It will account for this contrast by recourse to the broader constitutional and criminal justice environment in which prison law is placed. In line with the purpose of this thesis as a comparative examination of the 'the method and manner of conceiving' of the prisoners' legal and rights status in Germany and England, this section will not embark on a detailed comparative examination of particular provisions.

The drafters of the German Prison Act sought legally to define the prisoner's basic rights and constitutionally permissible limitations thereof whilst at the same time to fulfil a substantive purpose of prison administration in line with both the broader conception of the criminal code and deeper constitutional principles.² As the first part of this thesis has aimed to demonstrate, these aspirations are the product of the German criminal justice and constitutional context. Thus, the German Prison Act can be viewed as an indicator of the strength of rights rhetoric in the process of prison legislative reform and as an expression of the institutional power and interpretative bravery of the Federal Constitutional Court.³ These elements can in turn be linked to the strength and legitimacy of the German Basic Law and the deep faith in fundamental rights in Germany.⁴ Equally, the Act can be seen as the product of a powerful codification impulse felt within Germany

² See chs. 1–3.

³ See chs. 1 and 2.

⁴ See ch. 1, pp. 32–37.

for over a century.⁵ The mentality and style of this codification impulse was inherently non-incrementalist - seeking the wholesale replacement of a multiplicity of prison administrative rules and regulations with a uniform and comprehensive statutory prison code. Those behind codification sought to achieve an overarching design of prison administration by enacting fundamental principles in line with both the general purposes of the criminal law and the objects of the Basic Law from which detailed provisions were carved. Whatever the pitfalls and disappointments involved in the drafting and implementation of the German Prison Act, there is little doubt that the criminal justice and constitutional ideals which shaped this legislation and the conception of the prisoner's legal status continue to operate as a benchmark against which German prison law is measured, interpreted and developed.⁶

The ideals shaping German prison law are not reflected in the current legal regime governing prisons in England. With no compelling codification impulse, no dominant rights rhetoric within prison policy making nor a Constitutional Court with the institutional and symbolic power to force a legislature to define prisoners' rights, England is without a statutory code of prisoners' rights and a clear systemic conception of prison administration. Before examining the broader reasons for this difference, it is necessary to provide a brief sketch of the statutory arrangement governing prisons in England.⁷

The English Prison Act 1952 is the primary source of legislative authority governing prisons and imprisonment. The 1952 Act does not differ much in its aims or content from its predecessors: the Prison Act 1877 and the Prison Act 1898.⁸ Both of these Acts, in particular the Prison Act 1877, sought to achieve the central concern of prison reformers during the nineteenth century, namely the placement of local prisons under central governmental control and the creation of a national prison administration.⁹ In order to effect the aims of centralisation and nationalisation, these Acts placed the Home Secretary in a pivotal role in the administration of prisons and extended the monitoring and controlling arm of central government over prison administrators and officials. In line

⁵ See ch. 2, pp. 60–71.

⁶ See ch. 3.

⁷ A more detailed examination of the regulations governing prisons is conducted in section 1.2 below.

⁸ S Livingstone and T Owen *Prison Law* (2nd edn Oxford OUP 1999) 1–5.

⁹ S McConville *A History of English Prison Administration* (Routledge London 1981) 468–482.

with its historical antecedents the Prison Act 1952 ‘calls upon the Home Secretary to create and police an internal regime for prisons’.¹⁰ Vesting a high level of policy making and administrative control in the Home Secretary, it is a skeletal statute aimed primarily at defining the responsibilities of different agencies in the administration of prisons and lines of accountability to the Minister. Whilst the Act serves the aim of political control, it also provides mechanisms of political accountability to Parliament.¹¹ The Act enshrines the background constitutional principle of ministerial responsibility by requiring the Home Secretary to report annually to Parliament.¹² In addition, the Act extends Parliament’s scrutinising function by establishing an Inspectorate of Prisons, as well as Boards of Visitors to monitor individual prisons, which report to Parliament.¹³ Moreover, the possibilities of political scrutiny have now been extended by the creation of a non-statutory Prisons Ombudsman who reports directly to the Home Secretary.¹⁴

Whilst the Act provides these mechanisms of political oversight,¹⁵ the extent of policy making and administrative discretion vested in the Home Secretary is significant. The Act has been described as ‘little more than a series of enabling provisions designed to give the Home Secretary maximum discretion in the organisation of the prison system’.¹⁶ A central enabling provision of this Act affords the Home Secretary the power to make and amend detailed rules regulating prisons.¹⁷ These Rules are considerably more detailed than the Prison Act and provide the primary guidance on the administration of prisons. However, they are intended as regulatory directions only and are not designed to be legally enforceable.¹⁸ In sum, neither the general statutory framework governing prisons, nor the rules governing the day to day administration of prisons, ‘purport to provide a code of directly legally enforceable rights in prisoners’.¹⁹ In contrast to Germany, there is no clear legislative invitation for the courts to take an active role in the prison context. As Lord

¹⁰ *Prison Law* (note 8 above) 5.

¹¹ G Richardson *Law, Process and Custody: Prisoners and Patients* (Weidenfeld and Nicolson London 1993) 8.

¹² Prison Act 1952, s. 5.

¹³ Prison Act 1952, ss. 5A and 6.

¹⁴ See further p. 171 below.

¹⁵ *Law, Process and Custody: Prisoners and Patients* (note 11 above) 9–11, 50–54.

¹⁶ *Prison Law* (note 8 above) 5.

¹⁷ Prison Act 1952, s. 47.

¹⁸ N Loucks *Prison Rules: A Working Guide* (Prison Reform Trust London 2000) 7.

¹⁹ G Richardson ‘Prisoners and the Law: Beyond Rights’ in C McCrudden and G Chambers, (edd), *Individual Rights and the Law in the UK* (Clarendon Oxford 1993) 179, 183.

Justice Shaw stated in 1979, ‘in the scheme envisaged by the Act and shaped by those Rules, the courts have no defined place and no direct or immediate function’.²⁰ Rather, English courts have had to carve out their own role through the assertion and development of their inherent jurisdiction under public law to review administrative action. Conscious of their intruder status, they have gingerly encroached on a case by case basis on the executive terrain of prison administration.²¹ This has been a laborious and incremental process in which the courts, over the last few decades, have developed prisoner’s legal rights under common law and given the Prison Rules some legal force. In this process, they have been encouraged and assisted by the decisions of the European Commission and Court of Human Rights regarding breaches of English prisoners’ Convention rights.²² But the contrast to Germany is significant. Whilst German courts have been busying themselves for over 25 years with implementing and interpreting a comprehensive statutory code of prisoners’ rights, English courts have chipped away at executive discretion and only recently settled the extent of their own jurisdiction over prison administration. Although the extent of this jurisdiction is now relatively settled, the courts remain hesitant in their role as the guardians of prisoners’ rights and inconsistent as to the level of judicial scrutiny which applies to large areas of prison administration.²³

A more detailed examination of the rules governing prison administration will be conducted in section 1.3 below, whilst a detailed account of the judicial treatment of prisoners’ rights will take place in chapter five. Enough has been said at this stage, however, to demonstrate that the aspirations animating German prison law are starkly different from those found in England. German prison law aims to define the prisoner’s constitutional and legal rights and establish deeper constitutional and penal principles regarding prison administration. A primary aim of this law is to ensure high levels of **legal** accountability in line with the *Rechtsstaatsprinzip*. Whilst concern with administrative flexibility has clearly affected the content of the German Prison Act, courts are charged with striking a principled balance between administrative freedom and the immutable protections of constitutional rights and principles under a detailed statutory code. Thus, as chapters 1 and 3 showed, the constitutional and legislative framework

²⁰ *R v Board of Visitors of Hull Prison, ex p St. Germain and others* (1978) 1 QB (CA) 425, 454.

²¹ See ch. 5.

²² See ch. 5.

²³ See p. 169–180 below and ch. 5.

governing prisons in Germany places courts in a central position in the process of prison administration. The English statutory regime reflects a concern to clarify lines of **political** control and accountability. In addition to the traditional responsibility of the Home Secretary to Parliament, the political accountability of the prison administration is supposedly enhanced through the use of scrutinising bodies such as the Prisons Inspectorate, Boards of Visitors and the Prisons Ombudsman. But these aims of political accountability are coupled with a powerful pragmatic concern to ensure an effective, flexible, fluid and politically responsive prison administrative structure by vesting high levels of policy-making discretion and administrative control in the Home Secretary. Whilst the Prison Act 1952 foresees the creation of prison rules and internal complaint mechanisms these are primarily intended at enhancing the control of the Home Secretary over the activities of the prison administration, rather than vesting prisoners with any legal entitlements. In this context, the English courts are uninvited guests, carefully sketching out individual prisoners' rights in the interstices of a system aimed at ensuring political accountability and control.

1.1 The prisoners' rights lobby

There has been no shortage of calls for the reform and modernisation of the statutory regime governing prisons, for the better definition of prisoners' rights and for the provision of an independent adjudicative forum in which these can be properly enforced. For the past twenty years a broad alliance of penal pressure groups,²⁴ academics, politicians, prison administrators, prison inspectors and judges acting in an extra-judicial capacity have called for the introduction of a set of specific and enforceable prison standards and prisoner entitlements.²⁵ The proposals for reform vary in tone. Pressure

²⁴ These vary from special interest pressure groups to more general civil liberty pressure groups. In the area of prisoners' rights the primary organisations are: The Howard League, The National Association for the Care and Resettlement of Offenders (NACRO), The National Prisoners' Movement (PROP); The Prison Reform Trust (PRT); Liberty and Justice. R Light 'Pressure Groups, Penal Policy and the Gaols' (1995) 100 *Prison Service Journal* 27.

²⁵ Speech of Lord Justice Woolf 'We still fail our prisoners' *The Times* 2 (1 February 2001) 4; *Prison Rules: A Working Guide* (note 18 above) 14–17; R Morgan 'Imprisonment: Current Concerns' in M Maguire et al, (edd), *Oxford Handbook of Criminology* (2nd edn OUP Oxford 1997) 1137, 1168–1171; R Morgan 'Prison Accountability Revisited' (1993) *PL* 314; S Casale 'Conditions and Standards' in E Player and M Jenkins, (edd), *Prisons After Woolf: Reform through Riot* (Routledge London 1993) 66; S Casale and J Plotnikoff *Minimum Standards for Prisons: A Programme of Change* (NACRO London 1989); *Prison*

groups, such as the Prison Reform Trust and NACRO, and academics such as Richardson, Morgan and Casale call for a more ‘specific’ and ‘more prescriptive statutory framework’ creating prisoner entitlements and regime standards enforceable at law.²⁶ The Woolf Report, which was based on widespread consultation and has generally been acknowledged to have ‘advanced the most comprehensive agenda for radical change in the penal system since the Gladstone Report of 1895’,²⁷ identified ‘justice’ as a central area in need of enhancement in prisons.²⁸ Although the report avoided the language of prisoners’ rights per se,²⁹ it did propose *inter alia* giving prisoners reasons for decisions, a system of prison compacts which gave rise to ‘legitimate expectations’ vested in prisoners, a national system of accredited standards which would be made legally enforceable over time and the provision of a properly independent complaint body with adequate powers of enforcement.³⁰ Few proponents of reform of prisoners’ rights favour strong judicial intervention in prisons in the absence of a specialised prison court system. Most envision a system of ‘extra-judicial’ routine enforcement where the courts’ role is limited to providing a mechanism of ‘last-resort enforcement’.³¹ Nevertheless, while differing in emphasis, all these proponents argue for the introduction of a clearer set of prison standards and prisoner entitlements and the introduction of a truly independent complaints body with proper powers of enforcement.³² In sum, despite differences in tone, it cannot be said that England is without a prisoners’ ‘rights rhetoric’ within contemporary penal culture.

Disturbances April 1990: Report of an Inquiry by the Rt. Hon. Lord Justice Woolf (part I and II) and His Honour Judge Stephen Tumin (Part II) (Cm 1456); ‘Prisoners and the Law: Beyond Rights’ (note 19 above) 203.

²⁶ ‘Prison Accountability Revisited’ (note 25 above) 332; *Minimum Standards for Prisons: A Programme of Change* (note 25 above); ‘Prisoners and the Law: Beyond Rights’ (note 19 above) 203 and 207.

²⁷ D Downes and R Morgan ‘Dumping Hostages to Fortune’ in M Maguire et al *Oxford Handbook of Criminology* (2nd edn OUP Oxford 1997) 87, 124.

²⁸ *Prison Disturbances April 1990* (note 25 above). The Woolf report makes repeated reference to ‘justice’ within prisons, see in particular paragraph 14.19. This call has now been reiterated by Lord Justice Woolf in his speech commemorating the tenth anniversary of the Woolf Report. See ‘We still fail our prisoners’ (note 25 above).

²⁹ ‘From Rights to Expectations’ (note 118 above) 92.

³⁰ *Prison Disturbances April 1990* (note 25 above) paragraph 1.167.

³¹ ‘Prison Accountability Revisited’ (note 25 above) 331–332; ‘Prisoners and the Law: Beyond Rights’ (note 19 above) 203–204.

³² In this call the prisoners’ rights lobby is echoing a core principle of international law on prisoners’ rights. See for example *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (United Nations General Assembly resolution 43/173, 9 December 1988) calls for the protection of prisoners’ rights by a ‘judicial body’ or ‘other authority under the law whose status and tenure affords the strongest possible guarantees of competence, impartiality and independence’.

This domestic reform movement is part of, and gains support from, a broader international concern with prisoners' rights which has gained momentum since 1945 and resulted in an international prison law.³³ In particular, the highly publicised visits and criticisms of the European Committee for the Prevention of Torture and Inhuman and Degrading Punishment or Treatment (CPT) has provided a useful impetus for domestic reformers.³⁴ As Stephen Shaw argues: 'the publicity - which to the CPT's displeasure, attached to its visit - added to the public view of Britain's prisons as antiquated and in need of thoroughgoing reform'.³⁵

Despite this prison reform movement, a clear set of enforceable rights and prison standards is yet to materialise. Whilst the Home Office and Prison Service appeals to the language of 'decency' or 'humanity' in prisons,³⁶ there is as yet no strong legislative commitment to match this rhetoric. This absence might be explained as a simple matter of political fact. As Richardson explains:

Prisons may be news when prisoners sit on roofs, burn them down, or dramatically escape from them. For the majority of the voting public, however, they are marginal and, despite the prison governors' warning that 'dreadful conditions, broken promises and dashed expectations provide fertile conditions for those intent on trouble' (Evidence of the Prison Governor' Association to the Woolf Inquiry, 1990) the government has priorities more pressing than prisoners' rights. Real change it seems will only occur when it is no longer politically acceptable to delay reform.³⁷

Given the low political capital to be gained from providing prisoners with rights in England, we might leave the analysis at this point and argue that the failure to advance prisoners' legal entitlements is a direct outcome of England's constitutional arrangements. Put simply, in England's political constitution, governments who dominate the legislature have no political gain in affording prisoners' rights and jealously guard their administrative and policy discretion afforded by current legislative arrangements, courts

³³ N Rodley *The Treatment of Prisoners under International Law* (2nd edn Clarendon Oxford 1999) ch. 1; M Evans and R Morgan 'The CPT: An Introduction' in R Morgan and M Evans, (edd), *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture in Context* (OUP Oxford 1999) 3; V Stern *A Sin Against the Future* (Penguin London 1998) chs. 10–12. See also Introduction, p. 1 and note 6.

³⁴ The CPT has made two visits to the UK. The first visit to Brixton, Leeds, Wandsworth, Holloway, and Bulwood Hall coincided with the Woolf Inquiry into the causes of the Strangeways riots in 1990. The second visit was in 1993 to Northern Ireland following allegations of ill-treatment of persons suspected of offences related to terrorism by the security forces.

³⁵ S Shaw 'The CPT's Visits to the United Kingdom' in R Morgan and M Evans *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture in Context* (OUP Oxford 1999) 265, 271.

³⁶ See Prison Service website: <http://www.hmprisonservice.gov.uk/>.

do not have the power to force the legislature to entrench a code of prisoners' rights and the legislature is neither willing nor does it have the teeth to shape or resist governmental prison policies. But the absence of legislative reform of prisoners' rights in England can also be explained in a deeper sense by reference to the dynamics of contemporary English penal politics.

1.2 Prisoners' rights and penal politics

Before embarking on our analysis of English penal politics, it is useful to revisit the comparative example of Germany. In chapters one and two of this thesis, it was shown that Germany experienced a particular constellation of factors which contributed to the success of the prisoners' rights movement. Important amongst these was a powerful 'codification impulse' in Germany which grew from the desire to create unity within the criminal law and, after 1945, the general project of re-humanisation of the criminal law, the views and arguments of a highly influential academy, and the politics of a highly reformist social-liberal government during the 1970s.³⁸ Equally important however was the fact that this reform movement took place in a legal and political culture dominated by faith in constitutional rights and a strong rights rhetoric.³⁹ It was, to put it simply, impossible to talk of legal reform in Germany without showing strong fidelity to constitutional rights and principles. Consequently 'rights rhetoric' had a powerful defining influence over the language of prison law reform and the shape of prison law. The use of 'rights rhetoric' was strengthened further by the explicit relationship set out by the Federal Constitutional Court between constitutional rights, the *Rechtsstaatsprinzip* and the prisoner's legal status.⁴⁰ Of course, as indicated, Germany has experienced alternative penal discourses which militate against prisoners' rights rhetoric.⁴¹ This was evident both in the process of legislative drafting and since the Prison Act 1976 came into force. But it has also been shown that these competing penal discourses in Germany have consistently been countered by a powerful Federal Constitutional Court and an influential academy

³⁷ 'Prisoners and the Law: Beyond Rights' (note 19 above) 206.

³⁸ See ch. 2, pp. 60–79.

³⁹ See ch. 1, pp. 32–37.

⁴⁰ See ch. 1, pp. 38–42.

⁴¹ See ch. 2, pp. 83–84.

committed to the achievement of constitutional rights and principles. In sum, it has been shown that ‘rights rhetoric’ enjoys a powerful currency relative to other discourses in the definition of penal policy in Germany.

Unlike Germany, however, ‘rights rhetoric’ in the English penal political environment struggles for influence in the face of powerful competing discourses.⁴² Since the 1970s crime and penal policy has become increasingly politicised,⁴³ and the pursuit of ‘law and order’ has come to occupy a central place in English political culture. Prison policy is especially vulnerable to the political motivations of Ministers and their governments who both incite and exploit the public’s concern with crime and justice.⁴⁴ This increased politicisation of penal policy has been accompanied by a marked decline in the influence of the penal ‘professional elite’ who up to the 1970s had enjoyed the respect of policy makers within criminal justice and relative immunity from political pressure.⁴⁵ It is against these forces that the prisoners’ rights lobby must battle. It cannot claim the backing of a powerful constitutional court or an influential academy, nor, in its use of ‘rights rhetoric’ can it claim to have a ‘higher’ constitutional purchase over the definition of penal policy. While it is possible that this will shift in the wake of the Human Rights Act 1998, it is not self-evident that the power of ‘rights rhetoric’ in England will not continue to be undermined by the traditionally ambivalent relationship of the English to rights in general.⁴⁶ Moreover the relative weakness of ‘rights rhetoric’ in defining penal policy has been compounded by the ascendancy of the discourse of ‘instrumental managerialism’ in penal reform over the last twenty years and the intensification of ‘populist punitivism’ during the 1990s.⁴⁷ Both of these competing discourses grow out of

⁴² A Bottoms ‘The Philosophy and Politics of Punishment and Sentencing’ in C Clarkson and R Morgan, (edd), *The Politics of Sentencing Reform* (Clarendon Oxford 1995) 17.

⁴³ ‘Dumping the ‘Hostages to Fortune’? The Politics of Law and Order in Post-War Britain’ (note 27 above) 87; L Zedner ‘In Pursuit of the Vernacular: Comparing Law and Order Discourses in Britain and Germany’ (1995) 4(4) *S & LS* 517; D Garland ‘The Limits of the Sovereign State’ (1996) 36 *BJC* 445, 445–446; D Garland ‘The Culture of High Crime Societies’ (2000) 40 *BJC* 347, 349–351.

⁴⁴ ‘The Philosophy and Politics of Punishment and Sentencing’ (note 42 above) 40.

⁴⁵ ‘The Culture of High Crime Societies’ (note 43 above) 350; M Ryan ‘Penal Policy Making Towards the Millennium: Elites and Populists; New Labour and New Criminology’ (1999) 27 *IJSL* 1, 1–11.

⁴⁶ See section 2 below.

⁴⁷ ‘Instrumental managerialism’ refers to managerial strategies aimed at enhancing the actuarial values of economy, efficiency and effectiveness for their own sake. ‘Populist punitivism’ refers to the strategy of politicians of ‘tapping into and using for their own purposes, what they believe to be the public’s generally punitive stance’. ‘The Philosophy and Politics of Punishment and Sentencing’ (note 42 above) 33 and 40.

and are constructive of the particular circumstances of the English penal system which requires further examination.⁴⁸

Since 1945, the English penal system has increasingly operated under considerable strain.⁴⁹ Dogged by rising prison numbers, overcrowding, understaffing and staff unrest, prisoner escapes and riots, deteriorating conditions, increased security risks and decreasing control, prisons have presented successive governments with high costs and high political risks.⁵⁰ The practical challenges of the penal system have been accompanied by changes in the penal environment which have intensified since the 1970s. It was then that the prevailing consensus around the rehabilitative ideal was drastically undermined and penal thinking and criminal justice strategies shifted and fragmented.⁵¹ This breakdown in the ‘penal-welfare strategy’⁵² was accompanied by the breakdown of the welfare state consensus, brought on by economic and fiscal crisis, and the rise of the new right with its peculiar mix of ‘free market economics, anti-welfare social policy and cultural conservatism’.⁵³ Without the traditional ideological lighthouse of rehabilitation, or a definitive rights rhetoric, the penal system has drifted since this time in a ‘policy’ and ‘moral vacuum’.⁵⁴ Prison policy makers and administrators have been reactive, responding to particular crises at particular times within a broader climate of fiscal restraint, declining social empathy and increased anxiety about crime.

⁴⁸ M Cavadino I Crow J Dignan *Criminal Justice 2000: Strategies for a New Century* (Waterside Press Winchester 1999) chs. 2 and 5.

⁴⁹ M Cavadino and J Dignan *The Penal System* (2nd edn Sage London 1997) ch. 5; R King and K McDermott ‘British Prisons 1970–1987: The Ever Deepening Crisis’ (1989) 29 *BJC* 107; ‘Imprisonment: Current Concerns’ (note 25 above) 1137–1141.

⁵⁰ *The Penal System* (note 49 above) ch. 2.

⁵¹ ‘The Limits of the Sovereign State’ (note 43 above) 447–448, 450–466; B Hudson *Justice Through Punishment: a critique of the ‘Justice’ Model of Corrections* (Macmillan London 1987) ch. 1; A Bottomley *Criminology in Focus: Past Trends and Future Prospects* (Martin Robertson Oxford 1979) ch. 4; *The Penal System* (note 49 above) 28; R Ericson and K Carriere, ‘The Fragmentation of Criminology’ in D Nelken, (ed), *The Futures of Criminology* (Sage London 1994) 89.

⁵² This term is developed and used repeatedly in D Garland *Punishment and Welfare* (Aldershot Gower 1985).

⁵³ A Gamble ‘Privatisation, Thatcherism, and the British State’ (1989) 16 *JLS* 1; D Garland and R Sparks ‘Criminology, Social Theory and the Challenge of Our Times’ (2000) 40 *BJC* 189, 197.

⁵⁴ ‘Dumping the ‘Hostages to Fortune?’ (note 27 above) 123–125; V Stern *Bricks of Shame* (Penguin Harmondsworth 1987) 229; ‘Imprisonment: Current Concerns’ (note 25 above) 1144–1151.

The strategy of the New Right to exploit anxieties about the state of ‘law and order’ in England was not entirely consistent in terms of its implications for prison policy.⁵⁵ In the 1980s Conservative policy was dominated by the search to reconcile the twin aims of bolstering ‘law and order’ whilst remaining committed to fiscal restraint.⁵⁶ This manifested itself in the government adopting a ‘twin-track approach’ and ‘bifurcating’ between harsh treatment of serious offenders and liberal treatment for less serious offenders. Conservative Home Secretaries were thus able to justify a relatively liberal approach to sentencing and penal policy in the 1980s, in particular restraint in the use of custodial sentencing, in an attempt to reduce the escalating cost of the prison population.⁵⁷

Accompanying sentencing reform initiatives the Conservative government implemented managerial reform within the prison system aimed at enhancing financial accountability to the centre.⁵⁸ Initiated by the May Inquiry,⁵⁹ and taken up later in the programme of Fresh Start in 1987, policies were aimed at increasing the ‘efficiency’, ‘economy’ and ‘effectiveness’ of the prison administration and at undermining a highly unionised and supposedly intransigent Prison Service.⁶⁰ At the same time government began enquiring into the possibility of contracting-out prisons,⁶¹ a policy later adopted in 1991 alongside the private financing of prison building.⁶² Although ‘enhancing prison regimes’ was one stated aim of these managerial reforms, early studies showed that these substantive goals

⁵⁵ ‘Dumping the ‘Hostages to Fortune’?’ (note 27 above) 87; R Reiner and M Cross ‘Introduction’ in R Reiner and M Cross, (edd), *Beyond Law and Order: Crime and Criminology into the 1990s* (Macmillan Basingstoke 1991) 1.

⁵⁶ N Lacey ‘Government as Manager, Citizen as Consumer’ (1994) 57 *MLR* 534, 536–542.

⁵⁷ Most notable amongst these were Leon Brittan’s parole policies in the early 1980s, policies of diversion for diverting young offenders and attempts to implement the policy of bifurcation and the principles of restraint in the use of custody for less serious offenders which culminated in the Criminal Justice Act 1991. ‘The Philosophy and Politics of Punishment and Sentencing’ (note 42 above) 40–41; T Newburn, ‘Youth, Crime, and Justice’ in M Maguire R Morgan and R Reiner, (edd), *The Oxford Handbook of Criminology* (2nd edn Clarendon Oxford 1997) 613, 643–645; A Ashworth *Sentencing and Criminal Justice* (3rd edn Butterworths London 2000) 78–84; ‘Government as Manager, Citizen as Consumer’ (note 56 above) 536–542.

⁵⁸ A Fowles ‘Monitoring Expenditure on the Criminal Justice System: The Search for Control’ (1990) 29 *Howard Journal* 82.

⁵⁹ *Report of the Committee of Inquiry into the United Kingdom Prison Services* (Cmnd. 7673); C Train ‘Management Accountability in the Prison Service’ in M Maguire J Vagg and R Morgan, (edd), *Accountability in Prisons: Opening Up a Closed World* (Tavistock London 1985) 177.

⁶⁰ K McDermott and R King ‘A Fresh Start: The Enhancement of Prison Regimes’ (1989) 28 *Howard Journal* 161.

⁶¹ *Private Sector Involvement in the Remand System* (Cm 434).

⁶² Criminal Justice Act 1991, s. 84; Criminal Justice Act 1991 (Contracted Out Prisons) Order 1992, SI 1992/1656.

were mostly impoverished by the priority given to the pursuit of the instrumental goals of ‘economy’ and ‘efficiency’.⁶³

These managerial reforms marked the beginning of a fundamental cultural shift in prison administration and policy making.⁶⁴ In line with the rest of the public sector, the 1980s reforms ushered in an important shift from traditional public law values of political and legal accountability to those associated with market discipline and financial accountability.⁶⁵ The focus on traditional accountability mechanisms shifted to strategies of New Public Management. This involved a redefinition of the traditional notion of citizenship in consumerist terms, a fragmentation of the ‘monolithic’ State through the hiving-off of executive functions to semi-autonomous agencies and the private sector, an organisational shift from vertical structures of accountability and control to horizontal ‘control through contract’, the injection of competition into the public sector through the use of quality and performance indicators, the separation of the purchaser and provider role within the State, and an emphasis on financial accountability mechanisms such as value-for-money audit and other regulatory strategies.⁶⁶ Whilst managerial strategies were not directly pitted against the development of prisoners’ rights, they were, as Loughlin argues, ‘driven and fashioned almost entirely by a political economic impetus and with virtually no legal or constitutional consciousness’.⁶⁷ In this managerial culture, talk of the legislature bolstering rights for prisoners or of an increased role of the courts in the administration of prisons was likely to be viewed as *passé*. Rather the challenge facing supporters of prisoners’ rights was to harness a managerial discourse with a predilection towards the attainment of instrumentalist goals such as ‘economy’ and ‘efficiency’ in order to further substantive aims such as individual dignity, humanity and justice.⁶⁸ To put

⁶³ C Jones ‘Auditing Criminal Justice’ (1993) 33 *BJC* 187, 198. Although it is questionable whether managerial initiatives made significant advances in respect of either ‘economy’ or ‘efficiency’. See ‘A Fresh Start: The Enhancement of Prison Regimes’ (note 60 above) 161.

⁶⁴ ‘Auditing Criminal Justice’ (note 63 above) 199–200.

⁶⁵ C Scott and A Barron ‘The Citizen’s Charter Programme’ (1992) 55 *MLR* 526.

⁶⁶ ‘The Citizen’s Charter Programme’ (note 65 above); J Stewart and K Walsh ‘Change in the Management of Public Services’ (1992) 70 *Public Administration* 499; C Scott ‘Accountability in the Regulatory State’ (2000) 79 *JLS* 38, 39–48.

⁶⁷ M Loughlin *Public Law and Political Theory* (OUP Oxford 1992) 260.

⁶⁸ ‘The Philosophy and Politics of Punishment and Sentencing’ (note 42 above) 33.

it bluntly, from this point on talk of prison reform or prisoners' rights without some recourse to managerial rhetoric was likely to fail.⁶⁹

In 1990 the large scale prison riots at Strangeways Prison shocked penal policy makers, for a brief moment, into recognising that partial managerial reform and prioritisation of efficiency was not an adequate response to the deeper structural problems of the prison system. The resultant scale of the Inquiry by Lord Justice Woolf and Stephen Tumin reflected the seriousness of the riots and the widespread concern with their root causes.⁷⁰ The Woolf report, committed to attaining a balance between security, control and justice in prisons, attempted to use this turning point to advance prisoners' rights whilst employing the dominant rhetoric of managerialism.⁷¹ Prisoner 'compacts' were clearly an example of Woolf's attempt to harness a language of, what might be termed, 'liberal managerialism' to the prisoner's advantage. But, while many of Woolf's proposals were taken up in the immediate aftermath of the report,⁷² the tentative advancement of a prisoners' rights agenda through the use of liberal managerial rhetoric was to prove short lived. Government reforms tended to advance more instrumental managerial goals at the expense of substantive values such as enhanced legal or political accountability or enhanced regimes. It was illustrative of this that a year after the achievement of a central managerial reform, the creation of the Prison Service Next Step Agency, one of the most conspicuous failures of political accountability of the 1990s took place between the Home Secretary and the Director General of the Prison Service.⁷³ Moreover, the development of Operating Standards and Key Performance Indicators designed to measure prison performance failed to advance individual prisoner interests.⁷⁴ Not only were operating standards and performance indicators officially described as 'not intended to be legally enforceable' and as not giving rise to 'prisoner entitlements',⁷⁵ but key performance indicators have been repeatedly criticised for prioritising quantitative measures over

⁶⁹ This is the strong message in the concluding paragraphs of *Prison Law* (note 8 above) 472–473.

⁷⁰ *Prison Disturbances April 1990* (note 25 above).

⁷¹ *Criminal Justice 2000* (note 48 above) 134.

⁷² See *Custody, Care and Justice* (Cm 1647).

⁷³ This was the scandal surrounding the escapes from Whitemoor and Parkhurst prisons in 1995. Michael Howard refused to accept ministerial responsibility arguing that failures in security were 'operational' matters and then fired Derek Lewis, Director General of the Prison Service.

⁷⁴ 'Imprisonment: Current Concerns' (note 25 above) 1168–1171; *The Penal System* (note 49 above) 125–128.

⁷⁵ *Prison Service Operating Standards* (HMSO London 1994) Introduction.

qualitative concerns.⁷⁶ This flew in the face of Woolf's vision of justice within prisons which had included a set of accredited standards which could be legally enforceable and the creation of prisoner compacts which could give rise to legitimate expectations in prisoners. Moreover, the introduction of the Prisons Ombudsman, under the strong control of the Home Secretary,⁷⁷ fell short of Woolf's vision of a fully independent complaints body with proper powers of enforcement.⁷⁸ On the face of it, Woolf had been defeated in his attempt to capture managerial discourse for a progressive and liberal cause.

One major factor contributed to the demise of Woolf's liberal managerial agenda within government penal policy. It was signalled in the announcement to the Conservative Party Conference in 1993 by Home Secretary Michael Howard that 'prison works' and that prison regimes should be 'austere'. This proclamation marked a break with the 'twin track' tone of the 1980s, where 'law and order' rhetoric was mixed in with liberal policy initiatives, and ushered in a period of intense 'populist punitivism' and 'penal austerity'.⁷⁹ The cause of this marked shift in Tory policy can on one level be attributed to the different personal agendas of the Home Secretaries in power. Douglas Hurd and Kenneth Clarke had been moderate conservatives, whilst Michael Howard was part of the increasingly powerful Tory Right. Moreover, Hurd and Clarke had governed in a time when conservatives enjoyed a relatively comfortable majority, whilst Howard was operating in a time of Tory decline and during the rise of a confident New Labour opposition. Moreover, as Downes argues, the British recession between 1989 and 1992 had marked an increase in unemployment and a rise in the crime rate by almost 50% and consequently 'for the first time in over 30 years, the Conservative lead over Labour as the

⁷⁶ *Prison Rules: A Working Guide* (note 18 above) 16. In addition it is interesting that the government now has 'expiry dates' on each performance indicator which indicates an attempt to foil any attempted legal argument that the indicators give rise to any legitimate expectations on the prisoners behalf. See Prison Service Standards on <http://www.hmprisonservice.gov.uk/library/dynpage.asp?Page=74>

⁷⁷ See note 118 above.

⁷⁸ This problem continues as Lord Justice Woolf recently acknowledged. See 'We still fail our prisoners' (note 25 above).

⁷⁹ 'The Philosophy and Politics of Punishment and Sentencing' (note 42 above) 17; R Sparks 'Penal 'Austerity': The Doctrine of Less Eligibility Reborn?' in R Matthews and P Francis, (edd), *Prisons 2000: An International Perspective on the Current State and Future of Imprisonment* (Macmillan Basingstoke 1996) 74, 75.

party best able to guarantee law and order vanished'.⁸⁰ The punitive message adopted by Howard was thus a tool of political survival.

But the political capital to be gained from a strategy of 'populist punitivism' has also been placed in a far larger context. Bottoms, in line with Garland,⁸¹ explains the rise of 'populist punitivism' as a consequence of the 'disembedding processes of modernity' which in combination with the rising crime rate 'have led to a fairly widespread sense of insecurity, ... as former social certainties are eroded, and the abstract systems upon which people are expected to rely sometimes seem inadequately reassuring'.⁸² Garland adds to this explanation by arguing that a cultural formation has arisen, at least in the United States and the United Kingdom over the last 30 years, which he terms the 'crime complex of late modernity'. This is a culture where acceptance of high crime rates as a normal social fact is widespread, popular anxiety about crime and feelings of 'fear, anger and resentment' is commonplace, crime issues are politicised and represented in emotive terms, concerns about victims and public safety dominate, and a crime consciousness is institutionalized by the media and popular culture. It is a culture which has produced the preconditions in which punitiveness and public protection can gain high levels of political currency.⁸³ In short, it produces a climate in which politicians can easily exploit the insecurities of the electorate by promising to be tough on crime. Without strong alternative discourses within criminal justice politics which can militate against it, the political strategy of populist punitivism is likely to gain currency.

While rooted in this broader context, the entrenchment of populist punitivism and penal austerity in the United Kingdom was also assisted by a crisis within the penal system. This was the escape of high security prisoners from Whitemoor and Parkhurst prisons in 1994. The huge publicity surrounding these escapes and the proposals of the resultant Learmont report hardened the government's position, led to the entrenchment of security and public protection as the central purpose of prison administration,⁸⁴ and legitimated

⁸⁰ D Downes 'The *macho* penal economy' (2001) 3(1) *P & S* 61, 69.

⁸¹ 'The Culture of High Crime Societies' (note 43 above) 350.

⁸² 'The Philosophy and Politics of Punishment and Sentencing' (note 42 above) 47.

⁸³ 'The Culture of High Crime Societies' (note 43 above) 367–369.

⁸⁴ *Review of Prison Service Security in England and Wales and the Escape from Parkhurst Prison on Tuesday 3rd of January 1995 (The Learmont Report)* (Cm 3020); R Morgan 'Learmont: Dangerously Unbalanced' (1996) 35 *Howard Journal* 346.

more restrictive and punitive practices within prisons.⁸⁵ The ambitions of the prisoners' rights lobby and the liberal agenda of the Woolf Report with its attempt to balance security, control and justice was to find little political currency in such an environment. Rather, the dominant language of penal administration shifted to one of 'punitive managerialism' with a central focus on public protection and security.⁸⁶ This shift was epitomised by the use of Woolf's prisoner compact. The Government failed to exploit the potential of these compacts to act as vehicles for prisoner empowerment, but rather viewed them as mediums of prisoner control. Thus, whilst downplaying prisoners' legitimate expectations, Government highlighted prisoners' obligations and the notion that the award of 'earnable privileges' would be dependant on compliance with these obligations.⁸⁷

Labour's return to power did little to quell the populist punitive tone of penal policy.⁸⁸ Whilst the Labour mantra 'Tough on Crime, Tough on the Causes of Crime' sought to sweeten the punitive pill with a dose of welfarism, it is widely accepted that the subtext, 'tough on criminals', has characterised much of Labour penal policy.⁸⁹ Although Labour seeks to align itself with a policy of advancing human rights, signalled in particular through the incorporation of the Human Rights Act, its punitive policies do not lend themselves easily to an extension of human rights protections to prisoners. Thus, whilst Labour had made a manifesto commitment to the Woolf Report in the past, this commitment has been neglected.⁹⁰ Until now, Labour has not yet produced anything significant in the area of prisoners' rights reform beyond retracting the highly restrictive fetters placed on the Prisons Ombudsman by Michael Howard and relocating with the Home Secretary the responsibility for answering parliamentary questions on operational

⁸⁵ 'Dumping the Hostages to Fortune?' (note 27 above) 125.

⁸⁶ *Criminal Justice 2000* (note 48 above) 144.

⁸⁷ 'Imprisonment: Current Concerns' (note 25 above) 1170–71.

⁸⁸ 'Penal Policy Making Towards the Millennium: Elites and Populists; New Labour and the New Criminology' (note 45 above) 11–16.

⁸⁹ 'The macho penal economy' (note 80 above) 69.

⁹⁰ It is noticeable in this regard that the new White Paper, *Criminal Justice: The Way Ahead* (Cm 5074), makes no reference to the Woolf Report.

matters of prison administration.⁹¹ While the Prison Rules 1964 were revised in 1999, their substance has only marginally changed and their legal status remains unchanged.⁹²

Indications as to the future of Labour's criminal justice policy, and its potential impact on prisoners, can be seen in its recent White Paper *Criminal Justice: The Way Ahead*.⁹³ The central aim identified in this broad ranging paper is the reduction of crime and the enhancement of public protection through the extension of policing measures in order to catch more criminals, more effective prosecution in order to convict more criminals and reform of sentencing and prisons in order to reduce persistent offending.⁹⁴ There is much in this paper which will alarm those who advocate a moderate approach to criminal justice in England. For example, the government promises to introduce 'the biggest ever expansion of CCTV this country has ever seen',⁹⁵ 'new anti-social behaviour orders',⁹⁶ 'intensive supervision and surveillance programs' which will include electronic tagging of hardcore repeat young offenders,⁹⁷ and increased severity of punishment for persistent offenders which will involve past offences leading to more 'intensive penalties'.⁹⁸ The paper also acknowledges that the ideal of 'just deserts' in the Criminal Justice Act 1991 will be abandoned in favour of 'a new sentencing philosophy' aimed at 'preventing reoffending' and 'ensuring that the punishment fits the criminal not the crime'.⁹⁹

This focus on the prevention of reoffending has mixed implications for prison policy. The government's aim 'to make prison work better to prevent re-offending' does involve some positive commitments with respect to prison regimes.¹⁰⁰ Thus, the government has stated that 'custodial sentences should not only be there as a punishment and incapacitation but also should help prisoners to lead law-abiding lives after release'. This, it is stated, 'requires decent, humane regimes and adequate and appropriate training and employment programmes'. Moreover, the paper acknowledges that 'conditions in some

⁹¹ *Criminal Justice 2000* (note 48 above) 145; 'Accountability in the Regulatory State' (note 66 above) 47. See also notes 118 and 73 above.

⁹² *Prison Rules: A Working Guide* (note 18 above) 1.

⁹³ *Criminal Justice: The Way Ahead* (note 90 above).

⁹⁴ *Criminal Justice: The Way Ahead* (note 90 above) 12.

⁹⁵ *Criminal Justice: The Way Ahead* (note 90 above) 5.

⁹⁶ *Criminal Justice: The Way Ahead* (note 90 above) 5.

⁹⁷ *Criminal Justice: The Way Ahead* (note 90 above) 32.

⁹⁸ *Criminal Justice: The Way Ahead* (note 90 above) 28, 41 and 42.

⁹⁹ *Criminal Justice: The Way Ahead* (note 90 above) 13 and 41.

prisons are very poor and must be improved'.¹⁰¹ The government thus intends to invest in more basic educational and vocational training to improve prisoner literacy, introduce a new strategy to prevent suicide and self harm by prisoners, introduce schemes to prepare prisoners for work in five prisons and five Young Offender Institutions, examine 'the scope for a long term programme to replace old, run down and remote prisons with new, purpose-designed and more accessible ones', and examine ways of improving assistance to prisoners after release.¹⁰²

The White Paper's acknowledgement that prison standards must be improved, and its intention to implement policies in order to assist the social reintegration of prisoners, will be welcomed by proponents of prison reform in England. At the very least the White Paper represents a notable retreat, if at this stage rhetorical, from an overriding concern with penal austerity and security in prisons. But the White Paper does not fully answer the the widespread public criticism regarding the state of current prison conditions and falls short of the numerous calls to implement a national system of accredited prison standards.¹⁰³ Moreover, given Lord Woolf's recent concern about the ongoing scourge of prison overcrowding and the government's plain commitment to increasing the prison population through increased severity of sentencing,¹⁰⁴ it is noteworthy that the White Paper only foresees investment in order to increase prison capacity by 2,660 places. A clearer governmental commitment to reducing prison overcrowding could have consisted in a promise to maintain the requisite level of investment required to ensure that prison overcrowding will not occur. But it is unlikely that such a commitment could be made in a climate of fiscal restraint.

Further proposals in the White Paper will be a cause of concern to those hoping to moderate the intensity of State intervention in offender's lives. One such proposal is the new 'custody plus' sentence which will extend short terms of imprisonment to include a further period of 'enforced programme in the community' with breach of the community

¹⁰⁰ *Criminal Justice: The Way Ahead* (note 90 above) 46.

¹⁰¹ *Criminal Justice: The Way Ahead* (note 90 above) 46.

¹⁰² *Criminal Justice: The Way Ahead* (note 90 above) 46–47.

¹⁰³ See note 25 above. See also the recent criticisms of Lord Woolf ('We Still fail our prisoners' *The Times* 2 (1 February 2001) 4) and the Director General of the Prison Service ('Prisons chief threatens to resign' *The Independent* (6 February 2001)).

¹⁰⁴ 'Chief justice clashes with Straw on jail policy' *The Guardian* (1 February 2001) 6.

element leading to automatic return to prison.¹⁰⁵ Finally, and perhaps most tellingly, the White Paper does not make any mention of the Woolf Report,¹⁰⁶ nor for that matter any proposal to advance Woolf's and Tumin's aim of enhancing 'justice' in prisons. Such an omission is a negation of the ongoing concern that prisoners are still without access to a fully independent complaints body with the power to enforce its decisions.¹⁰⁷

In sum, Labour's political record thus far provides us with little evidence that prisoners' rights rhetoric will gain any stronger political foothold than it has in the past, or for that matter, that legislative reform of prisoners' rights will be forthcoming.

1.3 The Prison Rules in focus

This account of English prison law has thus far indicated that England does not have a code of prisoners' rights nor a strong legislative acceptance of the courts' role in the process of prison administration. It has sought to explain this absence in the context of England's penal culture. The significance of this absence for the prisoner's legal status has not yet been fully discussed, however. Whilst England does not have a proper statutory code of prisoners' rights, it does have rules governing the administration of prisons. This section will look at these rules in more detail in order to demonstrate more fully the nature of the difference between the legal regime governing prisons in England and Germany.

The Prison Act 1952 vests the Home Secretary with the constitutional responsibility for administering prisons in England and Wales and the power to make rules for 'the regulation and management of prisons, remand centres ... and for the classification, treatment, employment, discipline, and control of persons required to be detained therein'.¹⁰⁸ The Prison Rules are statutory instruments which have obtained parliamentary

¹⁰⁵ *Criminal Justice: The Way Ahead* (note 90 above) 43.

¹⁰⁶ See 'Bibliography' where the Woolf Report is absent. *Criminal Justice: The Way Ahead* (note 90 above) 138.

¹⁰⁷ See 'We Still fail our prisoners' *The Times* 2 (1 February 2001) 4.

¹⁰⁸ Prison Act 1952, ss. 1 and 47.

approval albeit through a negative resolution procedure.¹⁰⁹ Until 1999, the Prison Rules in force were based on those enacted in 1964, although these rules were frequently amended. These have now been replaced by the Prison Rules 1999 which came into force on the 1st of April 1999.¹¹⁰ The new rules contain some individual amendments but in general retain the structure and style of the Prison Rules 1964.¹¹¹ The Prison Rules are augmented by a number of Standing Orders (SO) and Circular Instructions (CI) which provide formal statements of a prisoner's privileges and obligations and internal guidance on administrative issues and procedures respectively. SOs and CIs have no legal standing and cannot be relied on by prison administration to increase their powers beyond those permitted under the rules and certainly do not vest prisoners with any rights.¹¹² There is also a separate statutory framework for the administration of private prisons.¹¹³ However, the prisoners' legal status is not significantly different to those in public prisons, with the Prison Rules applying to both sectors.¹¹⁴

The legal status of the Prison Rules is complex. The rules place duties on the prison administration in the sense that they are obliged to act as the Home Secretary stipulates under the Prison Act 1952. These duties can be monitored by the Home Secretary who is under a duty in the Act to ensure compliance with the rules.¹¹⁵ The operations of the Prison Service are further monitored by the Prisons Inspectorate and the Prison Ombudsman who operate under the Home Secretary's authorisation. The Prison Rules form part of their monitoring process alongside a number of other performance standards and criteria which these bodies choose to adopt.¹¹⁶ The Minister is responsible to

¹⁰⁹ G Zellick 'The Prison Rules and the Courts' (1981) *CLR* 602, 612.

¹¹⁰ Statutory Instrument 1999 No. 728.

¹¹¹ *Prison Rules: A Working Guide* (note 18 above) 1.

¹¹² *Raymond v Honey* (1983) 1 AC 1; *Prison Law* (note 8 above) 20–21.

¹¹³ Criminal Justice Act 1991, s. 84 as amended by Criminal Justice and Public Order Act (CJPOA) 1994, s. 96.

¹¹⁴ *Prison Law* (note 8 above) 31–32. CJPOA 1994, s. 84 provides for the Secretary of State 'to contract with another person for the provision or running (or the provision and running by him), or (if the contract so provides) for the running by subcontractors of his, of any prison or any part of a prison'. Private prisons are governed by an agreed contract between the government and the prison company. Prisoners are not party to this contract and cannot enforce its terms, but a Home Office Controller is placed in each private prison to monitor performance under the contract (CJPOA 1994, s. 85). In addition, under CJPOA, s. 84 (2) all statutory regulations governing public prisons are said to apply to private prisons.

¹¹⁵ Prison Act 1952, s. 4 (2).

¹¹⁶ These can range from the Prison Service's own performance standards or international standards. See for example the *Report of Her Majesty's Chief Inspector of Prisons* (HMSO London 1998) which refers to the *United Nations Legislation on the Basic Principles for the Treatment of Prisoners* (General Assembly resolution 45/111 of 14 December 1995).

Parliament for his actions and the Prisons Inspectorate and Prison Ombudsman report both to the Minister and publish their findings for Parliament and the general public. There is also an internal complaints procedure which prisoners can and do use. The prisoner can pursue a request or complaint to the governor and the Board of Visitors (Prison Rule 8).¹¹⁷

Whilst prisoners are provided with recourse to these grievance procedures and additional access to the Prisons Ombudsman, all of these mechanisms have been shown to have limitations either in terms of effective prisoners' rights enforcement and/or independence from the prison administration.¹¹⁸ Critics argue that, whilst internal complaint mechanisms are important as a means of informal conflict resolution, the particular vulnerability of prisoners within closed prison institutions requires that internal complaint procedures must be supplemented by a truly independent complaints body for the resolution of genuine prisoner grievances.¹¹⁹ Moreover, internal grievance procedures have been criticised for failing to guarantee prisoner confidentiality and for failing to ensure that the prisoner has access to the senior prison governor in the prison.¹²⁰ The office of Prisons Ombudsman is non-statutory and created in the exercise of the Home Secretary's powers and reports directly to the Home Secretary. The Home Secretary may change the Ombudsman's terms of reference and has the last say on the eligibility of a complaint or the interpretation of these terms of reference. Given reformers concerns with the possibility of prisoners' access to an independent complaint body, there is significant disquiet as to the appropriateness of the current arrangements with respect to the Prisons Ombudsman. As Woolf recently stated in his speech on the tenth anniversary of the Woolf Report on the Prisons Ombudsman: 'it would be an advantage if they were answerable to some person other than the Home Office'.¹²¹ In addition, the Prisons Ombudsman does not have the power to overturn a decision, but is restricted to making recommendations to the Director General of the Prison Service who has a broad discretion as to whether he will accept such recommendations.¹²² The Boards of Visitors, which report directly to the Minister, are only nominally independent from the prison

¹¹⁷ *Prison Law* (note 8 above) 35–47.

¹¹⁸ See *Prison Law* (note 8 above) 9–11, 35–47.

¹¹⁹ 'Prisoners and the Law: Beyond Rights' (note 19 above) 204; see also pp. 155–158 and note 32 above.

¹²⁰ *Prison Law* (note 8 above) 35–42.

¹²¹ 'We still fail our prisoners' (note 25 above) 4.

¹²² *Prison Law* (note 8 above) 43.

authorities and have no statutory powers to change the decision of prison staff or to alter policy decisions at a higher level. Matters were improved somewhat by the removal of the Board's dual function as both disciplinary and complaint bodies in line with the recommendations of the Woolf Report. However, thus far the Boards of Visitors have failed to develop a reputation as 'independent, fearless, public critics'.¹²³ Rather their performance thus far has fulfilled Richardson's initial doubts that the Boards could ever 'possess sufficient status and independence to provide on their own, an adequate external safeguard of the rights and interests of prisoners'.¹²⁴ Given the significant disquiet surrounding extra-judicial enforcement mechanisms, strong reliance continues to be placed by prisoners and the prisoners' rights lobby on the ordinary courts.¹²⁵ These remain the only bodies which exist at present with **both** full independence of the Home Secretary and Prison Service and the power to alter their decisions or to enforce prisoners' rights against the authorities.

But, the extent to which the Prison Rules give rise to legally enforceable entitlements remains a matter of judicial interpretation. The judicial approach to the rules has changed over time and the current position was only settled in 1992. Whilst chapter 5 will examine this in more detail some guidance can be provided at this point. Originally all prison rules were held to be 'regulatory directions only, giving rise to no cause of action'.¹²⁶ This position has shifted somewhat. Individual rules are now justiciable in the sense that breaches of the rules are subject to judicial review and may give rise to a public law remedy which the court has the discretion to award.¹²⁷ The rules do not create rights in prisoners directly enforceable at private law and a prisoner cannot bring any claim for breach of statutory duty in respect of the Rules.¹²⁸ Breach of the Rules may nevertheless serve as evidence in support of ordinary negligence actions,¹²⁹ but such a breach by the administration does not give rise to an action for the tort of false imprisonment.¹³⁰ Judicial

¹²³ *Prison Law* (note 8 above) 11.

¹²⁴ G Richardson 'From Rights to Expectations' in E Player and M Jenkins, (edd), *Prisons After Woolf* (Routledge London 1994) 78, 94.

¹²⁵ On the contribution of the strategic litigation of prison reform lobby groups to the development of a prisoners' rights jurisprudence see: 'Prisoners and the Law: Beyond Rights' (note 19 above) 188.

¹²⁶ *Becker v Home Office* [1972] 2 QB 407, 418.

¹²⁷ *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733, 737 and 752 h-j.

¹²⁸ [1991] 3 All ER 733.

¹²⁹ [1991] 3 All ER 733, 752a.

¹³⁰ [1991] 3 All ER 733, 756.

review actions therefore form the main body of prisoners' rights cases. The prisoner may challenge a decision, if granted leave to do so,¹³¹ if it is ultra vires the empowering legislation. This means a potential challenge arises if the decision maker has: a) gone outside the discretion afforded to them; b) exercised their discretion illegally (for improper purposes, on the basis of irrelevant considerations or in bad faith); c) made an unreasonable decision and d) violated the rules of procedural justice.¹³² There is now an additional head of illegality which has been introduced under the Human Rights Act which requires public authorities such as the Prison Service to respect the rights laid out thereunder.¹³³ If a prisoner is successful in any of these claims, the court can compel the administrator to make a particular decision or have the administrative decision quashed, reversed, prohibited, returned for revision, stopped, or obtain a statement as to its illegality.¹³⁴ If a breach of a Convention right is established, the court under s. 8 (1) HRA may grant such remedies as it considers appropriate, including an award of damages if on the facts this would amount to 'just satisfaction' (s. 8 (2) HRA) of the injured party.

The prison rules are clearly relevant in an action for judicial review in the sense that they define the objects and extent of administrative discretion in prison but, unless the court considers a particular rule to confer an entitlement which it will uphold, a prisoner cannot directly enforce a prison rule under public law.¹³⁵ At most, the prisoner can petition the Home Secretary and then challenge the exercise of the Home Secretary's decision under public law for failing to fulfil his duty under section 4 (2) Prison Act 1952, to ensure compliance with the Rules and the Act.¹³⁶ However, on the basis of the courts record in checking the discretion of the Secretary of State on administrative questions, Richardson argues that 'the mere recognition of a right in prisoners to the reasonable exercise of discretion by the authorities, provides no adequate mechanism for enforcing special substantive rights in prisoners'.¹³⁷ On the other hand, the prison rules, being subordinate legislation, are nevertheless subject to judicial revision. This is because courts can control the Home Secretary's discretion under s. 47 (1) Prison Act 1952 in the making of the

¹³¹ It is not the intention here to embark upon a long discussion as regards leave for judicial review. In this regard see: P Craig *Administrative Law* (4th edn Sweet & Maxwell London 1999) chs. 21–23.

¹³² P Craig *Administrative Law* (Sweet & Maxwell London 1999) chs. 13 - 19.

¹³³ Human Rights Act 1998, s. 6 (1).

¹³⁴ *Administrative Law* (note 132 above) ch. 22.

¹³⁵ 'From Rights to Expectations' (note 118 above) 86.

¹³⁶ *R v Deputy Governor of Camphill Prison, ex p King* (1985) QB 735, 749.

prison rules. Courts have made the Home Secretary revise rules in particular areas of prison administration which are found to violate fundamental rights and/or general principles of judicial review. With the introduction of the Human Rights Act the potential is now higher than ever for the judiciary to intervene in the process of prison administration in this way. But the potential for creative judicial intervention very much depends on the extent of judicial activism and the judicial conception of the protections afforded by fundamental rights in the prison context. These are matters which are taken up further in sections 2 and 3 of this chapter.

Although in theory all Prison Rules are now justiciable under public law, as chapter five will show the extent to which prisoners can claim protection under the prison rules in a court of law is dependant on the nature of the rules in question and the subject matter involved. The Prison Rules, which are considerably more detailed than the Act, contain a mixture of provisions ranging from statements of broad prison administration policy to more specific obligations and duties on the Prison Service. Zellick, whose classic analysis of the Prison Rules 1964 remains relevant to the Prison Rules 1999, analysed the rules as falling into five categories.¹³⁷ These are statements of ‘general policy objectives’ such as the purpose of prison administration set out in Prison Rule 3; ‘rules of a discretionary nature’ which govern matters such as temporary release and communications with persons outside; ‘rules of general protection’ which prescribe certain minimum standards in matters of health and welfare; ‘rules of institutional structure and administrative functions’ which cast duties on the prison administration as regards their dealings with prisoners; and ‘rules of specific individual protection’ which chiefly cover areas of discipline and order, stipulating disciplinary offences and penalties.¹³⁹

Zellick argued that differing degrees of justiciability applied to his five categories of rules.¹⁴⁰ Although judicial attitudes have changed since Zellick wrote, many of his ideas on justiciability are reflected in the manner in which English courts have chosen to intervene in prisons. Of particular significance from a comparative perspective, was his argument that rules of ‘general policy objectives’ were too broad to be justiciable. He

¹³⁷ ‘From Rights to Expectations’ (note 118 above) 86.

¹³⁸ ‘The Prison Rules and the Courts’ (note 109 above) 602.

¹³⁹ ‘The Prison Rules and the Courts’ (note 109 above) 612–615.

¹⁴⁰ ‘The Prison Rules and the Courts’ (note 109 above) 612–615.

argued that ‘it is inconceivable that a departure from them, even if it were capable of demonstration, would be amenable to judicial supervision’.¹⁴¹ There is indeed very little judicial attention to ‘rules of general policy objectives’, in particular to Prison Rule 3 which states that ‘the purpose of the training and treatment of convicted prisoners shall be to encourage and assist them to lead a good and useful life’.¹⁴² The only judge to have mentioned ‘rules of general policy objectives’ in the course of his reasoning is Ralph Gibson LJ who stated that: ‘the Prison Rules may be regarded as the detailed provisions designed to achieve the purpose stated in rule 1 and rule 2 (1)’.¹⁴³ This could be read as an indication that the purpose of imprisonment as set out in these rules might be regarded as an interpretative guide or provide broad based guidance in evaluating the exercise of discretion under the Prison Rules. But this potentially purposive argument did not have any real significance in the case in question which turned on whether ‘intolerable conditions’ could form a basis for an action for false imprisonment. In any event there has not been any further judicial mention of the potential use of rules of ‘general policy objectives’ for the establishment of a legal claim or for that matter within any legal arguments presented before the court. Equally, it is significant that there is no mention in Prison Rule 2, which provides guidance on the interpretation of the Rules, that any purposive approach might be adopted in the interpretation of the rules or that ‘rules of general policy objectives’ might form the basis of such an approach.

Lack of judicial attention is not the only evidence to show that ‘rules of general policy objectives’ under the Prison Rules are not considered to provide any deeper legal principles guiding prison administration. In practice, those employed in prison administration and in its regulation no longer view the rules as offering authoritative guidance on the purpose of prison administration. This much has been accepted in the Prison Officers’ Training Manual which indicates that, since the decline of the rehabilitative ideal, attitudes to Prison Rule 3 have changed.¹⁴⁴ Equally, the Prison Inspectorate has long since abandoned any reference to Prison Rule 3 as a standard in the

¹⁴¹ ‘The Prison Rules and the Courts’ (note 109 above) 613.

¹⁴² This keeps the same wording as Rule 1 of the Prison Rules 1964.

¹⁴³ *Weldon v Home Office* [1992] 1 AC 128. Reference was made here to the Prison Rules 1964. Under the Prison Rules 1999, the purpose of imprisonment is now stated in Prison Rule 3 and has the same wording as Rule 1 of the Prison Rules 1964.

¹⁴⁴ *Prison Rules: A Working Guide* (note 18 above) 23.

analysis of prison regime quality.¹⁴⁵ Rather than recourse to the Prison Rules as a set of legal standards, the Prison Service now stipulates its own Statement of Purpose in its Framework Document. This purpose is three-fold: to keep secure those the courts put in custody, to treat those in custody with humanity, to help prisoners lead ‘law abiding and useful lives in custody and after release’.¹⁴⁶ But the Statement of Purpose is by no means exclusive as the Prison Service now suffers from a surfeit of ‘Visions, Aims, Objectives, Values and Principles’ included in a variety of Prison Service and Home Office documents.¹⁴⁷ Thus in addition, the Prison Service Corporate Information now states that the aim of prison administration is the ‘effective execution of the sentences of the courts so as to reduce re-offending and protect the public’.¹⁴⁸

This multiplicity of purposes reflects two factors. First, it reflects the lack of consensus on the purpose of prison administration which has been characteristic of official policy on prisons since the decline of the rehabilitative ideal in England in the mid 1970s. Ever since the first challenge to the official purposes of the Prison Rules were heard from King and Morgan and the May Committee in 1979, the purpose of imprisonment and prison administration has been changing with the tides of penal politics, attitudes and debate.¹⁴⁹ In this context the search for a unitary purpose of prison administration, such as that found in Germany, is fruitless. Secondly, this multiplicity of purposes indicates the absence of a purposive approach to prison law in England. Whether articulated as ‘humane containment’,¹⁵⁰ ‘positive custody’,¹⁵¹ ‘security, control and justice’¹⁵² or the ‘protection of the public’, statements of prison purpose in England certainly do **not** amount to statements of legal or constitutional principle. They are policy statements and ultimately matters of executive fiat. They do not provide the background substantive and principled basis upon which prisoners can establish more specific legal claims. In such a context it is hardly surprising that Zellick viewed ‘rules of general policy objectives’, under the Prison Rules, as non-justiciable.

¹⁴⁵ *Prison Rules: A Working Guide* (note 18 above) 24.

¹⁴⁶ *Framework Document for the Prison Service* (HMSO London 1993) point 2.1.

¹⁴⁷ *Prison Rules: A Working Guide* (note 18 above) 22.

¹⁴⁸ <http://www.hmprisonservice.gov.uk/corporate/>

¹⁴⁹ ‘Imprisonment: Current Concerns’ (note 25 above) 1146–1148.

¹⁵⁰ R King and R Morgan *The Future of the Prison System* (Gower Aldershot 1980) ch. 1.

The absence of any deep legal principles guiding the interpretation of the Prison Rules and the evaluation of the discretion exercised thereunder is a marked contrast to the German purposive approach to prison law. As the first part of this thesis has consistently shown, the conception and development of prisoners' rights in Germany centres on legal principles defining the purpose of imprisonment and prison administration. Paragraph 2 and the guiding principles of prison administration under paragraph 3 of the German Prison Act have thus formed the basis of judicial interpretation of individual provisions and provide substantive legal guidance as to the exercise of discretion.¹⁵³ Equally the German 'constitutional resocialisation principle' guides the courts' interpretation of the protections and limitations of the prisoner's basic rights within prisons and underpins the general provisions in the Act. This is a stark contrast between the German and English approach to prison law and it is repeated in the conception of the prisoner's legal status which will be discussed in section three below.

Zellick's second category, namely 'rules of a discretionary nature', is one into which many prison rules fall. A strong discretionary element can be found, for example in rules governing classification, temporary release, physical activity, time out of cell, work, education, correspondence and communications.¹⁵⁴ Many of these rules are characterised by words such as 'may', 'so far as reasonably practicable', 'where possible', 'subject to any directions of the Secretary of State' or 'where the Secretary of State permits'. Zellick recognised that establishing a breach under such rules would be difficult, although he accepted that judicial intervention would be possible in principle where the exercise of discretion was not properly exercised.¹⁵⁵ Judicial intervention in the exercise of prison administrative powers can occur, therefore, where it is held that a legal standard or right has been breached in the exercise of such discretion. With no general legal standards of prison administration to call upon, prisoners can only question prison administrative decisions in law by relying on general principles of judicial review and/or claiming a violation of a fundamental right in that particular case. They have to mould general legal propositions to the specific questions of prison administration. As chapter five will

¹⁵¹ *Report of the Committee of Inquiry into the United Kingdom Prison Services* (May Committee) (Cm. 7673) paragraph 4.26.

¹⁵² *Prison Disturbances April 1990* (note 25 above).

¹⁵³ See ch. 3, pp. 94–113.

¹⁵⁴ See Prison Rules 1999, numbers 7, 9, 19, 29, 30, 31, 34, 35.

¹⁵⁵ 'The Prison Rules and the Courts' (note 109 above) 13.

demonstrate, however, the extent to which the courts will recognise the existence of a prisoner's right and the weight accorded to that right in considering the exercise of discretion is not consistent, rather it depends on the court's view of the subject matter involved. Whilst courts are quicker to uphold rights where the decision involved directly or indirectly affects the length of the prisoner's sentence, they are very reluctant to interfere in the exercise of 'operational' or 'managerial' discretion within prisons, in particular where matters of security are involved.

Similarly, reticence characterises the judicial approach to Zellick's rules of 'general protection' which he saw as too 'generally formulated' and 'imprecise' to have been intended to be justiciable.¹⁵⁶ These rules provide minimum standards of nutrition, accommodation, health and cleanliness. The argument for non-justiciability in this instance was based on an objection to judicial intervention in the 'minutiae of day-to-day prison administration'.¹⁵⁷ This by and large accords with the attitudes of the courts who, short of clear evidence of 'intolerable conditions', are concerned not to meddle with prison administrative decisions regarding welfare and conditions.¹⁵⁸

The rules which Zellick identified as most amenable to judicial supervision were 'rules of institutional structure and administrative function' and 'rules of specific individual protection'. But even here the record is variable. Rules in the first category cast duties on prison administrators from which prisoners can claim correlative entitlements. Such rules require, for example, a Board of Visitors to hear a prisoner's application,¹⁵⁹ a chaplain to make a specified number of visits to a prisoner,¹⁶⁰ a prison governor to hear a prisoner complaint or a prison doctor to take care of a prisoner's health.¹⁶¹ Whilst judges have been happier to review the exercise of Board of Visitor powers, the assertion of judicial jurisdiction over the exercise of governor's powers has been more recent. Despite the

¹⁵⁶ 'The Prison Rules and the Courts' (note 109 above), 612–613.

¹⁵⁷ 'The Prison Rules and the Courts' (note 109 above), 614.

¹⁵⁸ See ch. 5.

¹⁵⁹ Prison Rules 1999, number 78.

¹⁶⁰ Prison Rules 1999, number 14.

¹⁶¹ Prison Rules 1999, numbers 11 and 20.

assertion of this jurisdiction, judges remain reluctant to exercise strong scrutiny of governor powers.¹⁶²

‘Rules of specific individual entitlement’ are rare and are usually only found in the disciplinary code and in rules relating to good order and discipline. These rules set out disciplinary offences and behaviour classified as a threat to good order or discipline, the procedures which are followed in determining whether a prisoner has committed an offence and the penalties awarded. Zellick argued that rules of specific entitlement were ‘so concrete and precise in nature that it is inconceivable that any latitude should be left to the prison authorities in their implementation’ and argued that ‘strict compliance goes hand in hand with judicial oversight’.¹⁶³ Indeed as chapter five will show, the courts have been most rigorous with respect to the procedural rights of prisoners charged with disciplinary offences, in particular where the penalties awarded have an impact on the length of the prisoner’s sentence. This intervention has primarily been corrective in that judges have upheld rules of natural justice or the right of access to the courts thereby prompting amendments of the rules. Judicial intervention is less forthcoming, however, where the penalties awarded are less serious or with respect to rules protecting good order and discipline which are classified as having a ‘managerial’ or ‘operational’ character.¹⁶⁴

To sum up, the rules governing the day-to-day administration of prisons in England do not amount to a code of prisoners’ rights. Drafted and amended by the Home Secretary and subject to cursory legislative scrutiny, the Prison Rules are ‘regulatory’ and do not give rise to actionable rights in private law. Although all the rules have been justiciable under public law since 1991, the judicial record in upholding public law entitlements has been highly variable and dependant on the rule in question and the subject matter involved. This variability is exacerbated by the absence of any judicially recognised principles of prison administration which bind the rules together, which assist in the interpretation and enforcement of the Rules and in the scrutiny of administrative discretion. The difference between the statutory framework and administrative rules governing prisons in England and the German Prison Act is evident. The German Prison Act explicitly specifies special rights for prisoners and provides leading principles in

¹⁶² See ch. 5.

¹⁶³ ‘The Prison Rules and the Courts’ (note 109 above) 614.

¹⁶⁴ See ch. 5.

paragraphs 2-4 which act as strong interpretative guidelines and as guidance in the exercise and supervision of discretion afforded under the Act. In short, there is a significant difference between England and Germany in terms of the body of special rights which prisoners can claim and the foundational principles upon which these rights might be founded.

These differences cannot be attributed solely to differences in the status and content of the rules regulating prisons in these two countries, however. Equally significant to the treatment of prisoners' rights in England and Germany are the broader constitutional context within which judges are operating and the judicial interpretation of fundamental rights in the prison context. The following two sections will deal with both of these in turn.

2. Fundamental rights and English constitutionalism

Corresponding to the physical security of an engineer's design and the intellectual security of a philosophical system is the political security of Germany's Rechtsstaat: every possible contingency seems covered by some law. Law, courts and constitution regulate everything. In Britain, much depends not on law, but on custom and tradition. Law itself is the by-product of custom built up by habit. Precedent is more important than purpose. The German state was designed-and rather well designed. The British state grew-although it is none the worse for that. Each country is very different both for the way the state works and what people think about it.¹⁶⁵

In the German chapters it was argued that at all levels of our analysis of German rights culture,¹⁶⁶ was a strong belief in and strong support for legally entrenched, fundamental rights. Thus, the German Basic Law entrenches fundamental rights unequivocally, starting out with a clear positive duty on the State to protect human dignity and by making fundamental rights under the Constitution unamendable.¹⁶⁷ The Basic Law, as an 'expression of a deep revulsion against a distasteful past',¹⁶⁸ sought to safeguard against the vagaries of democratic political processes both by guarding against strong government

¹⁶⁵ M Uchida 'Chalk and Cheese' (1998 Feb) *Prospect* 24, 28.

¹⁶⁶ See Introduction, p. 22-24.

¹⁶⁷ See ch. 1, pp. 32-37.

¹⁶⁸ P Merkl *The Origin of the West German Republic* (OUP New York 1963) 176.

in the political provisions of the constitution¹⁶⁹ and by vesting guardianship of basic rights in the hands of a judiciary with considerable powers of legislative review.¹⁷⁰ In German ‘rhetoric about rights’ we saw a high level of judicial, academic and political faith in fundamental rights. This is expressed in widespread advocacy of a natural rights philosophy that views fundamental rights as pre-State and the State’s very existence as justified and legitimised by its ability to safeguard and protect these rights.¹⁷¹ Just like the provisions of the Basic Law, this strong faith in fundamental rights displayed in ‘rhetoric about rights’ is also rooted in Germany’s recent political history. At its simplest, it expresses the strong resolve to guarantee against the recurrence of the abuses of the past. At its most fundamental, ‘rhetoric about rights’ in Germany expresses a political project of re-legitimising a State that had forfeited any claim to legitimacy. While fundamental rights scepticism is present in Germany, and has increased in recent years, it is fair to say that the primary consensus remains that of faith in fundamental rights.¹⁷² This faith in fundamental rights is highly determinative of legal and political relations generally and in turn has led to the dominance of ‘rights rhetoric’ when invoking arguments concerning social, legal and political change. This applies equally to criminal justice and explains the widespread and powerful use of rights rhetoric in the development of prison policy and reform.¹⁷³

The English do not share with the Germans the political history that has made constitutional rights so fundamental to them. Constitutionally entrenched rights in England have far less immediate symbolic connotations. Rather, when shadowed by German active faith in fundamental rights, the English display a marked ambivalence about the role and place of fundamental rights in political and legal culture. English constitutionalism contains a variety of conflicting and conflicted approaches to fundamental rights, ranging from overt scepticism to mere acceptance, and more recently, glimmers of rights optimism with the introduction of the Human Rights Act 1998. This ambivalence about rights is equally rooted in England’s peculiar history. If German faith

¹⁶⁹ The founding principles in this regard rest in the Democratic and Federal State principles in combination with the *Rechtsstaatsprinzip* under Basic Law, Article 20 (1). There are numerous further provisions in the Basic Law which concretise these principles. See C Degenhart *Staatsrecht I* (13th edn Müller Heidelberg 1997) 1–138.

¹⁷⁰ Basic Law, Article 93. See also ch.1, pp. 32–37.

¹⁷¹ Ch. 1, pp. 32–37.

¹⁷² See ch. 1, pp. 32–37.

¹⁷³ See ch. 2, pp. 60–79.

in rights expresses a determined rejection of the past and an admission of the failure of local political processes to safeguard against this past, English ambivalence about constitutionally entrenched rights springs from the relative continuity of its local democratic traditions,¹⁷⁴ conventions and institutions. This continuity has generated faith within traditional English constitutionalism in the legitimacy of local political institutions and a belief that England is blessed with a ‘general culture of tolerance and forbearance’.¹⁷⁵ While the discontinuity of Germany’s history can explain the need to constitutionally design and control every aspect of society, the historical continuity of England’s democratic past can explain the faith in the fluidity, flexibility and evolutionary nature of its constitutional arrangements and its belief in parliament, rather than the judiciary, as the ultimate protector of individual liberty. Grounded in the confidence gained from the longevity of its political and legal institutions and so-called culture of liberty, English constitutionalism has traditionally attributed the historical success of its constitution to its organic and unwritten nature. As Sedley states,

The phrase ‘an unwritten constitution’ is something of a confidence trick. In the context of the United Kingdom it suggests that we manage without the need of a real constitution: we know how to govern ourselves and do not have to write it down; common sense and tradition tell us what to do; written constitutions are for nations which have to work out how they should be governed.¹⁷⁶

Thus, until the enactment of the Human Rights Act 1998, England lacked the most obvious trapping of a rights culture, namely a clearly defined, unified and authoritative declaration as to what individual fundamental rights citizens held. Rather, England exhibited a ‘liberty-consciousness’. This meant, first, that ‘residual’ freedom was always

¹⁷⁴ The English constitution has not evolved without interruption, but can nevertheless be thought of as continuous, relative to Germany. The question whether the Parliamentary Rebellion of 1652 and the Cromwell Republic represented a complete break in constitutional history is a matter of debate. See on the one hand, C Munro *Studies in Constitutional Law* (Butterworths London 1999) 5; S De Smith and R Brazier *Constitutional and Administrative Law* (Penguin London 1998) 8–9 who argue that the return to the old order was sufficient to restore the continuity of the constitution. In opposition, see P Craig ‘Public Law, Political Theory and Legal Theory’ (2000) *PL* 211, 215.

¹⁷⁵ P Norton *The Constitution in Flux* (Blackwell Oxford 1986) 22; K Ewing and C Gearty *Freedom under Thatcher: Civil Liberties in Modern Britain* (Clarendon Oxford 1990) 2. This ‘culture of tolerance’ has been shown to be more evident in the political elite of Britain than amongst the population at large. See D Barnum, L Sullivan and M Sunkin ‘Constitutional and Cultural Underpinnings of Political Freedom in Britain and the United States’ (1992) 12(3) *OJLS* 362, 370.

¹⁷⁶ S Sedley ‘Governments, Constitutions, and Judges’ in G Richardson and H Genn, (edd), *Administrative Law and Government Action* (Clarendon Oxford 1994) 35.

protected where it was not prohibited by law,¹⁷⁷ and secondly, that included in the Diceyan conception of the rule of law, were general constitutional principles that expressed the rights and liberties of private persons.¹⁷⁸ These rights and liberties, which were subject to the express limitation of Parliament, were determined by the decisions of common law judges and did not derive from any general principles of a written constitution.¹⁷⁹ Rather, individual rights and liberties, in this view, were tacitly accepted as being part of the common law, they were the creation of judicial pronouncements over time. Or as Allan puts it, rights and freedoms were ‘the incidental consequence of ordinary litigation’.¹⁸⁰

The introduction of the Human Rights Act 1998 represents a break with this incidental or organic approach to rights and liberties. It is the culmination of deeper cultural shifts within English constitutionalism which themselves require elaboration. The following sections will set out this process of cultural change.

2.1. Rights scepticism and English constitutional culture

German constitutionalism is idealist and rationalist and aspires to the comprehensive and systematic protection of entrenched constitutional rights in line with overarching interpretative guidelines and constitutional purposes.¹⁸¹ These aspirations, have not traditionally been shared by English constitutional orthodoxy which was pragmatic, empiricist, positivist and highly sceptical of idealist notions of natural rights or

¹⁷⁷ AV Dicey *Law of the Constitution* (10th edn Macmillan London 1959) 270–272; D Feldman *Civil Liberties and Human Rights in England and Wales* (Clarendon Oxford 1993) 60–61; *Constitutional and Administrative Law* (note 174 above) 388; *Studies in Constitutional Law* (note 12 above) 334.

¹⁷⁸ See *Law of the Constitution* (note 177 above) 189–191; J Jowell ‘The Rule of Law Today’ in J Jowell and D Oliver, (edd), *The Changing Constitution* (3rd edn OUP Oxford 1994) 58–59; P Craig ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) *PL* 467, 470–474; I Harden and N Lewis *The Noble Lie - The British Constitution and the Rule of Law* (Hutchinson London 1986) ch.1 and 194–196.

¹⁷⁹ A V Dicey, *The Law of the Constitution* (8th edn Macmillan London 1927) 191.

¹⁸⁰ T Allan ‘Pragmatism and Theory in Public Law’ (1988) 104 *LQR* 422.

¹⁸¹ D Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press Durham 1997) 40. This is due to a large extent to the civil law culture in which it exists. On rationalism in civilian legal culture see H Glenn *Legal Traditions of the World* (OUP Oxford 2000) 132–135.

‘comprehensive ideology of any kind’.¹⁸² Instead, English constitutional orthodoxy, commonly expressed in Diceyan terms,¹⁸³ was ‘anti-rationalist’ and rooted in tradition and practical experience.¹⁸⁴ These values were expressed in a vision of an organic constitution governed by the political conventions and traditions of a sovereign parliament and articulated by pragmatic common law judges subordinate to Parliament.

Thus, the first fundamental principle of English constitutional orthodoxy is expressed in the doctrine of parliamentary sovereignty as articulated in the judgements of the common law and in the views of, amongst others, Blackstone, Coke, Dicey and Wade.¹⁸⁵ Parliament, it was argued, had proved over time a better safeguard of rights and freedoms in practice than any legal safeguard entrenched in a Bill of Rights. The English were,

¹⁸² This scepticism of constitutionally entrenched fundamental rights has been traced, beyond Dicey, to a variety of sources within English political culture and philosophy. Credit has been given to the authoritarianism of Hobbes, the constitutionalism of Mill and Bagehot, the legal positivism of Bentham and Austin, the radical scepticism of Bentham and Mill, the conservative scepticism and common law traditionalism of Burke, and even Hume’s jurisprudence. See: J Gray *Enlightenment’s Wake: Politics and Culture at the Close of the Modern Age* (Routledge London 1995) 172–173; A Ryan ‘The British, the Americans, and Rights’ in M Lacey and K Haakonssen, (edd), *A Culture of Rights* (CUP Cambridge 1991) 375–395; P Atiyah *Pragmatism and Theory in English Law* (Stevens and Sons London 1987) 18–26; K Minogue ‘What is wrong with rights’ in C Harlow, (ed), *Public Law and Politics* (Sweet & Maxwell London 1986) 209, 209–212; A Lester ‘Human Rights and the British Constitution’ in J Jowell and D Oliver, (edd), *The Changing Constitution* (4th edn OUP Oxford 2000) 89, 90–92 and M Loughlin *Public Law and Political Theory* (Clarendon Oxford 1992) where Oakeshott’s conservatism is viewed as an exemplar of the political philosophy underlying this peculiar form of English constitutionalism.

¹⁸³ Diceyan orthodoxy can usefully be characterised as the dominant interpretation of Dicey’s views. See *Public Law and Political Theory* (note 182 above) 184; C Harlow and R Rawlings *Law and Administration* (2nd edn Butterworths London 1997) 37. This form of Diceyan constitutionalism has been consistently challenged in England both in direct opposition to Dicey’s theory (e.g. W A Robson *Justice and Administrative Law* (Macmillan London 1928); I Jennings *Law and the Constitution* (University of London Press London 1938)) and in an ongoing dispute as to the correct interpretation of Dicey’s views (e.g. P Craig ‘Public Law, Political Theory and Legal Theory’ (2000) *PL* 211; P Craig ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) *PL* 467, 470–474; T Allan *Law, Liberty and Justice* (Clarendon Oxford 1993)). It is fair to say however that Dicey continues to form the starting point of constitutional analysis in twentieth century. As C Harlow stated in ‘Changing the Mindset: The Place of English Administrative Law’ (1994) 14(3) *OJLS* 419, 426: ‘Whether or not Dicey ‘got it wrong’, his work has become, to the chagrin of many, the orthodox background theory of the twentieth century constitution’. See also: J Goldworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Oxford 1999) ch. 10.

¹⁸⁴ Loughlin calls this form of constitutionalism ‘conservative normativism’, Harlow and Rawlings refer to this as ‘red light theory’, Harden and Lewis as ‘whig constitutionalism’. See *Public Law and Political Theory* (note 182 above); *Law and Administration* (note 183 above) ch 2; *The Noble Lie* (note 178 above) 1. I do not attach these labels as the issue at hand is not whether these views represent a background political theory but that they describe a cultural attitude to the entrenchment of fundamental rights. In this sense I am closer to McCrudden’s characterisation of the orthodox English attitude to rights as one of ‘pragmatic empiricism’. See C McCrudden and G Chambers *Individual Rights and the Law in Britain* (Clarendon Oxford 1994) 585.

¹⁸⁵ W Wade ‘The Basis of Legal Sovereignty’ (1955) *CLJ* 172; *Constitutional and Administrative Law* (note 174 above) ch 1; A Bradley ‘The Sovereignty of Parliament—in Perpetuity’ in J Jowell and D Oliver, (edd), *The Changing Constitution* (3rd edn OUP Oxford 1994) 79, 85–89; *The Sovereignty of Parliament: History and Philosophy* (note 183 above) chs. 3–9.

therefore, the proud recipients of liberty under a Parliament that, as a matter of ‘clearly accepted convention’, would ‘not use its unlimited sovereign power in an oppressive or tyrannical way’.¹⁸⁶ Belief in Parliament as a guarantor of freedom runs deep within English political and legal culture¹⁸⁷ and was sufficiently compelling to resist persistent calls for the inclusion of a bill of fundamental rights over a significant period of time.¹⁸⁸ This appeal to the rhetoric of parliamentary sovereignty continued to have resonance over the last thirty years even when the practices of governments, party politics and developments in European law were eroding its very foundations.¹⁸⁹ The strength of the appeal to parliamentary sovereignty was grounded in continuing faith in the ideals of majoritarian and unitarian democracy.¹⁹⁰ It can also be argued, however, that parliamentary optimism in England rested on a belief in a benign political culture where the proper limits of governmental power were taken for granted and where the political elite all shared an intrinsic sense of proper government.¹⁹¹ As András Sajó argues, ‘the exercise of power’ in England ‘is *built on trust*, contagious trust’.¹⁹² For ‘whig constitutionalists’, trust in the benignity of English political culture was bolstered by anachronistic and chauvinist views of continental Europe as the home of absolutism and despotism, against which Britain’s culture of liberty shone out. As Dicey hinted, what came effortlessly to the British had to be written in legal documents elsewhere.¹⁹³

The definition and extent of parliamentary sovereignty and the relationship of the Courts to Parliament and the Executive was never explicitly defined in positive law. This was left to a pragmatic common law judiciary committed to upholding the ideals of the ‘balanced

¹⁸⁶ G Marshall *Constitutional Conventions* (Clarendon Oxford 1984) 9.

¹⁸⁷ *The Sovereignty of Parliament: History and Philosophy* (note 183 above) chs. 3–9; ‘The British, the Americans and Rights’ (note 182 above) 395–406.

¹⁸⁸ A Bradley ‘The Sovereignty of Parliament—Form or Substance?’ and A Lester ‘Human Rights and the British Constitution’ in J Jowell and D Oliver, (edd), *The Changing Constitution* (4th edn OUP Oxford 2000) 23, 51–52 and 89, 90–92, 97–100.

¹⁸⁹ ‘The Sovereignty of Parliament—in Perpetuity’ (note 185 above) 98.

¹⁹⁰ P Craig *Administrative Law* (4th edn Sweet & Maxwell London 1999) 4–7. This is not the place to embark on a detailed examination of the meaning and philosophy of parliamentary sovereignty. For an in-depth analysis see *The Sovereignty of Parliament, History and Philosophy* (note 183 above) ch. 10.

¹⁹¹ ‘The British, the Americans and Rights’ (note 182 above) 405; K Ewing and C Gearty *Freedom Under Thatcher* (OUP Oxford 1990) 1–2; ‘Constitutional and Cultural Underpinnings of Political Freedom in Britain and the United States’ (note 175 above) 370. This was assisted after the Second World War by a sustained period of political consensus on matters of governmental policy. See *Individual Rights and the Law in Britain* (note 184 above) 5.

¹⁹² A Sajó *Limiting Government: An Introduction to Constitutionalism* (CEU Press Budapest 1999) 10. Author’s own emphasis.

¹⁹³ *Law of the Constitution* (note 177 above) 192.

constitution'. As guardians of the common law constitutional tradition, courts understood best how to respect the sovereignty of Parliament whilst articulating and protecting the traditional freedoms inherent in the 'spirit of the common law'.¹⁹⁴ Protection of freedom in this way was held up against what was viewed as the pretensions of an idealist, rationalist and metaphysical approach to fundamental rights.¹⁹⁵ Rather, under orthodox English constitutionalism questions of individual freedoms were to be settled not by an appeal to ideals, categories or principles based on natural rights but through a common law rooted in custom and common sense.¹⁹⁶ As Atiyah argues, there is 'a profoundly English belief that an independent judiciary, and a judiciary with the power to issue practical orders, was more important than any number of grand theoretical declarations about the Rights of Man'.¹⁹⁷

This common sense or pragmatism was cherished and protected by a legal profession famously insulated from, and distrustful of, academic opinion or theoretical argument.¹⁹⁸ This was a profession which saw itself as guardians of the 'artificial reason' that grew from the experience, traditions and uses of the common law. Legal knowledge in this tradition was not founded on an explicit exercise in rational and logical reasoning but rather 'historically evidenced custom'.¹⁹⁹ Thus, in the development of these freedoms, the common law would aspire not to construct a rational and comprehensive system of principles and rights but to find the best practical resolution of each individual case. As Wilberforce famously pronounced, 'English Law fastens not on principles but on remedies'.²⁰⁰

¹⁹⁴ K Ewing and C Gearty *The Struggle for Civil Liberties* (OUP Oxford 2000) 25–29.

¹⁹⁵ 'The British, the Americans and Rights' (note 182 above) 378; 'What is Wrong with Rights' (note 182 above) 209–211.

¹⁹⁶ On the anti-categorical, anti-rationalist, anti-theoretical and pragmatic approach of the common law see J Allison *A Continental Distinction in the Common Law* (OUP Oxford 2000) 122–128; *Pragmatism and Theory in English Law* (note 182 above) ch. 1; 'Changing the Mindset: The Place of Theory in English Administrative Law' (note 183 above); G Postema *Bentham and the Common Law Tradition* (Clarendon Oxford 1986) ch.1. On the historical conditions which led to the anti-rationalistic bent within the common law see R Van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (CUP Cambridge 1987).

¹⁹⁷ *Pragmatism and Theory in English Law* (note 182 above) 22.

¹⁹⁸ *A Continental Distinction in the Common Law* (note 196 above) 74. As Atiyah points out however there is no reason to believe that judges did not act on 'implicit theories' of their role and of the English constitution. *Pragmatism and Theory in English Law* (note 182 above) ch. 4.

¹⁹⁹ *Bentham and the Common Law Tradition* (note 196 above) ch.1.

²⁰⁰ *Davy v Spelthorne BC* [1983] 3 All ER 278 at 285.

Belief in the sensible and balanced approach of the judiciary was also implicit in England's 'inchoate' principle of the separation of powers. As Stevens maintains:

In modern Britain the concept of the separation of powers is cloudy and the notion of the independence of the judiciary remains primarily a term of constitutional rhetoric. Certainly its penumbra, and perhaps even its core, are vague. No general theory exists, although practically the English have developed surprisingly effective informal systems for the separation of powers The political culture of the United Kingdom, however, provides protections for the independence of the judiciary, which are missing in the law.²⁰¹

What this orthodox 'political culture' produced was a tacit consensus that the judicial role should be conceived in apolitical terms. In the vision of a unitarian democracy unelected judges, who lacked the political mandate of elected politicians, were not viewed as a legitimate part of the political process.²⁰² A broad division was thus established between 'the judicial control of legality and the parliamentary control of the political'.²⁰³ Thus, the common law judge was to safeguard the limits of executive action by policing the laws of the sovereign Parliament whilst simultaneously marrying this with the traditions of the common law.²⁰⁴ Judicial review in particular was thus confined to checking the legality (as opposed to the merits) of executive action, in the narrow sense of its conformity to empowering legislation and to the common law rules of procedure and process. Judges, imbued with this orthodox view, conceived of their role in particularly formalist terms.²⁰⁵ Vesting in judges the *explicit* power to check parliamentary and executive action on the grounds of their own interpretation of constitutionally entrenched substantive rights challenged this cultural view of the apolitical judge. A Bill of Rights thus threatened to politicise the judiciary and to break the tacit balance between the legislative and judicial functions.²⁰⁶ Gradual incremental judicial development of residual civil liberties, process standards and procedural safeguards could only be accommodated within the careful

²⁰¹ R Stevens 'A Loss of Innocence? Judicial Independence and the Separation of Powers' (1999) 19(3) *OJLS* 365, 367.

²⁰² *Administrative Law* (note 190 above) 5–7; *The Sovereignty of Parliament: History and Philosophy* (note 183 above) 233.

²⁰³ *A Continental Distinction in the Common Law* (note 196 above) 158.

²⁰⁴ W Wade and C Forsyth *Administrative Law* (7th edn Clarendon Oxford 1994) 5–7; *Administrative Law* (note 190 above) 7; *Law and Administration* (note 183 above) 578–579.

²⁰⁵ M Hunt 'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession' (1999) 26(1) *JLS* 86, 93.

²⁰⁶ J Young 'The Politics of the Human Rights Act' (1999) 26(1) *JLS* 27, 30; 'Constitutional and Cultural Underpinnings of Political Freedom in Britain and the United States' (note 175 above) 370 and 373; 'A Loss of Innocence?' (note 201 above) 395.

balance of the organic English constitution as an extension of parliamentary will and thus as a less explicitly political enterprise.²⁰⁷

If constitutional orthodoxy was sceptical of entrenched fundamental rights, preferring to place faith in tradition, radical constitutionalism was sceptical of fundamental rights on opposite grounds.²⁰⁸ Those concerned with political and social change focused their energies not on the entrenchment of a Bill of Rights or the pursuit of a rights consciousness, but on changing the make-up of government and forcing legislative reform.²⁰⁹ Protection of liberty was a matter for Parliament because it was as elected MPs that reformists could define the scope of such liberty. Left-wing thought in particular had always viewed fundamental rights as an idealist facade for the entrenchment of liberal values of egoistic individualism and the vision of a limited State.²¹⁰ Rather than trust a conservative and insulated judiciary with a bias towards private individualistic freedoms, left-wing constitutionalists preferred to place faith in the increased political power of the legislature.²¹¹ Far from supporting a recourse to fundamental rights, left wing constitutionalists viewed the prospect of increased judicial power with deep felt suspicion.²¹² For Labour, common law judges presented a threat to the necessary extension of the State for the attainment of socialist goals.²¹³ Entrenched fundamental rights, which the Left (in line with orthodox constitutionalism) viewed as primarily negatively conceived, only gave judges more political power to stem the tide of welfarist reform. Rather, a strong government was required with the power to implement, under

²⁰⁷ C Forsyth 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55(1) *CLJ* 122, 136–7.

²⁰⁸ *The Sovereignty of Parliament: History and Philosophy* (note 183 above) 215–220, 228 and 233; 'The British, the Americans and Rights' (note 182 above) 413.

²⁰⁹ *The Sovereignty of Parliament: History and Philosophy* (note 183 above) 233.

²¹⁰ 'What is Wrong With Rights' (note 182 above) 211; Loughlin (*Public Law and Political Theory* (note 182 above) ch. 6, 165–176, 190–205) also attributes the socialist resistance to the pragmatic/realist and empiricist strains of functionalist thought. Functionalism, also termed 'green light theory' by Harlow and Rawlings (*Law and Administration* (note 183 above) ch. 3) is a view of law as an instrument of politics and government. It rejects the notion of judicial interpretation of basic rights as a normative exercise, but rather one soaked in political preferences. It also views the adjudicative model and rights as a deficient means of resolving polycentric disputes which are the main forms of dispute which occur in the public sector.

²¹¹ Examples of these arguments are to be found in J Griffiths *The Politics of the Judiciary* (4th edn Fontana London 1991); Id. 'The Political Constitution' (1979) 42 *MLR* 1; K Ewing and C Gearty *Freedom under Thatcher: Civil Liberties in Modern Britain* (Clarendon Oxford 1990) ch. 8; Id. *The Struggle for Civil Liberties* (OUP Oxford 2000) ch. 8.

²¹² K Ewing 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *MLR* 79, 80.

²¹³ 'The Human Rights Act and Parliamentary Democracy' (note 212 above) 79 at 80.

statute, positive rights to State resources.²¹⁴ Equally, these rights should be defined and implemented in a modern administrative system that was free of the formalist, restrictive view of the common law and understood the need to effect a dynamic and workable administrative State.²¹⁵ Therefore, for very different reasons, both conservative constitutional orthodoxy and a particularly English brand of radical socialist constitutionalism rejected the notion of a Bill of Rights.²¹⁶ Both placed their faith in Parliament to realise their competing aims. As Ryan states, ‘political radicals have always looked to Parliament to legislate in their desired direction, just as conservatives have looked to Parliament to hold off the changes they feared’.²¹⁷

Despite this rights sceptical consensus between conservatives and radicals, there can be little doubt that an incipient ‘rights consciousness’ has slowly been building over the last thirty years, in particular within the legal profession.²¹⁸ With the introduction of the Human Rights Act 1998, which transformed the European Convention of Human Rights into domestic law, this process was explicitly acknowledged.²¹⁹ It has been said that the shift to a Bill of Rights represents a departure from both orthodox and radical constitutional traditions, and is bound up with a reinvention of English constitutionalism as expressing a systematic, rationalist, principled and rights based consciousness.²²⁰ For Loughlin and Ryan, incorporation of a Bill of Rights is far from the inevitable outcome of a process of constitutional evolution, rather it is tantamount to an ‘exercise in political reform’.²²¹ Given this apparent volte-face, we might ask why and how such a cultural shift has come about?

²¹⁴ ‘The British, the Americans and Rights’ (note 182 above) 409–410; *Public Law and Political Theory* (note 182 above) 197–201; *Law and Administration* (note 183 above) 602–604.

²¹⁵ *Law and Administration* (note 183 above) ch. 3.

²¹⁶ ‘The Politics of the Human Rights Act’ (note 206 above) 30.

²¹⁷ ‘The British the American and Rights’ (note 182 above) 413.

²¹⁸ M Hunt *Using Human Rights Law in English Courts* (Hart Publishing Oxford 1998) ch. 5.

²¹⁹ ‘The Human Rights Act and Parliamentary Democracy’ (note 212 above) 79.

²²⁰ *Public Law and Political Theory* (note 182 above) 210.

²²¹ *Public Law and Political Theory* (note 182 above) 210; ‘The British, the Americans and rights’ (note 182 above) 419.

2.2. The shift to a rights consciousness

Recourse to arguments for a Bill of Rights initially came in the form of conservative political objections to the socialist policies of Labour in the 1970s. The phrase ‘elective dictatorship’ was exploited by conservatives to stem the tide of State expansion.²²² But if conservatives exploited rights rhetoric in order to challenge Labour dominance in the 1970s, the 1980s saw an even greater shift across the political spectrum, and in the attitudes of the judiciary in particular, towards the possibility of entrenching a Bill of Rights. Erosions of parliamentary scrutiny, civil and political freedoms and local governmental power, under the Thatcher government undoubtedly inspired those on the left and centre of British politics, as well as the moderate Right,²²³ to review their assumption that English liberty consciousness was immutable.²²⁴ England’s effortless culture of liberty so internalised by the political elite had been fundamentally challenged by the authoritarian and centralist style of three consecutive Thatcher governments. Concerns rose that the organic development of the constitution by the common law judiciary could not keep up with the threats to civil liberties posed by modern British government.²²⁵ The threat of Thatcherism was coupled with the challenge to government legitimacy presented by the political events of Northern Ireland.²²⁶ Moreover, New Right ideology and its associated brand of New Public Management led to a redefinition of the State which threatened traditional political accountability mechanisms.²²⁷ This heightened the disjuncture between constitutional orthodoxy and political reality, and increased the perception that parliamentary controls over executive power were becoming more symbolic than effective.

²²² Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (London Collins 1978).

²²³ For an example of conservative concern about Thatcherism see S Jenkins *Accountable to None: The Tory Nationalization of Britain* (Penguin London 1995).

²²⁴ ‘The British, the Americans and rights’ (note 182 above) 429.

²²⁵ K Ewing and C Gearty *Freedom under Thatcher: Civil Liberties in Modern Britain* (Clarendon Oxford 1990) 257; A Lester ‘European Human Rights and the British Constitution’ in J Jowell and D Oliver, (edd), *The Changing Constitution* (3rd edn OUP Oxford 1994) 32, 41.

²²⁶ C McCrudden ‘Northern Ireland and the British Constitution’ in J Jowell and D Oliver, (edd), *The Changing Constitution* (3rd edn OUP Oxford 1994) 323.

²²⁷ G Drewry ‘Revolution in Whitehall: The Next Steps and Beyond’ in J Jowell and D Oliver, (edd), *The Changing Constitution* (3rd edn OUP Oxford 1994) 155; I Harden *The Contracting State* (Open University Press Buckingham 1992); R Baldwin ‘The Next Steps: Ministerial Responsibility and Government by Agency’ (1998) *MLR* 622; J Stewart and K Walsh ‘Changes in the Management of Public Services’ (1992) *PA* 504.

As a result during the 1980s in Britain political activism towards the entrenchment of a Bill of Rights increased sharply. A new liberal democratic party intensified its calls for constitutional reform and a Bill of Rights and civil liberties groups, such as Liberty and Charter 88, proliferated.²²⁸ These groups enjoyed the support of a broad political alliance of unlikely political bed-fellows and a number of converts from the orthodox sceptical approach to a Bill of Rights.²²⁹ This was accompanied by the intensification of domestic human rights scholarship signalled in the first two textbooks on human rights law (as opposed to civil liberties and freedoms) in Britain in 1993 and 1994 respectively.²³⁰ Following on from this political and scholastic activism were changes in the internal attitudes of the Labour Party as regards the need for a Bill of Rights. Crucially, in 1992, New Labour placed on its agenda its intention to incorporate the European Convention of Human Rights. Once the rights sceptical alliance between Left and Right had been broken, the course to the Human Rights Act 1998 was set down.²³¹

It cannot be denied however that constitutional reform might also have occurred without shifting the basic cultural premises of the orthodox English constitutional consensus against the entrenchment of a Bill of Rights. Ewing and Gearty, for example, saw the solution not in resort to a Bill of Rights, but in the reinvigoration of England's liberty consciousness by strengthening the doctrine of separation of powers and bolstering parliamentary power over State activity.²³² The move away from a pragmatic, organic and political constitutionalism imbued with a scepticism of constitutionally entrenched rights can be attributed also to additional cultural shifts.

The most obvious of these shifts comes in the globalization of human rights discourse and the growing influence of foreign legal cultures on Britain's local tradition. Consciousness of constitutional rights discourse was heightened by shifts in other common law

²²⁸ 'The British, the Americans and rights' (note 182 above) 428.

²²⁹ For a full list of the pressure groups in the United Kingdom see Appendix C in *Individual Rights and the Law in Britain* (note 184 above). On the make up of the movement for constitutional reform see *Public Law and Political Theory* (note 182 above) 220–224.

²³⁰ *Individual Rights and the Law in Britain* (note 184 above); D Feldman *Civil Liberties and Human Rights in England and Wales* (Clarendon Oxford 1993). On this matter see A Tomkins 'Inventing Human Rights Law and Scholarship' (1996) 16 *OJLS* 153.

²³¹ 'The Politics of the Human Rights Act' (note 206 above) 33; 'The Human Rights Act and Parliamentary Democracy' (note 212 above) 80–82.

jurisdictions.²³³ Senior judges who were increasingly internationally mobile became more receptive to the development of an international common law of human rights.²³⁴ This human rights internationalism was also fostered in part by the activities of the judiciary on the Privy Council which was being called upon to decide on matters of human rights in Commonwealth jurisdictions.²³⁵ Further, within the academy the dominant legal positivist tradition in England had been fundamentally challenged by the import of American legal scholarship, in particular Ronald Dworkin, and therewith liberal theories of law as a system of rights and principles.²³⁶

The most significant element of this process of globalisation was undoubtedly the influence of European law and the European Convention of Human Rights on the consciousness of politicians and, importantly, the judiciary.²³⁷ Under European law, English courts were de facto being called upon to review the constitutionality of parliamentary legislation, a role which drew them closer to the political stage.²³⁸ In addition, European law brought common law judges and academics closer to continental style rationalist principles.²³⁹ Moreover, the provision of direct access to the European Commission and Court of Human Rights in 1965 raised the rights consciousness of individuals, interest groups, the broader legal profession, public administration and the legal academy.²⁴⁰ The common law had to adapt to the existence of the Convention and as a result it was steered towards the consistent recognition of fundamental rights.²⁴¹

²³² *Freedom Under Thatcher* (note 225 above) 262–275; C Gearty in A Cygan, *Constitutional Civil Liberties in Germany and the United Kingdom* (Civil Liberties Research Unit Kings College and Goethe-Institut 1998) s. 2.1.

²³³ e.g. Canada and New Zealand.

²³⁴ M Hunt *Using Human Rights Law in English Courts* (Hart Oxford 1998) 24–25.

²³⁵ This was particularly the case in the West Indian Commonwealth where the judiciary impeded the enforcement of the death penalty on human rights grounds. ‘A Loss of Innocence?’ (note 201 above) 395.

²³⁶ *Public Law and Political Theory* (note 182 above) 206. A primary disciple of Dworkin in public law theory is Trevor Allan, see T Allan ‘Dworkin and Dicey: the Rule of Law as Integrity’ (1988) 8(2) *OJLS* 266.

²³⁷ ‘The Politics of the Human Rights Act’ (note 206 above) 34–37; *Using Human Rights Law in English Courts* (note 234 above) ch. 5; ‘European Human Rights and the British Constitution’ (note 225 above) 34.

²³⁸ ‘A Loss of Innocence’ (note 201 above) 402.

²³⁹ C Harlow ‘Changing the Mindset: The Place of Theory in English Administrative Law’ (1994) 14(3) *OJLS* 419, 429.

²⁴⁰ ‘European Human Rights and the British Constitution’ (note 225 above) 35–36.

²⁴¹ In *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720, HL it was accepted that the European Convention on Human Rights had an impact on domestic law through the presumption in the interpretation of statutes that Parliament did not intend to legislate against it and that the courts could pay

Traditional English constitutionalism, which had been sustained by the high level of institutional and historic continuity, was finding itself challenged by changes in the international environment. Britain was no longer an island, and the organic constitution was evolving from the protector of England's national identity to an expression of more global principles.

In part because of the changes in the local political and constitutional environment and in part because of the impact of globalisation, 'the role, power and self perception' of the higher English judiciary began to change as did their view on the function of the common law.²⁴² One of the most telling signals of this changing self-perception of the judiciary lies in the expansion of common law doctrines of judicial review over the last 30 years.²⁴³ Inspired by concern about the weakness of Parliament, the judiciary have sought to limit the growing powers of the executive by actively developing public law doctrine.²⁴⁴ Within this process the courts have more recently shown more willingness to articulate their supervisory jurisdiction in the language of rights rather than parliamentary intention and to develop fundamental rights at common law.²⁴⁵ This has been coupled by the increased propensity of the higher judiciary to enter into public political and constitutional debates in order to advance a 'rights consciousness'.²⁴⁶ These shifts in judicial attitude both inside and outside the courts have tested the orthodox view of the judiciary as pragmatic apolitical servants of parliamentary will and has in turn generated a re-evaluation of England's constitutional tradition.²⁴⁷

attention to it in the development of the common law. Furthermore, the Convention has been used as a basis for the interpretation of Community law in domestic courts. *Civil Liberties and Human Rights in England and Wales* (note 230 above) 66f.; *Using Human Rights Law in English Courts* (note 234 above) chs. 4–7.

²⁴² 'A Loss of Innocence?' (note 201 above) 393.

²⁴³ G Richardson and H Genn *Administrative Law and Government Action* (Clarendon Oxford 1994) Introduction, chs. 2 and 3; P Craig *Administrative Law* (Sweet & Maxwell London 1999) Part II.

²⁴⁴ 'Governments, Constitutions, and Judges' (note 176 above) 38–43.

²⁴⁵ J Jowell 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' (1999) *PL* 448; P Craig 'Competing Models of Judicial Review' (1999) *PL* 428. See also ch. 5.

²⁴⁶ *Using Human Rights in English Courts* (note 234 above) 164–174; 'A Loss of Innocence?' (note 201 above) 395; M Loughlin 'Rights Discourse and Public Law Thought in the United Kingdom' in G Anderson, (ed), *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (Blackstone London 1999) 193.

²⁴⁷ 'Rights Discourse and Public Law Thought in the United Kingdom' (note 246 above) 193; Id. 'Courts and Governance' in P Birks, (ed), *Frontiers of Liability* (OUP Oxford 1994) 91, 111; C Harlow and R Rawlings *Law and Administration* (Butterworths London 1997) ch. 3, ch. 17 in particular 602–604.

Signals of this re-evaluation can be found in the ongoing lively debate amongst senior members of the English judiciary and public law academics as to the constitutional foundation of judicial review.²⁴⁸ In this debate two broad propositions have been formulated. First, there are those who remain within the terms of constitutional orthodoxy and continue to root judicial review in parliamentary intention.²⁴⁹ The second position, broadly defined,²⁵⁰ roots the foundation of judicial review on a principled view of the common law as anchored in ideas of justice, the rule of law and individual rights.²⁵¹ These arguments have inevitably been associated with interpretations of the English constitutional conceptions of parliamentary sovereignty, the rule of law and the common law tradition which challenge constitutional orthodoxy.²⁵² In particular they seek to restore a common law rights consciousness and a principled constitutionalism which, it is argued, had been dormant since the nineteenth century.²⁵³ This general re-evaluation of the English constitutional heritage has questioned, both normatively and empirically, the notion of our constitutional heritage as necessarily pragmatic and empiricist. There are a variety of views within this second approach and not all of those who belong in this category necessarily viewed the incorporation of a Bill of Rights as desirable or

²⁴⁸ 'Rights Discourse and Public Law Thought in the United Kingdom' (note 247 above) 201–211.

²⁴⁹ C Forsyth 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament, and Judicial Review' (1996) *CLJ* 122; W Wade and C Forsyth *Administrative Law* (7th edn Clarendon Oxford 1994) 342; M Elliot 'The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review' (1999) 115 *LQR* 119; Id. 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) *CLJ* 129.

²⁵⁰ There are inevitably significant varieties of views within this broad camp.

²⁵¹ J Laws 'Law and Democracy' (1995) *PL* 72; P Craig 'Ultra Vires and the Foundations of Judicial Review' (1998) *CLJ* 63; D Oliver 'Is the Ultra Vires Rules the Basis of Judicial Review' (1987) *PL* 543; Lord Woolf 'Droit Publique–English Style' (1995) *PL* 57.

²⁵² T Allan *Law, Liberty and Justice* (Clarendon Oxford 1993) ch. 1; Id. 'Dworkin and Dicey: The Rule of Law as Integrity' (1988) *OJLS* 266; Id. 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1985) *CLJ* 111; Id. 'Pragmatism and Theory in Public Law' 1988 *LQR* 422; P Craig 'Formal and Substantive Conceptions of the Rule of Law' (1997) *PL* 467; Id. 'Public Law, Political Theory and Legal Theory' (2000) *PL* 211; Id. *Administrative Law* (Sweet & Maxwell London 1999) ch. 1; Id. *Public Law and Democracy in the United Kingdom and the United States* (OUP Oxford 1990); J Jowell and A Lester, 'Beyond Wednesbury: substantive principles of administrative law' (1987) *PL* 368; Id. 'Courts and Administration in Britain: Standards, Principles and Rights' (1988) *Israel Law Review* 409; Lord Woolf 'Droit Publique–English Style' (1995) *PL* 57; Sir John Laws 'Is the High Court the Guardian of Fundamental Constitutional Rights?' (1993) *PL* 59; Id. 'The Constitution: Moral and Rights' (1996) *PL* 622; Lord Browne Wilkinson 'The Infiltration of a Bill of Rights' (1992) *PL* 397; S Sedley, 'Human Rights–A Twenty First Century Agenda' (1995) *PL* 386.

²⁵³ The work of Paul Craig has been particularly concerned to reveal the historical foundations of the rights based approach. In particular in creating a principled foundation of the relationship between parliament and courts and a principled basis, in English constitutional theory, for parliamentary sovereignty. See for example P Craig 'Public Law, Political Theory and Legal Theory' (2000) *PL* 211. In addition see multiple references to older common law cases rooted in a rights approach and arguing for an inherent rights jurisdiction within the common law in P Craig *Administrative Law* (Sweet & Maxwell London 1999) e.g. 847.

inevitable,²⁵⁴ nor do they all embrace rights activism.²⁵⁵ Nevertheless, many did argue for the incorporation of a Bill of Rights as the necessary extension and clarification of what was fast becoming the self-perceived role of the judiciary.²⁵⁶ In sum, it can be argued that the legal cultural foundations of rights scepticism were called into question both by judicial activism in the courts and by extra-judicial and academic re-evaluation of the nature of English constitutionalism.²⁵⁷

2.3. Human rights, prisoners' rights and English constitutionalism

English constitutional culture displays a continuing tension between a tradition of rights scepticism, rooted in sovereignty and pragmatism, and an emergent rights consciousness, founded on a view of the common law as a body of rights and principles.²⁵⁸ This tension, which has intensified over the last thirty years, is unlikely to be fully resolved. Thus, the Human Rights Act 1998, which limits judicial powers of legislative review, is a product of the concern to balance a rights approach with the profound constitutional attachment to parliamentary sovereignty.²⁵⁹ It is the legislative symbol of the ambivalence towards fundamental rights which lies at the heart of English constitutional culture. Equally, the future impact of the Human Rights Act will be shaped by the way in which this cultural tension plays itself out. There are a variety of conflicting positions within the English legal community about the extent to which the human rights project should be taken. Rights optimists, be they practising lawyers, academics or human rights pressure groups seek to embrace the chance offered by the Human Rights Act to develop a 'transformative

²⁵⁴ e. g T Allan 'Constitutional Rights and Common Law' (1991) 11(4) *OJLS* 454; Lord Browne Wilkinson 'The Infiltration of a Bill of Rights' (1992) *PL* 397; S Sedley, 'Human Rights—A Twenty First Century Agenda' (1995) *PL* 386.

²⁵⁵ J Laws 'Law and Democracy' (1995) *PL* 72.

²⁵⁶ e.g. Sir Thomas Bingham MR 'The European Convention of Human Rights: Time to Incorporate?' (1993) 109 *LQR* 390; Lord Taylor 'The Judiciary in the 1990s' 1992 Dimpleby Lecture (30 November 1992).

²⁵⁷ 'Rights Discourse and Public Law Thought in the United Kingdom' (note 247 above) 213.

²⁵⁸ M Loughlin 'The Underside of Law: Judicial Review and the Prison Disciplinary System' (1993) *CLP* 23, 40.

²⁵⁹ 'The Human Rights Act and Parliamentary Legislation' (note 212 above) 98–99; P Craig *Administrative Law* (Sweet & Maxwell London 1999) 553.

constitutionalism'.²⁶⁰ Rights moderates within the legal community hope to see the incremental development of fundamental rights coupled with judicial deference to Parliament and other political processes.²⁶¹ Those in support of this moderate position hope to see the judiciary steer a course between the 'Scylla of excessive activism and the Charbybdis of a failure to protect guaranteed rights'.²⁶² Others still remain highly sceptical of the human rights project,²⁶³ even if some opponents have now grudgingly accepted the reality of the Human Rights Act.²⁶⁴ The future impact of the Human Rights Act 1998 will depend on which vision of the English constitution comes to dominate England's constitutional culture. This is likely to be a protracted and complex process, for as Hunt warns, 'highly stable prevailing or dominant cultures ... have a tendency to absorb new changes into their familiar ways and habits'.²⁶⁵

However, the point of this analysis is not to speculate on the future impact of the Human Rights Act 1998, or to provide a general commentary on recent case law in this regard. Rather its purpose has been to provide a backdrop against which judicial development of prisoners' rights in England over the last thirty years are to be viewed. As chapter five will show, judicial development of prisoners' rights in England has been marked by a struggle between the competing discourses of pragmatism and sovereignty on the one hand and individual rights on the other. This struggle underpinning judicial treatment of prisoners' rights in England is a point of substantial comparative significance with Germany. The ambivalence at the heart of English constitutional culture about the ideal of fundamental rights protection is not present within German constitutional culture, nor has it marked German judicial treatment of prisoners' rights. Rather the development of prisoners' rights in Germany has been rooted in a deep commitment within German legal culture to the systematic and comprehensive protection of fundamental rights and principles. Whilst chapters two and three showed that many institutional and political

²⁶⁰ M Hunt 'The Human Rights Act and Legal Culture' (1999) *JLS* 86; F Klug *Values for a Godless Age* (Penguin London 2000).

²⁶¹ Variations on this position can be found in W Wade 'The United Kingdom's Bill of Rights' in J Beatson, (ed), *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart Oxford 1998) 61, 66; G Marshall 'Interpreting Interpretation in the Human Rights Bill (1988) *PL* 167; G Marshall 'Two kinds of compatibility: more about section 3 of the Human Rights Act 1998' (1999) *PL* 377; J Laws 'The Limitations of Human Rights' (1998) *PL* 254; *Administrative Law* (note 259 above) 559–563.

²⁶² 'The Limitations of Human Rights' (note 261 above) 261.

²⁶³ J Redwood 'Freedom to confuse' *The Independent* (7 October 2000) 9.

²⁶⁴ K Ewing 'Social Rights and Constitutional Law' (1999) *PL* 104.

²⁶⁵ 'Human Rights Act and Legal Culture' (note 260 above) 102.

obstacles stand in the way of the full realisation of the constitutional ideals underpinning prisoners' rights in Germany, they also showed that the core commitment of the legal community to the realisation of these ideals has strengthened prisoners' rights in the face of these continuing challenges. As chapter five will show, however, the judicial development of prisoners' rights in England has been characterised by continuing ambivalence as to the very project of prisoners' rights protection. Instead of a comprehensive and consistent judicial commitment to prisoners' rights protection, prisoners' rights cases in England 'reveal signs of the strains of operating in a schizophrenic world oscillating between a legal culture rooted in sovereignty and one constructed on the foundation of individual rights'.²⁶⁶ Consequently, there is little common language with which to define prisoners' rights and to balance the competing demands of administrative flexibility and the maintenance of prison security against them. Rather English judges have vacillated between parallel discourses, on the one hand using rights discourse to advance the cause of prisoners' rights and on the other hand hindering their development through recourse to the language of sovereignty and pragmatism. In short, as chapter five will show in more depth, the story of prisoners' rights protection in England is a testimony to the broader ambivalence about rights at the centre of English constitutional culture.

Whilst prisoners' rights in England have been shaped by the constitutional environment in which they were developed, a further underlying factor distinguishes treatment of prisoners' rights in England from that of Germany. This is the contrasting judicial conception of the prisoners' fundamental rights status in both countries. The following and final section will examine this issue.

3. The prisoner's fundamental rights status in Germany and England

In order to understand how the English conception of the prisoners' fundamental rights status differs from that of Germany, it is necessary to remind ourselves of that present in Germany. The German conception of the prisoner's basic rights status is made up of two basic elements. Firstly, the prisoner's legal status is divided between those rights which

²⁶⁶ 'Courts and Governance' (note 247 above) 94.

are relevant to the length, type and duration of his sentence - known as status decisions - and those rights which are relevant to the actual administration of the prison sentence - known as administrative decisions. This division stems from the systemic conception of German criminal law which strictly distinguishes between decisions taken with regard to the criminal sentence (*Strafzumessung* and *Strafvollstreckung*) and decisions taken during the administration of the prison sentence (*Strafvollzug*). This conception is equally reflected in constitutional law which makes a clear distinction between the limitations and protections of fundamental rights which arise as a result of the imposition of a custodial sentence and the limitations and protections of fundamental rights which occur during the process of prison administration. Thus the German Basic Law explicitly regulates the legality of status decisions by giving the State competence to imprison criminal offenders,²⁶⁷ and laying out criteria by which a person may be punished,²⁶⁸ detained or sentenced to imprisonment.²⁶⁹ In addition, a separate constitutional justification for the restriction of rights at the administrative level has been founded by the FCC in the 'constitutional resocialisation principle' which itself is derived from the rights and principles of the constitution.

The recognition of administrative rights as distinct from status rights in Germany, provides a legal and constitutional expression of Paterson's dictum that prisoners are sent to prison as punishment not for punishment.²⁷⁰ This accepts that, while the imposition of a custodial sentence might restrict certain rights, rights protections will remain in the course of administering the custodial sentence. Similarly, this distinction is premised on recognition of the institutional threats to liberty which imprisonment represents. Goffmann argues that the total regulation of the prisoner's life by the prison regime constitutes a 'mortification' of his 'civilian self'.²⁷¹ Protection of administrative rights can thus be viewed as an attempt to preserve the essence of this 'civilian self' for prisoners in the course of their imprisonment.

²⁶⁷ Basic Law, Article 74, point 1.

²⁶⁸ Basic Law, Article 103 (2).

²⁶⁹ Basic Law, Article 104.

²⁷⁰ D Van Zyl Smit 'Leave of Absence for West German Prisoners' (1988) 28 *BJC* 1.

²⁷¹ E Goffmann 'On the Characteristics of Total Institutions: the Inmate World' in D Cressey *The Prison: Studies in Institutional Organisation and Change* (Holt, Rinehart & Winston New York 1961) 16, 23.

Having identified a distinct administrative rights status for the prisoner in Germany, the Federal Constitutional Court has constructed this administrative status in the following way. The prisoner is viewed as a bearer of both negative fundamental rights against state infringement (*abwehr status*) and positive rights to state action (*soziale integrationsstatus*). The prisoner's negative rights status ensures that, while prison administrators can limit his fundamental rights, core fundamental rights protections remain within the prison context. In addition, however, the prisoner bears a general positive right to a particular form of prison regime and particular kind of imprisonment. The prisoner's positive rights status is rooted in his basic constitutional 'right to resocialisation' and the 'constitutional resocialisation principle'. This principle is drawn from Articles 1 (1) and 2 (1) of the Basic Law combined with the Social State Principle enshrined in Article 20 of the Basic Law.²⁷² The 'constitutional resocialisation principle' determines the nature and purpose of the prison regime and the ways in which permissible limits on the prisoner's negative rights can occur. 'The constitutional resocialisation principle' also acts as a counter to the potential limitations of rights which might occur in the course of the attainment of internal security or public protection. As chapter three showed, while these are recognised as inherent functions of imprisonment, they have to be balanced against the constitutional purpose of prison administration.²⁷³ Moreover, chapter three showed that the prisoner's right to resocialisation gives courts a substantive basis upon which to scrutinise the nature of the prison regime and the Federal Constitutional Court in particular the power to force the State to implement policies within prison.²⁷⁴ In short, prisoners can be said to hold an economic and social right to the direction of State resources towards the realisation of their resocialisation.

Although challenged in the mid 1980s, the German definition of the prisoner's legal status based on a **divisible** conception of the prisoner's administrative and status rights and on a **dual** conception of the prisoner's positive and negative rights has nevertheless survived. The definition has served both as a guideline for the interpretation of the Prison Act 1976 and as the basis of the corrective function which the court continues to perform over the development and amendments of the Act. The prisoner's constitutional status has provided a framework within which German penal politics must operate and German

²⁷² See ch. 1, pp. 38–50.

²⁷³ See ch. 3, pp. 94–113.

²⁷⁴ See ch. 3, pp. 94–113 and 132–148.

judges are called upon at all levels of the legal hierarchy to decide on the legality and constitutionality of a significant number of questions which arise in the day to day administration of the prison.

To say that a consistently applied conception of the prisoner's legal status exists in England would be to iron out conflicts within the common law. As chapter five will show this conception is yet to be settled. It is possible nevertheless to point to what we might call the 'best' conception, developed thus far, of the prisoner's fundamental rights status in England. This 'best' conception is an amalgam of the principles set out in *Raymond v Honey* and *Leech (No. 2)*. In *Raymond v Honey* Lord Wilberforce, summarising the words of Lord Justice Shaw in *St. Germain*,²⁷⁵ stated that 'under English law, a convicted prisoner, in spite of his imprisonment, retains all the civil rights which are not taken away expressly or by necessary implication'.²⁷⁶ This dictum was extended by Lord Steyn in *Leech (No. 2)* where he stated that 'the more fundamental the right interfered with and the more drastic the interference, the more difficult becomes the implication'.²⁷⁷ Moreover, that even where restrictions of rights were permitted by necessary implication 'the authorised intrusion must ... be the minimum necessary to ensure' the 'statutory objective'.²⁷⁸ When taken together, the principles in *Raymond v Honey* and *Leech (No. 2)* amount to much more than a mere statement of residual rights. Rather they amount to the stronger statement that, in the absence of Parliament's express words to the contrary, the negative aspect of prisoners' fundamental rights would be protected as far as possible and in line with a principle of proportionality designed to ensure minimum interference with those rights.

This conception of prisoners' rights in England sits squarely with the general conception of fundamental rights which has been developed at common law. A clear exposition of this can be found in *Wheeler v Leicester City Council*:

Basic constitutional rights in this country such as freedom of the person and freedom of speech are based not on any express provisions conferring such a right but on freedom of an individual to do what he will save to the extent that he is prevented from so doing by the law. Thus, freedom of the person depends on the fact that no one has the right lawfully to arrest

²⁷⁵ *R v Board of Visitors of Hull Prison, ex p St. Germain and others* (1978) 1 QB (CA) 425, 455.

²⁷⁶ *Raymond v Honey* (1983) 1 AC 1, 10.

²⁷⁷ *R v Home Secretary, ex p Leech (No. 2)* [1994] QB 198, 209.

²⁷⁸ [1994] QB 198, 217.

the individual save in defined circumstances. The right to freedom of speech depends on the fact that no one has the right to stop the individual expressing his own views, save to the extent that those views are libellous or seditious. These fundamental freedoms therefore are not positive rights but an immunity from interference by others. I do not consider that general words in an Act of Parliament can be taken as authorising interference with these basic immunities which are the foundation of our freedom. Parliament (being sovereign) can legislate so as to do so; but it cannot be taken to have conferred such a right on others save by express words.²⁷⁹

From this statement of Lord Justice Browne-Wilkinson, we can distil the basic elements of common law rights protection. First, the rights recognised and protected under common law are traditional civil and political rights such as the right to freedom of assembly and the right to free speech.²⁸⁰ These liberties derive fundamental constitutional status not through positive enactment, but are a species of a general residual liberty which the common law vigilantly protects. Secondly, common law liberties are negatively conceived, in the sense of acting as immunities from state or governmental intervention. They are not positively conceived as ‘rights against the State to ensure that acknowledged liberties may be more fully or readily exercised’.²⁸¹ Finally, rights and liberties are always subject to limitation by Parliament, which has sovereign power and the democratic authority to limit rights, although at best such limitations have to be expressly stated in legislation. Given this background, it should come as no surprise that the conception of the prisoner’s rights status is negatively conceived, that limitations of the prisoner’s negative rights are slow to be accepted unless stated expressly, and that where such restrictions are implied they must amount to ‘minimum interference necessary’ to achieve the stated aim.

With the introduction of the Human Rights Act (HRA) 1998 the prisoner’s rights status takes on a new dimension in that prisoners’ Convention rights are now positively enacted in law. Under the Human Rights Act courts are required to ‘take into account’ European Convention jurisprudence on the issue at hand.²⁸² It is noteworthy therefore that the ‘best’ conception of prisoners’ rights in England is not far removed from that of the European Court of Human Rights (ECtHR) which was originally developed in *Golder*.²⁸³ In this case, the ECtHR departed from its prior doctrine that certain forms of rights restrictions

²⁷⁹ *Wheeler v Leicester City Council* [1985] AC 1054, 1065.

²⁸⁰ See in general D Feldman *Civil Liberties and Human Rights in England and Wales* (Clarendon Oxford 1993); C McCrudden and G Chambers *Individual Rights and the Law in Britain* (Clarendon Oxford 1994).

²⁸¹ T Allan ‘Constitutional Rights and Common Law’ (1991) 11(4) *OJLS* 453, 457.

²⁸² Human Rights Act 1998, s. 2.

were an ‘inherent feature’ of imprisonment.²⁸⁴ Instead it argued that rights restrictions were to be assessed ‘having regard to the ordinary and reasonable requirements of imprisonment’. Moreover, that these restrictions had to be ‘stipulated by law’ and in accordance with the proportionality test developed in general ECtHR jurisprudence, namely that the restrictions be ‘necessary in a democratic society’ and for the attainment of a ‘legitimate aim’ stipulated in the Convention.²⁸⁵ The court accepted that the ‘legitimate aim’ of the ‘prevention of disorder and crime may justify wider measures of interference in the case of ... a prisoner than in that of a person at liberty’.²⁸⁶ But, in line with the proportionality principle, the ECtHR required that any such restrictions were no greater than was necessary to address a ‘pressing social need’.²⁸⁷ In sum, the *Golder* test starts out from the position of the prisoner as the bearer of Convention rights and then requires that restrictions of these rights, be they express parliamentary words or delegated legislation, be assessed in the context of ‘the ordinary requirements of imprisonment’ and against the doctrine of proportionality.

Livingstone and Owen consider the ECtHR to ‘have proved more protective of prisoners’ rights than those in England’ and have suggested that this is ‘perhaps because the legal standards they apply explicitly require them to conceptualise in terms of rights and legitimate restrictions of them’.²⁸⁸ But, since the entry into force of the Human Rights Act 1998 it is suggested that the *Leech* and *Golder* tests are now extremely close. They both share a presumption in favour of the protection of the prisoner’s civil and political rights and freedoms and the need to uphold these protections in the face of the potential limitations of imprisonment through a strict application of the proportionality doctrine. Given that the Prison Rules are delegated legislation and subject to the full force of judicial supervision under the Human Rights Act, and given that ECtHR jurisprudence needs to be taken into account under the Act, it is suggested that the tests in *Leech* and *Golder* should effectively amount to the same thing.

²⁸³ *Golder v UK* (1975) 1 EHRR 524, Series A No 18.

²⁸⁴ F Jacobs and R White *The European Convention on Human Rights* (2nd edn Clarendon Oxford 1996) 198–199 and 297–301; *Golder v UK* (1975) 1 EHRR 524, Series A No 18, para 45 of judgement.

²⁸⁵ 1 EHRR 524, Series A No 18, para. 45.

²⁸⁶ 1 EHRR 524, Series A No 18, para. 45.

²⁸⁷ *The European Convention on Human Rights* (note 284 above) 306.

²⁸⁸ S Livingstone and T Owen *Prison Law* (2nd edn OUP Oxford 1999) 456.

The English and European conception of prisoners' rights whilst roughly speaking in accord with the German view of the prisoner's negative rights status, differs from the German view in two important respects. Firstly, there is no explicit division in this conception between the definition of rights and liberty at the 'status' level and those which apply at the 'administrative' level. Once a criminal offender has been convicted under the criminal law and sentenced to a term of imprisonment there is no additional constitutional rationale found for the limitation or protection of his or her rights at the 'administrative' level. From the court's perspective imprisonment might or might not involve restrictions of the prisoner's civil and political liberties and rights, but there is no legal distinction between the limitation of rights as a result of the imposition of the criminal sentence and limitation of rights during the day to day administration of prisons. It is possible to argue that, as a matter of logic, the maxim in *Raymond v Honey* is grounded in an implicit acceptance between 'status' and 'administrative' liberty. To say that 'a convicted prisoner, in spite of his imprisonment, retains all the civil rights which are not taken away expressly or by necessary implication' can be read as involving an implicit acceptance that while a prisoner's liberty is lawfully restricted by the imposition of the prison sentence (i.e. the restriction of liberty at the status level), residual liberty continues to apply within the prison context (i.e. at the administrative level). Equally the rejection in *Golder* of the 'inherent limitations doctrine' and the acceptance that rights must be protected whilst the offender is in prison would suggest a tacit acceptance of administrative rights. Nevertheless, a stated division between 'status' and 'administrative' rights and liberties and an open commitment to the protection of the prisoner's administrative liberty is not clearly articulated or recognised by English judges or legal commentators.

Indeed, domestic English case law often operates on an implicit assumption that status liberty needs protection whilst at the same time negating administrative liberty. As will be shown in chapter five, the judiciary is often particularly concerned to intervene when decisions in prisons have a direct or indirect impact on the length of the prisoner's sentence. This threat is usually articulated as an infringement of the prisoner's 'personal' liberty.²⁸⁹ This notion of 'personal liberty' encapsulates what Germans would classify as the prisoner's status rights. Intervention in order to protect the prisoner's 'personal

²⁸⁹ See for example *Leech v Deputy Governor of Parkhurst Prison* [1988] 1 AC 533, 539.

liberty' (i.e. status rights) is evident in cases dealing with questions of parole, but equally so with regard to the prison disciplinary system and transfer decisions.²⁹⁰ Yet, as chapter five will show, the judiciary is resistant to close scrutiny of decisions in areas which are described as 'managerial' or 'operational'.²⁹¹ These are exactly the kinds of decisions which the Germans would classify as 'administrative decisions'. Another route to denying administrative rights in prisoners in England has been to operate on an explicitly **indivisible** conception of the prisoner's liberty. This can be seen for example in *Hague* and in the Court of Appeal in *Simms* where,²⁹² as chapter five will show, the court presumed that administrative rights were automatically abrogated as a result of the court's imposition of a custodial sentence. In sum, English reasoning on prisoners' rights can be said to be without an explicit division between the prisoner's status and administrative liberty and it is possible to argue that the German legal and judicial focus on the definition of the prisoner's administrative rights is not nearly as pronounced in the English courts.

The second marked difference between the English/European conception and the German conception of prisoners' rights is the absence of a positive rights status attributed to the prisoner. There is as such no explicit relationship between fundamental rights and the purpose or purposes of prison administration. As with the English Prison Rules, no clear overarching principles operate as benchmarks against which to evaluate what prison is for, what it should achieve and how it should be administered. The English courts and the ECtHR have not developed substantive or principled guidance for determining what the acceptable limitations of negative rights should be in the process of imprisonment, nor does it have a foundation for the development of special positive rights in prisoners which apply at the administrative level. Instead either the courts evaluate decisions by casting them in terms of the narrow objects of each separate administrative measure,²⁹³ or its references to purposes of imprisonment or prison administration are so general as to provide no guidance whatsoever. For example, whilst the *Golder* test makes reference to

²⁹⁰ See further ch. 5.

²⁹¹ See for example *Hague v Deputy Governor of Parkhurst Prison, ex parte Hague and Weldon* [1992] 1 AC 58, 116.

²⁹² *R v Secretary of State, ex p Simms and another* [1998] 2 All ER 491; (2000) AC 115. See ch. 5, p. 250f.

²⁹³ See for example *R v Home Secretary, ex p Leech (No. 2)* [1994] QB 198, 212–213 where the assessment of whether there was a 'self-evident and pressing need' for the measure in question was not measured against any general principle of imprisonment, but rather against the purposes of the specific powers in question.

‘permissible limitations of rights’ and whilst these limitations must be proportionate to their aim, there is no attempt to define what the ‘ordinary and reasonable requirements of imprisonment’ or the ‘prevention of crime and disorder’ may entail other than in the individual case. Similarly, there is no positive rights conception which could act as a counter against other potential functions of imprisonment such as security and protection of the public. This contrasts with Germany where the Prison Act 1976 and the courts attempt to balance the imperatives of German ‘constitutional resocialisation principle’ with the security function of imprisonment.²⁹⁴

The absence of a positive rights conception which gives rise to overarching principles of prison administration in both the European or English test has been acknowledged by commentators. In his recent assessment of the European Court’s performance on prisoners’ rights Livingstone concluded that while ‘the Strasbourg institutions ... have encouraged an emphasis on judicial supervision of imprisonment ... they have left it open as to whether compliance with human rights standards requires a particular view of the purposes of imprisonment ... there is little indication as to whether the authorities are under an obligation to provide positive programmes for those who are detained other than simply for retribution’.²⁹⁵ Equally Livingstone and Owen have concluded in their study of the English courts’ attitude to prisons that ‘the impression the courts give is primarily of a desire to ensure that the bureaucracy functions correctly according to its defined goals. There is less concern with shaping what these goals might be, something which goes some way towards explaining the greater degree of caution courts have displayed when it comes to ruling on the content of the prison authorities’ powers’.²⁹⁶

Under both the English and European Convention formula individual positive rights or correlative positive duties can be placed on the government by asserting the protections of negative rights in line with the principle of proportionality. This is clearly the case in a number of the cases discussed in chapter five. But in the absence of any overarching principles or standards this approach will remain piecemeal at best. This piecemeal tendency is explicitly acknowledged in *Golder* where it was stated that:

²⁹⁴ See ch. 3, pp. 94–113 and 132–148.

²⁹⁵ S Livingstone ‘Prisoners’ rights in the context of the European Convention on Human Rights’ (2000) 2(3) *P & S* 309, 321.

²⁹⁶ *Prison Law* (note 288 above) 458.

It is not the function of the Court to elaborate a general theory of the limitations admissible in the case of convicted prisoners, nor even to rule in abstracto on the compatibility of ... the Prison Rules 1964 with the Convention. Seised of a case which has its origins in a petition presented by an individual, the Court is called upon to pronounce itself only on the point whether or not the application of those Rules in the present case violated the Convention to the prejudice of Golder.²⁹⁷

Whilst it is accepted that piecemeal protections of individual negative rights are an important judicial function, this form of prisoners' rights protection is more modest than that undertaken in Germany. As argued in the first part of this thesis, the constitutional definition of the prisoner's legal status in Germany has given courts the power to scrutinise the general aims and objectives of prison administration and the development of prison policy within the political arena. The European and English test, by contrast, is premised on a view that courts should not enter into this political arena. Rather, it restricts the courts to producing a set of rights which 'may impose some limits on prison regimes but does not fundamentally undermine the modern prison as we know it'.²⁹⁸

This modest definition of the prisoner's rights status in England can be said to reflect the orthodox constitutional division between the judicial concern with legality and the parliamentary control of the political.²⁹⁹ In this orthodox vision, it is the executive under Parliament which must be afforded definitional power over the purpose and nature of prison administration, not the judiciary. Nevertheless, it is curious that English judges have rarely accepted this orthodox constitutional rationale when faced with limitations on their sentencing discretion, preferring to define for themselves the underlying rationale for punishment in each particular case.³⁰⁰ It is an interesting contradiction of the English context that judges guard jealously for themselves the definitional power over their sentencing discretion, whilst viewing the rationale for the administration of that sentence to be outside of their judicial remit. The substantive basis of prison administration remains a question which English judges are reluctant to address. This reluctance is both reflected and entrenched by the judicial conception of prisoners' rights as negative rights and by a lack of close and principled attention to the prisoner's administrative rights. In short, whilst the English conception of the prisoner's rights status tells us a lot about

²⁹⁷ *Golder v UK* (1975) 1 EHRR 524, Series A No 18, para 39.

²⁹⁸ 'Prisoners' rights in the context of the European Convention on Human Rights' (note 295 above) 312.

²⁹⁹ See pp. 183–190 above.

³⁰⁰ A Ashworth *Sentencing and Criminal Justice* (3rd edn Butterworths London 2000) ch. 2.

freedom, it tells us very little about how such freedom might be protected in conditions of captivity.

4. Conclusion

This chapter has sought to present the backdrop against which the judicial development of prisoners' rights must be viewed. To start it showed that England is without a code of prisoners' rights which, like the German Prison Act provides standards and principles of prison administration, special positive rights vested in prisoners or guidance as to the protections of prisoners' negative rights. This absence was explained in the context of England's penal political landscape. The chapter suggested however that differences between prisoners' rights in Germany and England could not only be attributed to differences in the legislative regimes governing prisons in both countries. In addition, it pointed to two further factors which lie behind the judicial treatment of prisoners' rights in both countries. These were the dynamics of contemporary constitutional culture and the place of fundamental rights within this and the different conception of the prisoner's fundamental rights status. As regards the first factor, the chapter argued that, in contrast to Germany's faith in fundamental rights and its systemic and comprehensive approach to fundamental rights protection, England experiences a cultural tension between an emergent idealist rights culture and a pragmatic tradition of rights scepticism. It has suggested that this complex and ambivalent approach to fundamental rights has had a significant impact on the judicial development of fundamental rights at common law and prisoners' rights in particular over the last thirty years. As regards to the second factor, the chapter argued that, in contrast to Germany's ambitious conception, the English and European conception of the prisoner's fundamental rights status does not include any express protection of the prisoner's administrative rights status or any positive conception of prisoners' rights. This was shown to be a more modest conception of the prisoner's fundamental rights status and one which was rooted in deeper constitutional sensibilities.

The following chapter will examine the judicial development of prisoners' rights in England in more depth and will seek to demonstrate how the factors outlined above have shaped this process.

The Jurisprudence of Prisoners' Rights in England

If the courts were to entertain actions by disgruntled prisoners, the governor's life would be made intolerable. The discipline of the prison would be undermined. The Prison Rules are regulatory directions only. Even if they are not observed, they do not give rise to a cause of action.¹

It is an axiom of our law that a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication ... It will be a rare case in which it could be held that such a fundamental right was by necessary implication abolished or limited by statute. It will, we suggest, be an even rarer case in which it could be held that a statute authorised by necessary implication the abolition or limitation of so fundamental a right by subordinate legislation.²

Judicial attitudes to prisoners' rights in England have undoubtedly changed over the last 30 years. The difference, in the opening quotes, between the pragmatic 'hands off approach' of Lord Denning in *Becker* and the interventionist fundamental rights tone of Lord Justice Steyn in *Leech* is dramatic. Yet while advances have manifestly been made and prisoners' rights cases are often held up as evidence of a growing 'rights consciousness' in England,³ others consistently point out that progress has been partial and that prisoners' rights remain minimal.⁴ In the English constitutional context both these accounts of prisoners' rights jurisprudence are explicable. If we use orthodox English constitutionalism as our benchmark, the judicial development of prisoners' rights does indeed present a victory for an emergent human rights consciousness. On the other hand, if we take a more expansionist view of prisoners' rights as Richardson does,⁵ the judicial approach to prisoners' rights in England might equally be characterised as partial and uneven.

¹ *Becker v Home Office* [1972] 2 QB 407, 418 per Lord Denning.

² *R v Home Secretary, ex p Leech (No. 2)* [1994] QB 198, 209 and 212 per Lord Steyn.

³ M Hunt *Using Human Rights Law in English Courts* (Hart Publishing Oxford 1998) 175–181; S Bailey, D Harris and B Jones *Civil Liberties: Cases and Materials* (3rd edn Butterworths London 1991) 684.

⁴ S Livingstone and T Owen *Prison Law* (2nd edn OUP Oxford 1999) 456; G Richardson 'Prisoners and the Law: Beyond Rights' in C McCrudden and G Chambers *Individual Rights and the Law in Britain* (Clarendon Oxford 1994) 179, 201–203; C Gearty 'The Prisons and the Courts' in J Muncie and R Sparks, (edd), *Imprisonment: European Perspectives* (Sage London 1991) 219; S Livingstone 'Prisoners have Rights, But What Rights' (1988) MLR 525.

⁵ G Richardson 'The Case for Prisoners' Rights' in M Maguire R Morgan and J Vagg *Accountability and Prisons* (Tavistock London 1985) 19; 'Prisoners and the Law: Beyond Rights' (note 8 above).

If we view England through a German lens we are more likely to adopt the view that the judicial development of prisoners' rights in England remains limited. On the one hand the development of certain areas of prisoners' rights (procedural rights in disciplinary proceedings, access to courts, correspondence rights) resemble those protected in Germany. Nevertheless, Germans would note the absence of any attempt to root the development of prisoners' rights within a clear constitutional conception of the purpose of imprisonment, a positive notion of the prisoner's fundamental rights status, and an explicit judicial commitment to the development of the prisoner's 'administrative rights'. Thus from a German vantage point, English judicial conceptions of rights in prisons would not appear to include a broad based and substantive commitment to shaping the nature of imprisonment and the day to day administration of prisons in line with deeper constitutional principles.

This chapter will examine in some detail the judicial development of prisoners' rights in England in order to demonstrate this difference. It will seek to illustrate how the factors identified in chapter 4, namely the ambivalence towards fundamental rights within English legal culture and the definition of the prisoner's rights status, have marked this judicial process and have set it apart from that in Germany. An exhaustive analysis of the case law is not being attempted here.⁶ Rather, landmark cases, including the influential decisions of the European Court of Human Rights, will be picked out to illustrate the general theses proposed.

Before moving on, however, one important caveat must be made. The scope of this chapter mirrors that of the first half of this thesis, that is the development of what Germans refer to as the prisoner's administrative rights and administrative legal status. Accordingly, the judicial development of prisoners' parole rights, which Germans define as status rights, will not be examined in this context.⁷

⁶ For such an account see: *Prison Law* (note 8 above); G Richardson *Law, Process and Custody: Prisoners and Patients* (Weidenfeld & Nicholson London 1993); S Creighton and V King *Prisoners and the Law* (2nd edn London Butterworths 2000).

⁷ See ch. 1, pp. 43–46 and ch. 4, pp. 197–207 on the difference between administrative and status rights.

1. The road to *Hague*: the slow rise of rights discourse

In 1972 Lord Denning clearly stated that courts would not involve themselves with any area of prison administration.⁸ This was a markedly conservative position to take as, following the decision in *Ridge v Baldwin* in the mid 1960s,⁹ there was clear potential for the courts to assume at least some supervisory jurisdiction in public law, in particular as regards matters of procedural fairness, over the administration of prisons. Denning's categorical statement was, however, slowly to be eroded over the next two decades. The process began across the channel when the European Court of Human Rights (ECtHR) decided *Golder*.¹⁰

Golder had been wrongfully accused of taking part in a prison riot in Parkhurst prison. In addition, his subsequent correspondence concerning these allegations was stopped by the governor and his petition to the Home Secretary asking for transfer and permission to consult a lawyer in order to bring civil proceedings was turned down. The ECtHR, rejecting the 'inherent limitations doctrine',¹¹ held that these actions violated Golder's Convention rights to a fair trial under Article 6 (1) and the privacy of his correspondence under Article 8 (2) ECHR. The conception of the prisoner's Convention rights status which was applied in this case has already been discussed in chapter four.¹² It achieved a clear statement of a prisoner's right of access to the courts and led to amendment of the rule that prisoners obtain permission from the Secretary of State in order to obtain legal advice.¹³

⁸ *Becker v Home Office* [1972] 2 QB 407, 418. See opening quote.

⁹ *Ridge v Baldwin* [1964] AC 40. Prior to *Ridge v Baldwin* the courts had justified intervention on the grounds of breach of natural justice, in particular the right to a fair hearing, on the basis that the administrative decisions in question were either 'judicial' or 'quasi-judicial'. *Ridge v Baldwin* explicitly rejected these formalist restrictions on the courts' jurisdiction and argued that the courts' discretion to apply the principles of natural justice should be guided by the 'nature of the power exercised and its effect on the individual in question'. See P Craig *Administrative Law* (London Sweet & Maxwell 1999) 401–406; *Law, Process and Custody: Prisoners and Patients* (note 6 above) 30.

¹⁰ *Golder v UK* (1975) 1 EHRR 524, Series A No 18.

¹¹ See ch. 4, p. 201.

¹² See ch. 4, p. 201.

¹³ The response of the government remained less than satisfactory in that a 'prior ventilation rule' still required prisoners to obtain a decision from the Home Office concerning his or her grievance before being allowed to obtain legal advice. The 'prior ventilation rule' was the subject matter of the later European Commission decision of *Silver v UK* (1983) 5 EHRR 347. See p. 215 below.

The impact of *Golder* on the domestic courts was symbolically powerful and a strong example of the impact of globalisation on English legal culture.¹⁴ As Sedley argues, since this judgement ‘the courts have consciously taken decisions on prisoners’ rights designed at least in part to rescue the UK government from the prospect of further embarrassment in Strasbourg’.¹⁵ It was not surprising then, that only a few years after *Golder* was decided, the domestic courts made their first break away from the *Becker* position in *St. Germain*.¹⁶ This case, like *Golder*, dealt with disciplinary proceedings regarding certain prisoners’ involvement in a prison riot. The prisoners in question were found by the Board of Visitors to be in breach of Prison Rule 47 for ‘concerted acts of indiscipline’. The procedure followed by the Board of Visitors was cavalier and their sentences were severe. In some cases the prisoners were awarded up to 720 days of loss of remission without being able to present their case or cross-examine witnesses.¹⁷ There was a clear argument for certiorari to lie against the Board of Visitors’ decision on the grounds of breach of the rules of natural justice. The Court of Appeal was asked to settle whether the courts had jurisdiction to grant such an award.

The Court of Appeal asserted its jurisdiction on the basis of two alternative justifications. The one justification was tentative, the other bold. The tentative position was presented by Lord Justice Megaw who stayed well within the confines of orthodox constitutionalism and applied formalist jurisdictional principles.¹⁸ Justifying the courts jurisdiction on the ground that the Board of Visitors were acting in a ‘quasi-judicial’ capacity, he stated:

While the Board of Visitors have numerous other functions connected with the administration of the prison, their function in acting as a judicial tribunal in adjudicating on charges of offences against discipline, and in making awards consequent on findings of guilt, is properly regarded as a separate and independent function, different in character from their other functions.¹⁹

In distinguishing the Board of Visitors’ functions in this way, Megaw LJ tried to hinder the potential extension of court supervision over prison administration in general. As a

¹⁴ See ch. 4, pp. 190–195.

¹⁵ S Sedley ‘Foreword to the First Edition’ *Prison Law* (note 8 above) viii.

¹⁶ *R v Board of Visitors of Hull Prison, ex p St. Germain and others* (1978) 1 QB (CA) 425.

¹⁷ M Loughlin and P M Quinn ‘Prison Rules and Courts: A Study in Administrative Law’ (1993) *MLR* 497, 508.

¹⁸ See note 9 above.

result, he was particularly concerned to show that the disciplinary functions of a prisoner governor were ‘materially different’ from those of a Board of Visitors:

While the governor hears charges and makes awards, his position in so doing corresponds to that of the commanding officer in military discipline or the schoolmaster in school discipline. His powers of summary discipline are not only of a limited and summary nature but they are also intimately connected with his functions of day-to-day administration. To my mind both good sense and the practical requirements of public policy make it undesirable that his exercise of that part of his administrative duties should be made subject to certiorari ... It may be difficult to define the distinction as a strict matter of logic. But I think that, as a matter of the proper practical application of the law in the general interest, not forgetting the legitimate interests of prisoners, that is where the line should be drawn.²⁰

Lord Justice Megaw’s concern with ‘the proper practical application of the law in the general interest’, ‘public policy’ and his explicit admission that his drawing of jurisdictional boundaries had no logical foundation, could not have been more illustrative of the pragmatism rooted in orthodox English constitutional and legal culture. It is not surprising therefore that his brief allusion to the prisoner’s ‘legitimate interests’ came more as an afterthought than as a principle upon which to ground the courts’ jurisdiction.

Megaw LJ’s tentative pragmatic line was starkly counterpoised in the judgement of Lord Justice Shaw in the same case. Shaw LJ rooted jurisdiction in the prisoner’s fundamental rights whilst paying, along the way, due respect to parliamentary sovereignty. Thus, he started out by examining the Prison Act and Prison Rules and argued that ‘in the scheme envisaged by the Act and shaped by those Rules, the courts have no defined place and no direct or immediate function’ and that ‘judicial intervention in the domestic management of a prison would generally be not merely *irrelevant* but also *intrusive* and *impolitic*’.²¹ Although careful to demonstrate judicial deference to Parliament, Shaw LJ nevertheless argued that whilst the prisoner is subject to a special regimen and has a special status, he ‘remains invested with residuary rights appertaining to the nature and conduct of his incarceration’. On this basis he presented the foundation of the prisoner’s rights status in England:

Now the rights of a citizen, however circumscribed by a penal sentence or otherwise, must always be the concern of the courts unless their jurisdiction is clearly excluded by some statutory provision. The courts are in general the ultimate custodians of the rights and liberties of the subject whatever his status and however attenuated those rights and liberties

¹⁹ *R v Board of Visitors of Hull Prison, ex p St. Germain and others* (1978) 1 QB (CA) 425, 447.

²⁰ (1978) 1 QB (CA) 425, 447–448.

²¹ (1978) 1 QB (CA) 425, 454. Emphasis added.

may be as the result of some punitive or other process ... Public policy or expediency as well as merits may be factors for relief; but to deny jurisdiction on the grounds of expediency seems to me ... to be tantamount to abdicating a primary function of the judiciary.²²

Accordingly, Shaw LJ saw no hindrance to the possible extension of the courts' jurisdiction:

I do not find it easy, if at all possible, to distinguish between disciplinary proceedings conducted by a Board of Visitors and those carried out by a prison governor ... the essential nature of the proceedings as defined by the Prison Rules is the same. So, in nature if not in degree, are the consequences to the prisoner.²³

St. Germain displayed a manifest tension between an established and an emergent constitutional culture. Unlike the German Federal Constitutional Court's decisions of the early 1970s that unambiguously asserted the prisoner's constitutional rights status, this foundational decision was ambiguous. Lord Justice Megaw was tentative and pragmatic and offered a restrictive basis for the courts' intervention into areas of prison administration, whereas Lord Justice Shaw delivered an expansionist view of prisoners' rights. These divergent positions laid the groundwork for two currents within judicial thinking that would shape the progress of prisoners' rights developments over the next decade.

Once given licence to review Board of Visitor disciplinary proceedings, the courts were quick to develop the principles of natural justice in this context. The process began with the Divisional Court decision in *St. Germain (No. 2)* which quashed all 16 decisions of the Board.²⁴ Thereafter a number of decisions bolstered the requirements of natural justice, in particular fairness, with respect to the disciplinary proceedings of Boards of Visitors.²⁵ The most important decisions to arise in this area dealt with the question of legal representation at Board of Visitor disciplinary hearings. Here the impetus was assisted, once again, by developments at the European level.

In *Campbell and Fell* the claimants had been involved in a protest of six prisoners and had been charged with the 'exceptionally grave' disciplinary offences of mutiny or

²² (1978) 1 QB (CA) 425, 455.

²³ (1978) 1 QB (CA) 425, 456.

²⁴ *R v Hull Prison Board of Visitors, ex p St. Germain (No 2)* [1979] 3 All ER 545.

²⁵ See in general S Livingstone 'The Changing Face of Prison Discipline' in E Player and M Jenkins, (edd), *Prisons After Woolf* (Routledge London 1994) 97; 'Prisons, Rules and Courts: A Study in Administrative Law' (note 17 above) 497.

incitement to mutiny.²⁶ The Board of Visitors had awarded 605 days and 570 days of loss of remission respectively. The claimants argued that the proceedings before the Board were in breach of Article 6 ECHR which entitles all persons charged with a criminal offence to a ‘fair and public hearing ... by an independent and impartial tribunal’. The European Commission of Human Rights decided that, due to the seriousness of the charges and the gravity of the penalties in the case, the proceedings before the Board of Visitors amounted to the determination of a ‘criminal charge’. It also concluded that a Board of Visitors did not classify as an ‘independent and impartial tribunal’.²⁷ The Commission decision was referred to the European Court of Human Rights for final resolution. In the meantime the Home Secretary announced his intention to establish the Prior Committee to review the operation of the prison disciplinary system.²⁸ Whilst the European Court decision was pending and the Prior Committee began its enquiries, the Divisional Court delivered its judgement in *Tarrant*.²⁹ This case dealt with Board of Visitors disciplinary proceedings in which similar charges were brought against prisoners involved in a prison riot in Albany prison.

In *Tarrant*, counsel invoked Article 6 of the European Convention and the Commission’s decision in *Campbell and Fell* to argue for a prisoner’s right to legal representation.³⁰ The Court declined to address Convention arguments on the grounds that it would not add anything to its decision and because it was ‘bound by the settled jurisprudence of our law’.³¹ Nevertheless, whilst stating that the prisoner’s right to legal representation was discretionary, the Court indicated that the presumption in favour of such representation being granted in serious disciplinary proceedings was high. Thus, it was stated that ‘any reasonable tribunal, properly exercising their discretion, would have allowed those applicants legal representation’.³² The Court rejected a variety of arguments on behalf of the Government which were based on ‘administrative convenience’, customary practice developed through ‘ancient long-established usage’ and ‘threats to discipline within the

²⁶ *Campbell and Fell* (Application Nos 7819/77; 7878/77).

²⁷ Get Commission decision for *Campbell and Fell*.

²⁸ ‘Prisons, Rules and Courts: A Study in Administrative Law’ (note 17 above) 517.

²⁹ *R v Secretary of the State Department, ex p Tarrant* [1985] 1 QB 251.

³⁰ [1985] 1 QB 251, 257–263.

³¹ [1985] 1 QB 251, 282 per Webster J and 296 per Kerr LJ.

³² [1985] 1 QB 251, 293 per Webster J.

prison'.³³ This rejection was founded on Lord Atkin's famous dictum that 'administrative difficulties, simpliciter, are not in our view enough. Convenience and justice are often not on speaking terms'.³⁴ The Court thus went on to conclude that there is 'nothing which takes away expressly or by necessary implication the discretion of a Board of Visitors to grant legal representation or, therefore, the right on the part of the prisoner to require the board to exercise it'.³⁵ The *Tarrant* decision whilst marginally less progressive than the European Commission decision in *Campbell and Fell*, nevertheless represented a local shift towards the recognition of rights and the invocation of principles rather than administrative power and convenience in prisons. It has consequently been described as the domestic 'high water mark of procedural standards' in disciplinary proceedings.³⁶

After the *Tarrant* case, the ECtHR delivered its judgement in the *Campbell & Fell* case.³⁷ It held that whilst the Board of Visitors was sufficiently 'independent and impartial' to conduct disciplinary proceedings, the prisoner's rights under Article 6 of the Convention had been violated because they were not 'entitled to obtain legal assistance prior to the Board's hearing or legal representation thereat'. The Court held that Article 6 ECHR applied despite the fact that disciplinary charges were not strictly speaking classified as 'criminal' offences within the English legal system. Rather the fact that the 'nature and severity of the penalties' were 'especially grave' was sufficient to allow their classification as 'criminal' for the purposes of Article 6.³⁸ The case, while not binding as domestic law, served to reinforce the tone adopted in *Tarrant*.

Campbell & Fell and *Tarrant* had a significant impact on the prison disciplinary system both internally and in terms of proposals for reform.³⁹ But beyond the area of prison discipline, advances were being made on a number of different fronts both locally and at the European level. In *Silver* the European Commission and Court of Human Rights held that any restrictions of prisoner correspondence were only justifiable restrictions of correspondence privacy under Article 8 (1) ECHR if they were 'prescribed by law' and

³³ [1985] 1 QB 251, 279 and 281 respectively.

³⁴ *General Medical Council v Spackman* [1943] AC 627, 638 quoted at [1985] 1 QB 251, 281.

³⁵ *R v Secretary of the State Department, ex p Tarrant* [1985] 1 QB 251, 282.

³⁶ 'The Changing Face of Prison Discipline' (note 25 above) 101.

³⁷ *Campbell and Fell v UK* (1985) 7 EHRR 165.

³⁸ (1985) 7 EHRR 165, § 73.

³⁹ 'Prisons, Rules and Courts' (note 17 above) 497; *Prison Law* (note 8 above) 276.

‘necessary in a democratic society’. The Commission found that the stopping of letters on the grounds of Standing Orders and Instructions which had not been published and made available to a prisoner resulted in interference with his correspondence rights which were not ‘foreseeable’ and therefore not in ‘accordance with the law’.⁴⁰ Whilst it was accepted that the ‘prevention of disorder’, ‘the prevention of crime’, ‘the protection of morals’ and /or ‘the protection of the rights and freedoms of others’ were ‘legitimate aims’ to be pursued under Article 8 and could justify monitoring and restrictions of prisoner correspondence, almost all of the restrictions in this case were viewed as disproportionate means of achieving such aims and thus not ‘necessary in a democratic society’.⁴¹ Subsequent to the Commission decision in *Silver* the government revised the directives on prisoner correspondence and published the orders relating to correspondence in their entirety.⁴² Moreover, control practices regarding the prisoner’s legal correspondence were amended.⁴³

At the domestic level, courts continued to develop prisoners’ rights which were a natural corollary of the admittance of court jurisdiction over Board of Visitors decisions in *St. Germain*, namely rights of access to legal advice and to the courts. These decisions were heavily influenced by European human rights jurisprudence. In *Raymond v Honey* both Lords Wilberforce and Bridge made direct reference to *Golder*, alongside domestic authority,⁴⁴ in support of the prisoner’s ‘constitutional rights to have their legal rights and obligations ascertained and enforced by courts of law’.⁴⁵ Here the Court held that a prison governor’s interception of a prisoner’s correspondence to his solicitor was a violation of such a right and therefore a contempt of court. Summarising the words of Shaw LJ in *St. Germain* in the now famous dictum that ‘a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication’, both judges took the view that there was nothing in the Prison Act 1952 or the regulations there under which permitted the restriction of ‘so basic a right’ as the

⁴⁰ *Silver v UK* (1983) 5 EHRR 347, § 91.

⁴¹ (1983) 5 EHRR 347, § 99.

⁴² (1983) 5 EHRR 347, § 26.

⁴³ Specifically this amounted to an amendment of the ‘prior ventilation rule’ to the ‘simultaneous ventilation’ rule whereby a prisoner had to state a grievance internally in order to seek outside legal advice, but would not have to wait for the outcome of the internal decision before seeking such advice. See note 13 above.

⁴⁴ *Attorney-General v Times Newspapers Ltd* (1974) AC 273, 310.

⁴⁵ *Raymond v Honey* (1983) 1 AC 1.

prisoner's right of access to the courts.⁴⁶ Lord Bridge stated outright that a 'basic principle' existed 'that a citizen's right to unimpeded access to the courts can only be taken away by express enactment'.⁴⁷ In *Anderson* the courts dealt a further blow to the control of a prisoner's legal correspondence and vindicated the prisoner's right of access to the courts and access to a legal adviser to receive advice and guidance.⁴⁸ Lord Justice Goff applied *Golder* to show that access to legal advice was an inseparable part of access to the courts,⁴⁹ and *Raymond v Honey* to argue that 'nothing in the Prison Act 1952 confers power to make regulations which would deny, or interfere with, the right of a prisoner to have unimpeded access to the court'.⁵⁰

The decisions flowing from *St. Germain* in the early 1980s could certainly be held up as evidence of an emergent rights consciousness within the English constitutional environment and of the growing influence of European human rights jurisprudence on the domestic judiciary. But the cumulative impact of these decisions was limited. The cases dealt with the particular areas of procedural rights within disciplinary proceedings, access to justice, and general correspondence rights. Judicial intervention was inspired by two concerns, namely to protect the prisoner's personal (i.e. status) liberty where disciplinary penalties were particularly grave or to protect the prisoner's right of access to the courts.⁵¹ Thus, in the area of disciplinary proceedings the courts rejected a significant number of applications from prisoners on the basis that their role was to remedy 'substantial injustice' only.⁵² Moreover there was resistance to arguments which implied more

⁴⁶ (1983) AC 1, 13.

⁴⁷ (1983) AC 1, 14.

⁴⁸ *R v Secretary of State for the Home Department, ex p Anderson* [1984] QB 778. In this case the court held the 'simultaneous ventilation rule' to be ultra vires the Home Secretary's rule making powers under s. 47 Prison Act. The court was particularly concerned that the prisoner, in raising a complaint under the simultaneous ventilation rule, could be charged with the disciplinary offence of making 'false and malicious allegations' against a prison officer. See notes 13 and 43 above.

⁴⁹ [1984] QB 778, 793.

⁵⁰ [1984] QB 778, 792.

⁵¹ This judicial concern to protect the prisoner's personal (i.e. status) liberty was clearly acknowledged in Sedley's argument before the House of Lords in *Leech* (*Leech v Deputy Governor of Parkhurst Prison* [1988] 1 AC 533, 539). See full discussion of this case below at p. 224.

⁵² *R v Board of Visitors of Pentonville Prison, ex parte Rutherford*, *The Times* (21 February 1985); *R v Board of Visitors of Swansea Prison, ex parte Scales*, *The Times* (21 February 1985); *R v Board of Visitors of Wandsworth Prison, ex parte Raymond*, *The Times* (17 June 1985); *R v Board of Visitors of Winchester Prison, ex parte Cartwright*, QBD (9 June 1981); *R v Board of Visitors of Dartmoor Prison, ex parte Seray Wurie*, *The Times* (5 February 1982); *R v Board of Visitors of Gartree Prison, ex parte Sears*, *The Times* (21 March 1985). See also 'Prisons, Rules and Courts: A Study in Administrative Law' (note 17 above) 508; M Loughlin 'The Underside of the Law: Judicial Review and the Prison Disciplinary System' (1993) *CLP* 23, 308.

fundamental reform of the Board of Visitors. Thus, in *ex parte Lewis*⁵³ where a prisoner had claimed a risk of bias on the part of the Board of Visitors, the Court declined to use natural justice as a vehicle for eliminating the dual function of the Board of Visitors as both a disciplinary and complaints body. This dual function represented one of the major objections to the operations of Boards of Visitors, and significantly undermined their legitimacy as independent complaint forums. Only one year before the decision in *Lewis*, the Prior Committee had recommended the abolition of the Board's disciplinary functions and the creation of a Prisons Disciplinary Tribunal.⁵⁴ Notwithstanding this evident discontent, the Court declined to take such an activist step, preferring instead to let politicians undertake such reforms.

Beyond the attention paid to disciplinary procedures and access to justice, there was little close judicial scrutiny of the exercise of prison administrative power at the managerial level or with the development of what the Germans would call the prisoner's administrative rights. The resistance of the English judiciary in this respect was displayed in the case of *McAvoy*.⁵⁵ Here a remand prisoner had been transferred for 'operational and security reasons' from Brixton to Winchester prison which meant that his parents and his lawyer were unable to visit him in the times permitted. This was despite Prison Rule 34 (1) which allowed remand prisoners to receive 'as many visits as he wishes' subject to the 'limits' and 'conditions' stipulated by the Secretary of State. In addition, the interview rooms available at Winchester prison did not guarantee that legal interviews would not be overheard. This was in violation of Prison Rule 37 (1) which stipulates that the legal adviser of a prisoner 'shall be afforded reasonable facilities for interviewing' a prisoner 'out of hearing of a prison officer'. Webster J admitted that these two Prison Rules, in conjunction with the *Raymond v Honey* principle, amounted to discretionary rights vested in the prisoner which were justiciable under judicial review and which the Secretary of State was under a duty to consider. Despite this promising recognition of the prisoner's discretionary rights, Webster J was nevertheless satisfied that the Home Secretary had fully considered these rights in the exercise of his discretion. As evidence of such

⁵³ *R v Board of Visitors of Frankland Prison, ex parte Lewis* [1986] 1 WLR 130.

⁵⁴ Until the changes made pursuant to the Woolf report, this dual role was one of the major objections to the operations of Boards of Visitors. In fact only one year before this decision, the Prior Committee had recommended the abolition of the Board's disciplinary functions and the creation of a Prisons Disciplinary Tribunal. See *Report of the Committee on the Prison Disciplinary System in England and Wales* (Cmnd 9641) ch. 6.

consideration he accepted the following briefly stated reasons in two separate affidavits: a) that it 'was considered essential to move the applicant from Brixton prison for operational and security reasons' and b) in response to the proposition that the prisoner be placed in an alternative prison inside London that 'in the circumstances of this case this option was not considered appropriate'. Webster J considered that:

The Secretary of State's powers ... are ... reviewable in exercise but they are also very wide. In my view it is undesirable - if not impossible - for this court to examine operational reasons for a decision made under that section: and to examine security reasons for decisions made under that section could ... be dangerous and contrary to the policy of that particular statutory provision, which is to confer an absolute discretion, within the law, on the Secretary of State to make such executive decisions as he thinks fit for operational and security reasons. ... (T)he power is ... one which can be reviewed if it is shown that the Secretary of State has misdirected himself in law. It would be a misdirection if the Secretary of State took the view that he was entitled to exercise his powers under that section without regard to such rights as a prisoner has in relation to visits by his family, friends and lawyers.... Having read the whole affidavit ... I am satisfied that the Secretary of State has taken into account the full effect of that transfer and I am satisfied that consideration is being given to the making of reasonable arrangements to enable the applicant to consult with his lawyers as may be necessary in Winchester. I am satisfied that the Secretary of State has not misdirected himself in law by failing to take into account the applicant's rights to visits by his family and lawyers. I also take the view that, where the Secretary of State has security reasons for transferring a prisoner from one prison to another, the prisoner's rights to be visited ... will rarely, if ever, be a factor of significance to be taken into account in making the decision whether that transfer should take place or not. In most cases, in my view, the same considerations apply to a prisoner's right to be visited by his legal adviser.⁵⁶

In *McAvoy* the assertion of jurisdiction to review the exercise of the Minister's managerial powers clearly did not amount to a full definition or proper protection of prisoners' rights in the area under review. This was despite the existence of prison rules which afforded the prisoner clear discretionary rights. Whilst Webster J formally recognised the existence of these discretionary rights under the prison rules they were afforded negligible weight. The rights did not act, as they are intended to do in Germany, as a mechanism by which to limit or scrutinise the exercise of prison administrative power within the managerial sphere, to create standards for the proper exercise of this power or to act as a counter to the security purpose within prisons. This was evidenced not only in Webster J's ready acceptance of the scant reasons provided for the exercise of managerial discretion, but also in his acknowledgement that where security is involved prisoner's rights will 'rarely, if ever, be a factor of significance to be taken into account'.

⁵⁵ *R v Secretary of State for the Home Department, ex p McAvoy* [1984] 1 WLR 1408.

⁵⁶ [1984] 1 WLR 1408, 1417.

Aside from judicial timidity in controlling ministerial ‘operational’ discretion, there was also evident passivity in response to the claims of prisoners with respect to inadequate treatment and living conditions. In *Egerton* a convicted sex-offender who had been attacked by fellow prisoners and lost the use of his right arm was unsuccessful in his claim that the prison officers had been negligent in failing to supervise his fellow prisoners adequately.⁵⁷ The prisoner, who had just been let out of segregation, argued that a special watch should have been kept on him as he was at risk of attack. The prison authorities acknowledged that there was a risk of attack in the circumstances. Nevertheless, although the Court confirmed that a duty of care on the part of prison officers had been established in *Ellis* in 1953,⁵⁸ it held that the prison officers had taken reasonable care in the exercise of their duties. The potential to impose positive duties of care on prison administrators in this regard was thus not fulfilled. In *Williams* a prisoner applied for remedies in both public and private law after he had been detained in a special control unit for 180 days.⁵⁹ The court rejected arguments that the treatment amounted to false imprisonment or ‘cruel or unusual punishment’ under the Bill of Rights 1688. Moreover, it denied any public law duty to give specific reasons for the prisoner’s containment or that the Home Secretary had not been empowered under the Prison Act 1952 to order such containment. Finally, in *Freeman* the Court rejected the argument that a prisoner’s consent to being injected with drugs was involuntary due to the coercive environment of the prison and the lack of adequate information as to the potential consequences of the drug.⁶⁰ Thus, the Court declined to impose a positive duty on the prison authorities to provide additional medical advice or require greater safeguards to ensure that consent in this context was voluntary. These cases showed evident judicial disinclination to intervene in areas considered to be part of the day to day administration of prisons.

Judicial resistance was most evident with respect to the extension of public law jurisdiction over prison administration beyond the disciplinary proceedings of Boards of Visitors. Such resistance was greatly assisted by the pragmatic line taken by Lord Justice

⁵⁷ *Egerton v Home Office* [1978] Crim LR 494.

⁵⁸ *Ellis v Home Office* (1953) 2 QB 135.

⁵⁹ *Williams v Home Office* [1981] 1 All ER 1211.

⁶⁰ *Freeman v Home Office* [1984] 1 All ER 1036.

Megaw in *St. Germain*.⁶¹ Thus, the ‘notorious tendency of British judges to prefer pragmatism over principle’ persisted alongside a growing rights consciousness with respect to prisoners.⁶² Nowhere was this more apparent than in the *King* case.⁶³ In this case a prisoner was charged under prison Rule 47 (1) with having an unauthorised article in his cell. The hypodermic needle which precipitated the charge was found in the course of a routine cell search which King shared with 3 other prisoners. The deputy governor was satisfied that the applicant had been in the cell knowing the needle was there and thus found the charge proved. He ordered 14 days loss of remission. The Court of Appeal had to decide whether the governor had misconstrued the rule and whether the courts had jurisdiction to review governor’s adjudications.⁶⁴ It accepted that the governor had misconstrued the rule but rejected the appeal on the grounds that it did not have jurisdiction. The reasons given for this are worthy of closer consideration.

All three judges in *King* took a highly orthodox and pragmatic view of the question. Lawton LJ, after a careful historical analysis of the development of the prison statutory framework argued that the courts were confined to controlling the powers of the Secretary of State who was obliged under s. 4 (2) of the Prison Act 1952 to ensure compliance with the prison rules.⁶⁵ Lawton LJ viewed the prison governor as ‘nothing more than a manager appointed by and answerable to the Secretary of State’. Moreover, he viewed the governor’s disciplinary functions as an integral part of his ‘managerial’ function in the prison and thus as not subject to review. This argument rested on an implicit presupposition that the prisoner had no rights at the ‘managerial’ level which courts could be called upon to protect.

This implicit presumption applied equally to the deeply pragmatic arguments of Griffiths LJ and Browne-Wilkinson LJ in the same case. The pragmatism of Lord Justice Browne-Wilkinson stood starkly at odds with his famous rights based approach in *Wheeler v Leicester City Council* which was delivered in the same year.⁶⁶ Similarly, his ‘floodgates’ argument as to jurisdiction in this case contradicted the view in *Tarrant* that

⁶¹ ‘The Underside of the Law: Judicial Review and the Prison Disciplinary System’ (note 52 above) 40–44.

⁶² T Allan ‘Constitutional Rights and Common Law’ (1991) 11(4) *OJLS* 454, 459.

⁶³ *R v Deputy Governor of Camphill Prison, ex p King* (1985) QB 735

⁶⁴ (1985) QB 735, 737.

⁶⁵ (1985) QB 735, 749.

⁶⁶ *Wheeler v Leicester City Council* [1985] AC 1054. See ch. 4, p. 201.

‘administrative difficulties simpliciter’ were not enough to restrict the courts’ jurisdiction. Browne-Wilkinson LJ’s reasoning went as follows:

I, too, can see no logical distinction between the disciplinary functions of prison governors and the disciplinary functions of boards of visitors which the House of Lords has held are subject to judicial review. On the other hand, the practical repercussions of holding that the disciplinary decisions of prison governors are subject to review by the courts are frightening. It would be to shut one’s eyes to reality to ignore the fact that, if prisoners are able to challenge in the courts the disciplinary decisions of the governor, they are likely to try to do so in many unmeritorious cases and the maintenance of order and discipline in prisons is likely to be seriously undermined.⁶⁷

Whilst Lord Justice Browne-Wilkinson was particularly concerned with the pragmatic consequences of extending jurisdiction over prisons, he also justified his view by recourse to the notion of parliamentary sovereignty. Thus, he stated that Parliament had intended the courts to control the obligations of the Secretary of State under section 4 (2) of the Prison Act rather than to interfere with the internal workings of the prison.⁶⁸

The judgement of Lord Justice Griffiths not only invoked pragmatism in order to limit the courts’ jurisdiction over prisons, it also glorified the common law’s pragmatic qualities. Being ‘firmly of the opinion that the Court should not extend the boundaries of judicial review to embrace the decisions of prison governors’, Lord Justice Griffiths rejected counsel’s argument that the distinction between the Board of Visitors and the governor was ‘absurd’ and went on to reply that:

The common law of England has not always developed upon strictly logical lines, and where logic leads down a path that is beset with practical difficulties the courts have not been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society. I can think of no more difficult task in contemporary society than that of managing and maintaining discipline in seriously overcrowded prisons ... I am convinced that we should make it very much more difficult to carry out that task if the authority of the governor is undermined by the prospect of every disciplinary award being the subject of potential challenge in the court ... I wish I could find a logical way in which to distinguish between governors and boards of visitors, but I have not been able to do so and I think at the end of the day I must content myself by pointing to some of the differences which justify a different approach.⁶⁹

After balancing the so called interests of society with the benefits of a strict logical application of the law, Griffiths LJ went on to ‘content himself’ with various analogous

⁶⁷ *R v Deputy Governor of Camphill Prison, ex p King* (1985) QB 735, 753.

⁶⁸ (1985) QB 735, 753–4.

⁶⁹ (1985) QB 735, 750.

arguments as to the differences between the governor and the Board of Visitors and dismissed the appeal.⁷⁰

The pragmatism so cherished in *King* was to represent a block to the courts' jurisdiction over prisons in England until this decision was overruled in the highly principled judgement of *Leech*.⁷¹ The outcome in *Leech* was prompted by the decision of the Court of Appeal of Northern Ireland in *McKiernan* which held that there was no logical distinction between a Board of Visitors and a prison governor's disciplinary functions and that the supervisory jurisdiction of the courts over such decisions could stand.⁷² Aside from *McKiernan*, another decision predated *Leech* which indicated a small shift from the *King* position. This was the case of *Herbage* which related to the discovery proceedings of a prisoner who applied for judicial review of the decision to place him with mentally disturbed inmates in a hospital wing of a prison.⁷³ *Herbage* was of sound mind, although physically disabled, and he complained that his detention amounted to 'cruel and unusual' punishment contrary to the Bill of Rights 1688. The decision dealt with the narrower question of discovery, but the argument as to jurisdiction was raised by counsel for the Home Secretary as a belated means of defeating the discovery action. On the basis of *King* it was argued that the court did not have jurisdiction to review the governor's decision and, in addition, that no decision on the part of the Home Secretary had been presented for review. The Court of Appeal was split on the question of jurisdiction. May LJ held that jurisdiction did not exist to review a governor's managerial decision taken in breach of the Prison Rules. Purchas LJ and Sir Cairns held, however, that whilst no jurisdiction existed to review decisions taken by governors in breach of Prison Rules, jurisdiction did exist where a breach of the Bill of Right 1688 had been alleged. In this way the Court asserted its jurisdiction over the treatment of prisoners where such treatment was a clear case of 'cruel or unusual punishment'. This jurisdiction was exerted regardless of the status of the decision maker or whether the decision was to be regarded as managerial or disciplinary. This was a broad view of jurisdiction rooted solely in the courts' role as the guardian of the prisoner's rights.

⁷⁰ (1985) QB 735, 751–753.

⁷¹ *Leech v Deputy Governor of Parkhurst Prison* [1988] 1 AC 533.

⁷² *R v Governor of The Maze Prison, ex parte McKiernan* (1985) 6 N.I.J.B. 6.

⁷³ *R v Secretary of State for the Home Department, ex p Herbage (No. 2)* [1987] 1 QB 1077.

The *Leech* case did not deal with the question of treatment but instead had to confront whether the exercise of a governor's disciplinary powers could be reviewed.⁷⁴ The case dealt with the claims of two prisoners, Leech and Prevot. Leech had successfully petitioned the Secretary of State to quash a disciplinary award handed down by the governor on the grounds of breaches of rules of natural justice. Although the punishment had been remitted, Leech's record remained unchanged and he was told that the Home Secretary was unable to quash a guilty finding pursuant to disciplinary proceedings. As a result Leech applied for judicial review of the governor's decision. Prevot was not successful in his petition to the Home Secretary to have his disciplinary award of 21 days loss of remission from the governor quashed on the grounds of procedural impropriety. He therefore applied for judicial review of the governor's decision. In the Court of Appeal, leave for judicial review had been granted but the substantive application had been declined on the sole ground that the court did not have jurisdiction to review governor's decisions after the *King* case. The case went on appeal to the House of Lords.

Counsel for the Home Office, Mr. John Laws, adopted both the argument and tone of the *King* case in order to support the view that courts should not directly interfere in the administration of the prison regime. Laws implored the Court to 'to take into account pragmatic factors' and to adopt 'the pragmatic approach' in 'the judgement of Megaw LJ in *St. Germain's* case'.⁷⁵ The case for the prisoners, presented by Stephen Sedley Q.C, was rooted in their right of access to the courts which, it was argued, had now been widely acknowledged by the case law with respect to decisions which had a bearing on the prisoner's personal liberty.⁷⁶ Sedley argued that, as a matter of logic and principle, supervisory jurisdiction should be extended to governor's disciplinary decisions and asked the Court not to 'allow pragmatism to become a ground for constricting jurisdiction'. He challenged the Court to reject the invitation 'not to take the single logical pace forward for fear of the steps which lie beyond it'.⁷⁷ In these arguments we can again see the battle between a prevailing culture of pragmatism and sovereignty and an insurgent culture of rights.

⁷⁴ *Leech v Deputy Governor of Parkhurst Prison* [1988] 1 AC 533.

⁷⁵ [1988] 1 AC 533, 543–545.

⁷⁶ [1988] 1 AC 533, 539.

⁷⁷ [1988] 1 AC 533, 547.

In marked contrast to the line taken in *King*, the Court in *Leech* was highly receptive to the rights based position. Lord Bridge, who delivered the leading judgement, rejected one by one the arguments against the extension of court jurisdiction over governor's disciplinary decisions. Firstly, he rejected the arguments that the Home Secretary's powers of enforcement and control under s. 4 (2) Prison Act 1952 ousted the courts' possible supervisory jurisdiction over prison governors.⁷⁸ He denied that this section of the Act could act as a 'jurisdictional tabula in naufragio'.⁷⁹ Second, he dismissed the 'analogous arguments' which had been presented in *King* in order to show the practical, if not logical, difference between the disciplinary function of the Board of Visitors and the prison governor. Finally, he rejected the argument that the extension of supervisory jurisdiction would have dire pragmatic consequences. He thus had little time for the argument that it would be impossible to limit supervisory jurisdiction to the governor's disciplinary roles and not to the governor's other administrative activities:

Mr. Laws held out the prospect, as one which should make our judicial blood run cold, that opening the door to judicial review of governors' awards would make it impossible to resist an invasion by what he called 'the tentacles of the law' of many other departments of prison administration. My Lords, I decline to express an opinion on any of the illustrations advanced in support of this part of the argument. In a matter of jurisdiction it cannot be right to draw lines on a purely defensive basis and determine that the court has no jurisdiction over one matter which it ought properly to entertain for fear that acceptance of jurisdiction may set a precedent which will make it difficult to decline jurisdiction over other matters which it ought not to entertain. Historically, the development of the law in accordance with coherent and consistent principles has all too often been impeded, in diverse areas of the law besides that of judicial review, by the court's fear that unless an arbitrary boundary is drawn it will be inundated by a flood of unmeritorious claims.⁸⁰

Moreover, Lord Bridge did not accept that supervisory jurisdiction should be limited because it might 'undermine the prison governor's authority and seriously aggravate the already difficult task of maintaining order and discipline in prisons'.⁸¹ On the contrary, he argued in much the same way as Lord Woolf was later to argue,⁸² that the absence of a sufficient remedy where a prisoner has a genuine grievance could just as easily damage order and discipline in prisons.⁸³ Lord Bridge concluded by acknowledging that his arguments were merely a more detailed exposition of the argument of Lord Shaw in *St.*

⁷⁸ [1988] 1 AC 533, 561–564.

⁷⁹ [1988] 1 AC 533, 564.

⁸⁰ [1988] 1 AC 533, 566.

⁸¹ [1988] 1 AC 533, 566.

⁸² *Prison Disturbances April 1990: Report of an Inquiry by the Rt. Hon. Lord Justice Woolf (part I and II) and His Honour Judge Stephen Tumin (Part II)* (Cm 1456).

⁸³ *Leech v Deputy Governor of Parkhurst Prison* [1988] 1 AC 533, 568.

Germain and Lord Wilberforce in *Raymond v Honey* rooted in the prisoner's right of access to the court and finished by saying: 'I cannot help reflecting ... that it would be a very remarkable state of affairs if he (the prisoner) were denied access to the courts to challenge the proceedings of an inferior judicial authority empowered, in effect, to deprive him of liberty by extending the term of his imprisonment'.⁸⁴

Lord Justice Oliver was in full agreement with Lord Justice Bridge, although perhaps more concerned initially to show his appreciation of the practical implications of affording prisoners' procedural rights: 'I am sensible of the inconvenience which may be occasioned in the administration of the prison system by over-frequent and possibly capricious applications for review by the court of decisions of prison governors'.⁸⁵ He nevertheless reasoned that, on the basis of *Ridge v Baldwin* and *O'Reilly v Mackman*,⁸⁶ any exercise of public power 'which affects the liberty and, to a degree, the status of the person affected by it' is 'subject to the general common law principle which imposes a duty of procedural fairness'.⁸⁷ He rejected the analogous arguments made in *King* to show the difference between the 'managerial' powers of the prison governor and the 'judicial' powers of the Board of Visitors, and argued that the governor's decision in disciplinary proceedings was one which is 'amenable to the courts' jurisdiction to review'. Moreover, Oliver LJ rejected the notion that the prisoner's alternative remedy to petition the Secretary of State under section 4 (2) Prison Act 1952 could oust the courts' jurisdiction and argued that only a 'clear and unambiguous expression of the will of Parliament that the prima facie right to apply for judicial review should be removed' would be sufficient to dislodge the courts' inherent jurisdiction. Rather, he argued that the existence of alternative remedies should go to the exercise of the courts' discretion in granting a public law remedy rather than to the question of jurisdiction.⁸⁸ Finally, Lord Oliver rejected Browne-Wilkinson LJ's assertion in *King* that the 'practical repercussions' of review by the courts would be 'frightening' and concluded:

I have, in the end of all, found myself unpersuaded not only that the position of a prison governor in relation to disciplinary adjudications can be logically distinguished from that of a

⁸⁴ [1988] 1 AC 533, 568. Words in parentheses added.

⁸⁵ [1988] 1 AC 533, 574.

⁸⁶ *Ridge v Baldwin* [1964] AC 40; *O'Reilly v Mackman* [1983] 2 AC 237, 279.

⁸⁷ *Leech v Deputy Governor of Parkhurst Prison* [1988] 1 AC 533, 578.

⁸⁸ [1988] 1 AC 533, 581.

board of visitors, but also that any sound or convincing reasons exist for holding that such adjudications should be treated so far as judicial review is concerned in any different way.⁸⁹

There is little doubt that *Leech* was a landmark case. It significantly extended the courts' supervisory jurisdiction over the administration of prisons and marked a victory in the continuing tug-of-war between a culture of legal pragmatism and a culture of rights and principle. Nevertheless, it is interesting that both counsel for the prisoner and the judiciary still sought the justification for judicial intervention in the potential impact of these decisions on the prisoner's personal (i.e. status) liberty and to distinguish the governor's disciplinary powers from his 'managerial' functions. Thus, although *Leech* was a step forward in that it accepted jurisdiction over some of the governor's powers it did not go all the way to accepting or asserting the notion that prisoners had rights which could be protected in the 'operational' or 'managerial' sphere. In short, there was still no recognition of the German concept of prisoners' 'administrative rights'.

In any event, the celebrations after the victory in *Leech* did not last long: in the very same year the House of Lords delivered a blow to prisoners' rights relating to disciplinary proceedings in *Hone and McCartan*.⁹⁰ In this case the advances made in *Tarrant* and *Campbell and Fell* on the issue of legal representation were significantly undermined. Hone and McCartan were life prisoners who had been charged with assault of prison officers and who had been denied legal representation in proceedings before the Board of Visitors. The House of Lords were asked to answer the single question of whether a right to legal representation existed in respect of serious disciplinary offences. The Court denied the existence of such a right on the grounds of both domestic jurisprudence and on the basis of a scantily reasoned and erroneous analysis of the prisoner's European Convention rights. Lord Goff, in marked contrast to his tone in *Anderson*, adopted a restrictive view of the *Tarrant* judgement. He emphasised the judgement had denied the existence of any right to legal representation, whilst downplaying the presumption in that case that, in exercising its discretion, the Board of Visitors would normally grant legal representation where the offences and punishments were severe. Instead Lord Goff used *Tarrant* to argue that in the exercise of Board of Visitors discretion 'everything must depend on the circumstances of the particular case'. Moreover, that 'it is easy to envisage

⁸⁹ [1988] 1 AC 533, 583.

⁹⁰ *R v Board of Visitors of the Maze Prison, ex p Hone and McCartan* [1988] 1 AC 379.

circumstances in which the rules of natural justice do not call for representation'.⁹¹ Yet again Lord Goff relied on the practical implications of upholding such a right to legal representation which he argued 'would result in unnecessary delays in many cases, to the detriment of all concerned including the prisoner charged, and to wholly unnecessary waste of time and money, contrary to the public interest'.⁹²

Lord Goff's restrictive view of *Tarrant* was similarly applied to Convention jurisprudence.⁹³ Operating on the pragmatic assumption that the protections of Article 6 ECHR had been interpreted by the European Court of Human Rights 'to ensure that its application does not exceed the bounds of common sense',⁹⁴ he interpreted the word 'criminal' under Article 6 ECHR so as to exclude its application to the case in question. Thus the conclusion was reached that 'the absolute right to legal representation now claimed by the appellants is not, as I understand the position, required by the Convention any more than it is required by English law'.⁹⁵ This was a narrow interpretation of Article 6 and of the potential application of *Campbell and Fell* which had been at pains to show that the definition of 'criminal' should **not** be limited to the criminal law only and should not preclude the possibility of Article 6 protections applying to prison disciplinary proceedings. As a result the decision was roundly criticised by prison lawyers and academics.⁹⁶

The retreat in *Hone and McCartan* from the procedural vigilance of *Tarrant* and *Campbell and Fell* has been explained as a consequence of the lesser punishments involved in this case and thereby the lower impact on the prisoner's personal liberty.⁹⁷ Lord Goff's attitude thus reflects earlier judgements on procedural rights in disciplinary proceedings which were restricted to remedying 'substantial injustice' only.⁹⁸ This judicial attitude was to become more pronounced after reform of the disciplinary system pursuant to the recommendations of the Woolf Report. These abolished the disciplinary

⁹¹ [1988] 1 AC 379, 392.

⁹² [1988] 1 AC 379, 392.

⁹³ *Campbell and Fell v UK* (1985) 7 EHRR 165; *Engel v The Netherlands* (No. 1) (1976) 1 EHRR 647.

⁹⁴ *R v Board of Visitors of the Maze Prison, ex p Hone and McCartan* [1988] 1 AC 379, 393.

⁹⁵ [1988] 1 AC 379, 394.

⁹⁶ V Treacy 'Prisoners' Rights Submerged in Semantics' (1989) *Howard Journal* 27; 'Prisons, Rules and Courts: A Study in Administrative Law' (note 17 above) 515.

⁹⁷ *Prison Law* (note 8 above) 461.

⁹⁸ See note 52 above.

element of the Board of Visitors functions, shifted more serious disciplinary offences to outside courts and restricted governor's powers to convict and punish disciplinary offenders. Since these reforms, court involvement in governor disciplinary proceedings has been marginal and the courts' approach has been similar to that adopted with regard to the exercise of 'administrative' powers in prisons.⁹⁹ This can be contrasted with Germany where disciplinary proceedings and penalties are closely regulated by courts even though none of the disciplinary penalties available to governors under the Prison Act 1976 have any direct impact on the length of the prisoner's sentence and thereby presenting a threat to the offender's status liberty.¹⁰⁰

With a lesser threat to the prisoner's personal liberty arising from changes to the disciplinary system and the resultant shift in judicial attention away from this area, the question of supervisory jurisdiction over 'managerial' powers within prisons became more pronounced. Whilst the courts had acknowledged jurisdiction to review the Home Secretary's 'managerial' and 'operational' discretion, *McAvoy* had shown that their taste for active intervention in this regard was yet to be acquired. Moreover, with the courts' supervisory jurisdiction over the exercise of the governor's disciplinary powers still only recently established in *Leech*, the question of the courts' jurisdiction over governor's 'managerial' powers remained moot. If anything both counsel for the prisoners and the judges in *Leech* had downplayed the implications of the courts' control over such powers in order to overcome the initial hurdle of extending supervisory jurisdiction to the governor's disciplinary powers. Thus, this final barrier to the courts' supervisory jurisdiction was yet to be overcome. This was one of the central questions to be confronted in the broad ranging decisions regarding the prisoners Hague and Weldon which the following section examines in detail.

To sum up: the development of prisoners' rights during the late 1970s and 1980s was marked by the rights ambivalence present within legal and political culture in England generally. On the one hand the courts grew more confident in their role as the guardian of the prisoner's constitutional rights and in founding their supervisory jurisdiction solely on this basis. Moreover, the courts increasingly made recourse to European human rights jurisprudence in their development of prisoners' rights at common law. But alongside this

⁹⁹ *Prison Law* (note 8 above) 461.

insurgent rights discourse there was a clear concern that prison management remain firmly within the province of government and that courts retain a hands-off supervisory role. This concern was articulated in the language of pragmatism and sovereignty. The conflict between prisoners' rights protection and the practical concern to protect administrative flexibility in prisons is not unusual nor is it absent within the German context. What distinguished the English from the German context, however, was that in England no common language existed to reason out the balance between effective prison administration and rights protection. Rather the conflict manifested in a competition between two alternative discourses. English judges might adopt the language of rights when reasoning in support of the prisoner, but there was an equal negation of rights discourse in favour of the language of pragmatism, sovereignty and tradition. When *Hague* was decided in 1990 it was in a legal culture marked by these parallel discourses.

2. Hague: turning point or dead end?

The judgements regarding the prisoners Christopher Hague and Kenneth Weldon are central decisions in prisoners' rights jurisprudence and remain authoritative today.¹⁰¹ The cases arose as a result of the following circumstances. Christopher Hague had been branded a 'trouble-maker' by the Governor of Parkhurst Prison who had ordered that he be transferred to Wormwood Scrubs and held there in segregation. He was held for 28 days in solitary confinement. The Governor's orders were made pursuant to Circular Instruction 10/1974 under Prison Rule 43 which permitted segregation for the purposes of good order and discipline. This circular instruction had been widely used to bypass procedural safeguards attached to the imposition of disciplinary sanctions in order to segregate supposedly subversive prisoners. Hague argued that the procedure followed under CI 10/74 was unlawful and pursued a claim for judicial review and damages for false imprisonment and breach of statutory duty. Kenneth Weldon alleged that he had been beaten up by prison staff, dumped in a strip cell and left there naked overnight. He pursued a claim for assault and false imprisonment. Hague and Weldon's claims were considered separately until their appeals to the House of Lords were conjoined.

¹⁰⁰ See ch. 4, pp. 197–207.

The decisions leading up to, and including, the House of Lords decision in *Hague* clarified three important questions, namely: the extent of the courts' supervisory jurisdiction over prison administration in public law, the legal status of the prison rules and the extent of the rights which prisoners could claim in private law. The handing of all three issues demonstrates important aspects of the English treatment of prisoners' rights and is worthy of separate consideration.

2.1 *Hague*, supervisory jurisdiction and public law rights in the 'administrative' sphere

In *Hague* the Divisional Court was asked to settle whether it had supervisory jurisdiction over the exercise of the prison governor's powers under Prison Rule 43. Given that the powers afforded under Rule 43 could be classified as a 'managerial' or 'operational' power, the Court was being asked to break down the last jurisdictional barrier to judicial supervision over prison administrative decisions. The Divisional Court accepted that it had jurisdiction and importantly that prisoners were not, as a rule, required to exhaust alternative remedies before turning to the court for assistance. The justification given in the Divisional Court for the extension of jurisdiction in this case related to the special impact that Rule 43 segregation had on prisoners. The court's view was that although segregation was not strictly speaking a disciplinary sanction, in practice the prisoner experiences prolonged segregation, without his consent, as a form of punishment. It therefore made no sense to the Divisional Court to restrict jurisdiction solely to measures formally classified as disciplinary.¹⁰²

The Court of Appeal was asked by Mr. Laws, counsel for the Secretary of State for the Home Department, to overturn the decision of the Divisional Court as to jurisdiction, or at least to restrict the level of scrutiny which might be applied by the courts to the exercise of the governor's managerial or operational powers. The Court of Appeal would not overturn the decision to grant jurisdiction over the governor's powers under Rule 43. It accepted that the governor's non-disciplinary powers could be subject to review. But at

¹⁰¹ *R v Deputy Governor of Parkhurst Prison, ex parte Hague and Weldon* [1992] 1 AC 58, [1991] 3 All ER 733.

¹⁰² [1992] 1 AC 58, 98.

the same time as accepting this jurisdiction, Taylor LJ, delivered a strong warning as to its use.

The question whether any relief and what relief should be granted is a matter of discretion in each case. Consideration of public policy may well arise in relation to prison management which would not arise elsewhere. The need to maintain good order and discipline and the need to make speedy decisions often in an emergency are important considerations in the special context of prison management. I would therefore agree with Mr. Law's less bold proposition, that the court should approach the exercise of discretion with great caution. The well known proposition that managers should be left to manage applies a fortiori in regard to prisons save where a clear case is made out for relief ex debito justified.¹⁰³

Thus, Taylor LJ's extension of jurisdiction did not amount to a green light to the judiciary to scrutinise the exercise of managerial or operational discretion or to create general standards in this respect. Certainly his words did not come close to the idea that the courts might act as protectors of prisoners' rights within the administrative sphere. Rather, the tone was tentative, presenting the decision to grant a prisoner a remedy in such a case as an action of last resort where clear injustice had been suffered.

Given this tentative proposition, it comes as little surprise that Hague himself did not receive much in the way of relief. Although Taylor LJ accepted that Hague's transfer was unlawful on the narrow and technical ground that the governor at the receiving prison should have made the decisions relevant to the case, he held that Hague had not suffered any injustice.¹⁰⁴ Granting a declaration of illegality only, Taylor LJ denied that Hague had any right to be heard by the governor nor any right to reasons for the governor's decision.¹⁰⁵ Taylor LJ invoked 'reasons of public policy' to defeat the claims to both of these procedural rights, namely the necessity of making 'urgent' segregation decisions and the possibility of 'escalating trouble' if the prisoner had recourse to the reasons for his segregation.¹⁰⁶ The court was reluctant to place any administrative burden upon the prison administration in order to protect the prisoner's procedural rights.¹⁰⁷ This decision was notably at odds with the growing recognition of the requirements of procedural

¹⁰³ [1992] 1 AC 58, 116.

¹⁰⁴ [1992] 1 AC 58, 114.

¹⁰⁵ [1992] 1 AC 58, 109–114.

¹⁰⁶ [1992] 1 AC 58, 109–112.

¹⁰⁷ *Law Process and Custody* (note 6 above) 120–123.

fairness with respect to disciplinary proceedings which had an effect on prisoners' status rights, as well as other areas of administration in England.¹⁰⁸

To sum up at this point, the Court of Appeal decision in *Hague* gave with one hand and took away with the other. While in theory it had extended supervisory jurisdiction to operational and managerial decisions it argued that the discretion to grant relief in such circumstances was to be exercised with circumspection. Moreover it was reluctant to impose exacting procedural standards to the decisions at hand.¹⁰⁹ All the way through the Court of Appeal decision in *Hague*, pragmatic concerns were used to defeat the potential rights of prisoners in the administrative sphere. The reticent tone in *Hague* continues to be heard in more recent English case law with regard to managerial and operational matters in prisons.¹¹⁰

The English treatment of prisoners' rights in the administrative sphere is in strong contrast to Germany. Whilst in Germany the courts continue seek to attain a principled balance between the full realisation of the prisoner's administrative rights and the need for administrative flexibility in prisons, in England no such principled commitment exists. Rather the English judiciary maintain a hands off approach with respect to the internal operations of the prison, insisting that intervention can only be assessed in each individual case and justified in extreme circumstances. In short, with respect to the rights of prisoners in the administrative sphere in England, pragmatism continues to prevail.

2.2 Hague, breach of statutory duty and the Prison Rules

The House of Lords, in *Hague*, had to confront the question of whether the prisoner could raise a claim for breach of statutory duty.¹¹¹ The legal position, which had been consistently held since *Arbon v Anderson* was decided in 1943, is that the Prison Rules do not confer rights which can be vindicated through an action for breach of statutory duty.¹¹²

¹⁰⁸ P Craig *Administrative Law* (4th edn Sweet & Maxwell London 1999) 425f.

¹⁰⁹ *Law Process and Custody* (note 6 above) 122.

¹¹⁰ See discussion on p. 241–256 below.

¹¹¹ *R v Deputy Governor of Parkhurst Prison, ex parte Hague and Weldon* [1992] 1 AC 58, 146.

¹¹² *Arbon v Anderson* [1943] 1 All ER 154, [1943] KB 252; *Becker v Home Office* [1972] 2 All ER 676, [1972] 2 QB 407.

The House of Lords was therefore being invited to overrule clearly established precedent on this question.

The possibility of a right to sue for breach of statutory duty under the Prison Rules was proposed by Sedley Q.C. He argued that, as a matter of precedent, a common law ‘ground rule’ applied that where a plaintiff belonged to a class of persons which the statutory provision was intended to protect, and the statute provided no other statutory remedy or penalty, he had a right to a remedy where a breach of the statute had caused damage to him.¹¹³ Sedley stated that the question of legislative intent did **not** arise as there was no ‘true remedy’ expressly stipulated by Parliament for breach of the Prison Rules. On the already established fundamental principle that ‘a convicted prisoner retains all civil rights which are not expressly or by necessary implication taken away’ and on the assertion that there ‘can and should be no special rule restricting the availability of relief in prison cases’, Sedley argued that it was open to the Court to overrule past precedent which had ‘neither adequately considered nor correctly applied the established principles for determining whether an action for breach of statutory duty applied’.¹¹⁴ Sedley rooted his argument in the right of the prisoner to an adequate remedy which he placed prior to any question of legislative intention in this regard. John Laws, acting on the respondent’s behalf, started from the opposite constitutional premise. The only question to be considered, it was argued, was whether Parliament intended to confer under the Prison Act 1952 and the Prison Rules 1964 private rights to be vested in prisoners. The clear answer was that it did not, as s. 47 Prison Act conferred no power on the Secretary of State to make rules which conferred such private rights on individuals.¹¹⁵ Once again, in the competing arguments presented by Sedley and Laws, we can see a battle between two visions of the English constitution.

The leading judicial arguments in *Hague*, presented by Lords Bridge and Jauncey, were articulated in the language of constitutional orthodoxy. Their analysis, based on a careful

¹¹³ *R v Deputy Governor of Parkhurst Prison, ex p Hague and Weldon* [1992] 1 AC 58, 149. Sedley relied on *Groves v Lord Wimborne* [1898] 2 QB 402; *Cutler v Wandsworth Stadium Ltd* [1949] 1 AC 398, 407; *Lonrho Ltd. v Shell Petroleum Co. Ltd (No 2)* [1982] AC 173, 183; *London Passenger Transport Board v Upson* [1949] AC 155, 168.

¹¹⁴ *R v Deputy Governor of Parkhurst Prison, ex p Hague and Weldon* [1992] 1 AC 58, 147–150.

¹¹⁵ [1992] 1 AC 58, 152.

reading of precedent, was imbued with respect for parliamentary intention. Both Lords agreed that:

(I)t must always be a matter for consideration whether the legislature intended that private law rights of action should be conferred upon individuals in respect of breaches of the relevant statutory provision. The fact that a particular provision was intended to protect certain individuals is not of itself sufficient to confer private law rights of action upon them, something more is required to show that the legislature intended such conferment.¹¹⁶

Using this test, the House agreed with Lord Jauncey's description of the status of the Prison Rules as regulatory:

The rules are wide ranging in their scope covering a mass of matters relevant to the administration and good government of a prison. Many of these do not directly relate to prisoners and I do not consider that those which do were ever intended to confer private law rights in the event of a breach. The rules are regulatory in character, they provide a framework within which the prison regime operates but they are not intended to protect prisoners against loss, injury and damage or to give them rights of action in respect thereof.¹¹⁷

The House of Lords decided *Hague* at a time when a number of the public law rights of prisoners were already recognised and established. Two judges deciding *Hague*, Lords Bridge and Ackner, had been highly instrumental in the development of these rights.¹¹⁸ Thus it could not be said that this was a court unsympathetic to the protection of prisoners' rights in principle. Moreover, *Hague* is not out of line with other contemporary cases, dealing with non-prisoners, in looking to the intention of the legislature in order to establish the liability of public bodies to private law actions, or in its preference for public law remedies when dealing with the exercise of public discretion.¹¹⁹ Thus, it could not be argued that the House of Lords treated prisoners in a patently different manner to non-prisoners on the question of breach of statutory duty.

Notwithstanding, the case displays evident judicial discomfort with vesting prisoners with actionable rights or with raising the status of the prison rules to mandatory status. The court's position in *Hague* was in marked contrast with the decision of the German Federal Constitutional Court in the 1970s which ordered the legislature to produce a special prison code and gave constitutional guidance as to the substantive principles it should

¹¹⁶ [1992] 1 AC 58, 170.

¹¹⁷ [1992] 1 AC 58, 172.

¹¹⁸ *Leech v Deputy Governor of Parkhurst Prison* [1988] 1 AC 533; *Raymond v Honey* (1983) 1 AC 1 (HL).

¹¹⁹ P Craig *Administrative Law* (Sweet & Maxwell London 1999) 847–849.

fulfil.¹²⁰ From the German perspective it is easy to understand why *Hague* is cited by English critics as evidence that English judges have not given any ‘any real endorsement to a notion of prisoners having any rights which they might assert against the authorities, or rights which might shape or constrain the exercise of official power’.¹²¹ When called upon to vindicate prisoners’ rights in a broad based sense rather than to uphold these rights on a discretionary and case-by-case basis, the judiciary in *Hague* were less inclined to adopt a fundamental rights rationale. While not explicitly acknowledged, pragmatic considerations could well have underpinned this judicial discomfort. The House may have been motivated by ‘floodgates’ concerns to restrict possible claims arising in private law which do not fall within the leave restrictions afforded under judicial review. Equally, it might be explained by the concern to restrict the expense which would flow from vesting prisoners with rights to compensation for breach of the Prison Rules.

Whatever the underlying policy grounds for the decision in *Hague*, the arguments and reasoning in this case illustrated a deeper aspect of English constitutional culture. The House of Lords had two competing constitutional rationales to choose from. It could either follow a rights based argument or it could defer to its interpretation of legislative intention. The court, clearly uncomfortable with the implications of a decision in favour of *Hague* opted to take an orthodox constitutional line on the question. Instead of adopting as its starting premise the prisoner’s right to an adequate remedy and reasoning from this premise in order to arrive at a conclusion as to the adequacy of the available remedies for prisoners, the Court simply started from the alternative premise of parliamentary sovereignty. *Hague* thus symbolises a legal culture vacillating between the language of sovereignty and the language of rights. This vacillation allowed the same judges to slip from one view of the constitution in one case (*Leech*) to competing constitutional arguments in another (*Hague*). Such vacillation has not been present in Germany since the introduction of the Basic law which insists that the rationale for any public decision and action must be reasoned in the language of basic rights and constitutionally permissible restrictions thereof. Whilst the outcomes of prisoners’ rights cases obviously vary in Germany, it is not possible to shift from basic rights as the starting premise of judicial reasoning. With the introduction of the Human Rights Act

¹²⁰ *BVerfGE* 33, 1.

¹²¹ *Prison Law* (note 8 above) 458. See also R Morgan ‘Imprisonment: Current Concerns’ in M Maguire, R Morgan and R Reiner, (edd), *Oxford Handbook of Criminology* (Clarendon Oxford 1997) 1138, 1164.

1998 and the removal of the ambiguity of the courts' role as the guardian of constitutional rights this starting premise should now no longer be allowed to vacillate in England. Whether the courts will end such vacillation or will prove in time to shift the status of the Prison Rules through creative interpretation of Convention rights remains to be seen however. In this respect the fate of prisoners' rights might be tied up with the future dynamics of English constitutional culture.¹²²

2.3 Hague, false imprisonment and the prisoner's legal status

The argument surrounding Hague and Weldon's case for false imprisonment illustrates the malleability of the English conception of prisoners' rights which is without any firm conceptual distinction between status and administrative decisions or any clear notion of positive administrative rights vested in prisoners.¹²³

The argument raised for false imprisonment was that a prisoner who was otherwise lawfully in prison could sue for false imprisonment in respect of a particular confinement which was unlawful. There were two arguments, supported by precedent, as to the possible unlawfulness of the confinement: a) that a prisoner unlawfully confined was capable of being falsely imprisoned and b) that imprisonment could be rendered unlawful by reason of the conditions of detention. The House of Lords rejected both arguments on the following grounds. It argued that the tort of false imprisonment had two components, namely the fact of imprisonment and the absence of lawful authority to justify it. It then stated that s.12 of the Prison Act 1952 provided the governor and officers with lawful authority to restrain a prisoner within the defined bounds of any prison.¹²⁴ The arguments which followed on from this premise are deserving of particularly close attention.

On the question of Hague's case Lord Bridge asked:

Can the prisoner ... complain that his legal rights are infringed by a restraint which confines him at any particular time within a particular part of the prison? It seems to me that the reality of prison life demands a negative answer to this question....the concept of the prisoner's 'residual liberty' as a species of freedom of movement within the prison enjoyed as a legal

¹²² See ch. 4, pp. 195–197.

¹²³ See ch. 4, pp. 197–207.

¹²⁴ *R v Deputy Governor of Parkhurst Prison, ex p Hague and Weldon* [1992] 1 AC 58, 162.

right which the prison authorities cannot lawfully restrain seems to me quite illusory. The prisoner is at all times lawfully restrained within closely defined bounds and if he is kept in a segregated cell, at a time when, if the rules had not been misapplied, he would be in the company of other prisoners in the workshop, at the dinner table or elsewhere, this is not the deprivation of his liberty of movement, which is the essence of the tort of false imprisonment, it is the substitution of one form of restraint for another.¹²⁵

On considering the arguments of the appellants, Lord Bridge went on to say:

Mr Harris seeks to surmount these difficulties by submitting that whenever there is a breach of the rules which is sufficiently 'fundamental' this converts an otherwise lawful imprisonment to an unlawful imprisonment. This, as I understand it, is quite a different concept from that of an infringement of residual liberty. The submission is that any breach of the rules which is sufficiently far reaching in its effects on the prisoner, for example the failure to supply him with clothing 'adequate for warmth and health' pursuant to r. 20 (2), undermines the legality of his imprisonment. Logically this would lead to the conclusion that the prisoner who has not been supplied with proper clothing would be entitled to walk out of the prison, but Mr Harris understandably disclaims any such extravagant proposition. It follows that the authority given by s. 12 (1) for lawful confinement of the prisoner cannot possibly be read as subject to any implied term with respect to compliance with the Prison Rules and this is fatal to any submission which seeks to make the lawfulness of the imprisonment depend in any sense on such compliance.¹²⁶

Lord Bridge's proposition was supported by Lord Jauncey. He acknowledged that the dictum in *Raymond v Honey* meant that prisoners retain all civil rights not expressly or implicitly taken away. He pointed out, however, that 'these observations ... are highly relevant to the protection of such rights as a prisoner retains but they do not assist in determining what those rights are'.¹²⁷ On this basis he argued that:

A prisoner is lawfully committed to a prison and while there is subject to the Prison Act 1952 and the Prison Rules 1964. His whole life is regulated by the regime. He has no freedom to do what he wants, when he wants. His liberty to do anything is governed by the prison regime. Placing Weldon in a strip cell and segregating Hague altered the conditions under which they were detained but did not deprive them of any liberty which they had not already lost when initially confined.¹²⁸

Thus Lord Jauncey concluded that the prisoner cannot be deprived of liberty whilst in prison 'because he has none already'.¹²⁹

The conclusions of Lords Bridge and Jauncey on the question of false imprisonment were arrived at on the basis of an indivisible view of the prisoner's residual liberty. This was a consequence of framing the question of residual liberty within the legal definition of false

¹²⁵ [1992] 1 AC 58, 162.

¹²⁶ [1992] 1 AC 58, 163.

¹²⁷ [1992] 1 AC 58, 174.

¹²⁸ [1992] 1 AC 58, 176.

imprisonment. The proposition that the lawfulness of the detention could be called into question by the conditions of confinement or by breach of the Prison Rules was rejected by the House of Lords on the basis that, once authority had been given to imprison a prisoner, the lawfulness of that authority could never be brought into question. Viewed from the perspective of the lawfulness of the prisoner's incarceration, or the lawfulness of the restriction of the prisoner's status liberty, this argument is unproblematic.

But viewed from the perspective of the prisoner's administrative liberty the reasoning here is highly problematic. As argued in chapter four, on a particular reading of the *Raymond v Honey* principle the notion of indivisible liberty is rejected.¹³⁰ It follows, as a matter of logic, from the *Raymond v Honey* principle that if the conception of residual liberty in prisons is to mean anything at all, it must by definition, not be vitiated by the lawfulness of the prisoner's imprisonment. The argument cuts both ways, for on a divisible conception of the prisoner's liberty the lawfulness of detention cannot be called into question each time a prisoner wishes to challenge an administrative decision in the process of his imprisonment. It would indeed be an 'extravagant proposition' to call into question the lawfulness of the prisoner's detention if he was not supplied with adequate clothing. But on a divisible conception of liberty we would nevertheless argue that the prison officer's treatment of Hague and Weldon in changing the conditions of their detention **did** deprive them of further liberty than they had already lost when being placed in prison. We would therefore question Lord Jauncey's assertions that the prisoner's 'whole life is regulated by the regime', that 'he has no freedom to do what he wants, when he wants' and that the prisoner has no liberty which could be deprived him. We would question this, because it amounts to an almost total negation of the prisoner's administrative liberty. Equally we would dismiss Lord Bridge's view of solitary confinement as the 'substitution of one form of restraint for another' but rather require that measures such as solitary confinement be justified in each case as a necessary restriction of the prisoner's administrative liberty. Whilst the arguments in *Hague* could be viewed as an example of the difficulty of framing complex questions of prison administration within the restrictive legal concept of false imprisonment, it is suggested that they demonstrate a deeper absence in English judicial thinking. From a German perspective, these arguments reflect the absence of a concern with, or a formulated

¹²⁹ [1992] 1 AC 58, 177.

conception of, the prisoner's administrative liberty within English judicial thinking on prisoners' rights.

Beyond this absence, *Hague* also demonstrates that there is no clear notion of what residual or negative liberty really means within a prison administrative framework. This was raised by Lord Jauncey when he noted that the proposition of residual liberty leaves us little guidance as to how to determine what prisoners' rights are. Unlike Germany, there is no legally defined benchmark presented in this case for determining what limitations of rights the prison administration may impose. Moreover, no principle has been recognised by the Court upon which to found positive administrative rights vested in prisoners which could compensate for the loss of status liberty or act as a counter to the inherent limitations of imprisonment. As argued in chapter four this lack of definition is not surprising in the English context.¹³¹ It is premised on a tacit constitutional and democratic understanding that the executive under Parliament be left to define the substantive basis of prison policy and criminal justice in general. In sum, when read with German eyes, the House of Lords decision in *Hague* is conspicuous for the absence of real concern either with the prisoner's administrative rights or with the relationship between rights protections and the purpose of imprisonment.

2.4 Hague and prison conditions

Although the House of Lords eliminated the possibility of a prisoner suing for false imprisonment or breach of statutory duty in both *Hague* and *Weldon's* case, they did aver that certain alternative remedies might be available with regard to intolerable conditions. Thus, the Court took the general view that conditions 'seriously prejudicial to health' could be challenged in public law or, where a prisoner's health was materially affected by the conditions of his confinement, he could sue in negligence or seek a public law

¹³⁰ See ch. 4, pp. 197–207.

¹³¹ See ch. 4, pp. 197–207.

remedy.¹³² The benchmark set in this instance was high. Nothing short of ‘physical injury or an impairment of health’ would suffice to qualify a prisoner for a claim in damages.¹³³

Whilst this aspect of *Hague* displayed some judicial concern with prisoner treatment inside prison, it also displayed judicial reticence. The court was only interested in protecting against the possibility of extreme physical injury or damage to health. The decision did not advance the already well established principle that prison authorities owe prisoners a duty of care with respect to the prisoner’s health and physical well being.¹³⁴ It certainly did not go as far as *Herbage* which accepted a general jurisdiction to monitor ‘cruel or unusual’ treatment irrespective of the injury incurred.¹³⁵ *Hague* thus adds little to the judicial record of protection of prisoner treatment and conditions. Under the Human Rights Act 1998 the courts’ jurisdiction now extends to infringements under Article 3 of the European Convention of Human Rights and, it seems, this will now be the sensible avenue for a prisoner to take where no physical injury has been incurred.

3. Prisoners’ rights post-*Hague*: snakes and ladders

Judicial protection of prisoners’ rights since the establishment of full supervisory jurisdiction in *Hague* has been mixed. After *Brind*, reference to European convention rights in prison cases became more common.¹³⁶ This process has now intensified since the Human Rights Act 1998 came into force. But whilst reference to these rights occurs, the reasoning employed in their application or in the resultant development of common law rights and principles in prisons has been widely diverse. Whilst quicker to intervene where a prisoner’s access to the courts might be jeopardised (*Leech No. 2*, *Simms*),¹³⁷ courts have been slow to recognise protections flowing from other convention rights

¹³² *R v Deputy Governor of Parkhurst Prison, ex p Hague and Weldon* [1992] 1 AC 58, 166 and 177.

¹³³ [1992] 1 AC 58, 166.

¹³⁴ *Ellis v Home Office* (1953) 2 QB 135.

¹³⁵ *R v Secretary of State for the Home Department, ex p Herbage (No. 2)* [1987] 1 QB 1077. See p. 223 above.

¹³⁶ *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720, HL. See ch. 4, p. 192 note 241.

¹³⁷ *R v Home Secretary, ex p Leech (No. 2)* [1994] QB 198; *R v Secretary of State, ex p Simms and another* [1998] 2 All ER 491; (2000) AC 115.

(*O'Dhuibhir*).¹³⁸ Yet, even in the well-trodden terrain of access to justice, the legal test applying to limitations of this right has been challenged in the Court of Appeal in *Simms*.¹³⁹ With respect to the development of prisoners' rights in the internal administrative sphere of the prison, judicial scrutiny of decisions has been far from exacting and the tentative tone demonstrated in *Hague* has been manifest. Courts are disinclined to check the substance of the Home Secretary's policy making power where this relates to internal prison administration (*Hargreaves*).¹⁴⁰ Rather the judiciary are more likely to intervene where the Home Secretary's decision has an indirect impact on the offender's sentence length and thereby threatens the status liberty of the prisoner. This has been evident in the 'fastest growing area of judicial intervention in recent years' regarding early release of life sentenced prisoners,¹⁴¹ but also with respect to transfer decisions (*Duggan*).¹⁴² We thus see a continuance of the established pattern of judicial bifurcation in which the status rights of prisoners are increasingly protected whilst administrative rights remain neglected. The remaining review of cases will highlight these trends.

The judicial concern to avoid interfering with prison administration policy, and the absence of any positive constitutional purpose of prison administration, was particularly evident in *Hargreaves*.¹⁴³ Here the Court of Appeal denied that a prisoner had a substantive legitimate expectation where the Home Secretary had changed his policy on eligibility for home leave. The applicants, convicted in 1994, were serving sentences between 6-8 years and had been told in a notice that they could apply for home leave after serving one third of their sentence. It was stressed in that notice, however, that home leave was a privilege. The prisoners had also signed a 'compact' with the prison authorities under which the prison promised to consider them for home leave when they became eligible in return for their good behaviour. In 1995 the Home Secretary changed the home leave system so that prisoners would only become eligible to apply after serving one half of their sentence. The Home Secretary, reacting to the fact that a number of

¹³⁸ *R v Home Secretary, ex p O'Dhuibhir* [1997] C.O.D. 315.

¹³⁹ *R v Secretary of State, ex p Simms and another* [1998] 2 All ER 491; (2000) AC 115.

¹⁴⁰ *R v Secretary of State, ex p Hargreaves* [1997] 1 All ER 397.

¹⁴¹ *Prison Law* (note 8 above) 461; *R v Home Secretary, ex p Doody* [1993] 1 All ER 151; *R v Secretary of State for the Home Department, ex p Pierson* [1997] 3 All ER 577; *R v Secretary of State for the Home Department ex p Thompson and Venables* [1997] 3 All ER 577; CA 26/10/2000.

¹⁴² *R v Secretary of State, ex p Duggan* [1994] 3 All ER 277

prisoners had absconded or committed further crimes while on leave, claimed to be improving public confidence in the administration of justice as well as public safety. The prisoners, who now had to wait for a much longer period of time before they could apply for home leave, argued that their legitimate expectation had been violated by the Home Secretary's change in policy. It was argued that the legitimate expectation had arisen both as a result of the previous policy and as a result of representations made in the 'compact' and the note. The prisoners relied on Sedley LJ's exposition in *Hamble Fisheries* which recognised the existence of a substantive legitimate expectation which could hamper the policy making power of government, and suggested that judges should balance the interests of the individual against the 'constitutional importance of ministerial freedom to formulate and reformulate policy'.¹⁴⁴

The Court of Appeal argued that the ambiguity in the wording of the notice and compact meant that no legitimate expectation arose on the prisoners' behalf. It warned the prison authorities, however, that unambiguous terms in compacts could give rise to legitimate expectations on the part of prisoners which would be upheld by the courts.¹⁴⁵ But the Court expressly rejected the possibility of using the action of legitimate expectation to restrict the Home Secretary's policy making power. Relying on *Findlay*,¹⁴⁶ the Court argued that where a prisoner was able to show that a legitimate expectation arose the most he could expect was that 'his case would be examined individually in the light of whatever policy the Secretary of State saw fit lawfully to adopt'.¹⁴⁷ In deciding whether a substantive policy was lawfully adopted the Court stated that the test to be applied was whether the policy was irrational in the *Wednesbury* sense, branding as constitutional 'heresy' the notion that courts should undertake a balancing exercise between the minister's policy making freedom and the legitimate interests of individuals.¹⁴⁸ It thus rejected the possibility of close scrutiny of the substance of the Home Secretary's policy decision. Applying the *Wednesbury* standard, the Court found that the decision had been properly considered and that the Home Secretary could 'not be faulted' in consideration

¹⁴³ *R v Secretary of State, ex p Hargreaves* [1997] 1 All ER 397.

¹⁴⁴ *R v Ministry for Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714. See P Craig *Administrative Law* (Sweet & Maxwell London 1999) 611–628.

¹⁴⁵ *R v Secretary of State, ex p Hargreaves* [1997] 1 All ER 397, 414 and 415.

¹⁴⁶ *Findlay v Secretary of State for the Home Department* [1985] AC 318, 333.

¹⁴⁷ *R v Secretary of State, ex p Hargreaves* [1997] 1 All ER 397, 398.

¹⁴⁸ [1997] 1 All ER 397, 412.

of the factors of ‘public safety and restoration of public confidence in the administration of justice’.¹⁴⁹

In addition, in *Hargreaves* counsel raised the argument that the Home Secretary’s decision had violated the prisoners’ Convention rights under Article 8 to private and family life. Whilst accepting that convention rights can be raised to ‘assist in the elucidation of common law or the interpretation of statute’, the Court held that the prisoners’ rights had not been violated.¹⁵⁰ The Court’s reasoning on this issue was brief and cursory.¹⁵¹ It argued, that the ‘fundamental interference with respect for family life in the present case is brought about by the lawful sentence of the court’. Whilst it accepted the importance of home visits, the Court stated that the requirements of Article 8 were fulfilled as prisoners still had contact with their families through family visits in the prison. Moreover, the Court held that the Home Secretary’s concern with public confidence and public safety in making this decision fell under the exceptions stipulated under Article 8 and were shown to be in pursuit of a ‘pressing social need’ and ‘proportionate to the legitimate aim pursued’.¹⁵² Whilst there was a clear recognition here that the prisoner was the bearer of Convention rights and the reasoning in the case consistently followed from this premise, the interpretation of the protections provided by Article 8 in this instance did little to advance the density of judicial control over the Home Secretary’s policy making discretion in the future. Moreover the brief reasoning in this case provided no guidelines for future consideration of Article 8 applications from prisoners.

The definition of the test for legitimate expectation and the interpretation of the protections of the prisoner’s convention rights in *Hargreaves* unambiguously expressed the view that courts should not second guess the Home Secretary in the formulation of internal prison administration policy. Thus, quoting from *Findlay*, Hirst LJ was anxious to emphasise that courts were not ‘as close, or as sensitive, to public opinion as a minister responsible to Parliament and the electorate ... he has to ... determine the policies needed

¹⁴⁹ [1997] 1 All ER 397, 414.

¹⁵⁰ [1997] 1 All ER 397, 412–413.

¹⁵¹ It amounted to three paragraphs.

¹⁵² *R v Secretary of State, ex p Hargreaves* [1997] 1 All ER 397, 413.

to maintain public confidence in the criminal justice system'.¹⁵³ The suggestion that courts might set positive constitutional standards which have to be balanced when the Home Secretary makes such decisions was rejected. No doubt, Hirst LJ would also have viewed the decisions of the German Federal Constitutional Court which established and sustained the 'constitutional resocialisation principle' and bound both legislative and executive discretion in this regard as constitutional 'heresy'.

Whilst Courts are disinclined to check ministerial policy making power, their readiness to intervene in the managerial decisions of those responsible for the administration of prisons appears to depend on the right in question and the issues at stake. A strong example of judicial resistance to review the prison governor's operational discretion is presented in *Hepworth*.¹⁵⁴ This case dealt with whether a governor's power could be reviewed under Prison Rule 4 (4). This requires governors to indicate at each prison what system of privileges is in operation and includes the procedures for determining when a prison is entitled to a higher level of privileges, when a privilege previously granted may be removed as well as a duty on the governor to give reasons why a privilege has been removed. The Divisional Court took a very restrictive view of the possibilities for review, arguing that it would take an exceptionally strong case to justify review of the criteria on which earned privileges could be granted or removed, namely 'something in the nature of bad faith or crude irrationality'.¹⁵⁵ This approach can be contrasted with the number of FCC decisions in Germany regarding the prison administration's discretionary powers of rights limitations (*Eingriffsbefugnisse*). In all these decisions, in particular those regarding non-legal correspondence, written information and personal possessions, the FCC has carefully scrutinised the decisions of the prison administration and invoked constitutional rights and principles, in particular the resocialisation principle and prisoners' legitimate expectations (*Vertrauensschutz*), in order to enhance the density of control over internal prison administrative decisions.¹⁵⁶

As already indicated, the judiciary are much more likely to intervene in internal prison administrative matters where the decision in question is likely to have an impact on the

¹⁵³ [1997] 1 All ER 397, 412. *Findlay v Secretary of State for the Home Department* [1985] AC 318, 333.

¹⁵⁴ *R v Secretary of State for the Home Department, ex p Hepworth*, Unreported 25 March 1997. Quoted in *Prison Law* (note 8 above) 166.

¹⁵⁵ *Prison Law* (note 8 above).

prisoner's personal (i.e. status) liberty. This was clearly the case in *Duggan* where the Divisional Court took the view that there was 'no material practicable difference' between the decision to categorise a prisoner as category A (high security) and the decision to release on parole, in that the former decision had a significant impact on the latter.¹⁵⁷ As a result it held that fairness required that the gist of the reports on which categorisation decisions were made should be revealed to the prisoner in order to give him the opportunity for comment and that reasons for the decision should subsequently be given.¹⁵⁸ Whilst the German courts are conscious of the internal relationship between administrative decisions and status decisions and have sometimes strengthened prisoners' claims in this way,¹⁵⁹ this is not the primary rationale behind the protection of prisoners' administrative rights in Germany. Rather Germans have recognised that the prisoner's administrative liberty is to be protected for its own sake, and not solely because of the potential knock on effects that this might have on the prisoner's status liberty.

In addition, to the protection of the prisoner's personal (i.e. status) liberty, courts are clearly concerned to protect the prisoner's rights of access to justice. But even with respect to this well established right, the courts approach is not always consistent. In *Wynne*, a prisoner applied for judicial review of the Home Secretary's requirement that he bear the cost of his own production to court.¹⁶⁰ As the prisoner had refused to fill out the relevant application form for transportation at his own cost, the House of Lords held that there was no decision to be reviewed. Despite this, the Court did indicate how it might require the Home Secretary to exercise his or her discretion on such matters. Lord Goff noted a competition between the prisoner's right of access to the courts and the countervailing public interest in secure containment of the prisoner both inside the prison and in his passage to court. But he argued that the interests should be resolved by 'practical means', on a case by case basis, in such a way that both interests might be protected.¹⁶¹ The practical suggestions made, which Lord Goff did not intend to have any

¹⁵⁶ See ch. 3, p. 138–148.

¹⁵⁷ *R v Secretary of State, ex p Duggan* [1994] 3 All ER 277.

¹⁵⁸ It should nevertheless be noted that fairness in this context does not extend to providing the prisoner with full reports. Thus, in *McAvoy*, the Court of Appeal reaffirmed that fairness requirements had to be balanced against the 'proper running of the prison' and would thus be fulfilled by providing the gist of the reports in question. *R v Secretary of State, ex p McAvoy* [1997] 1 WLR 790.

¹⁵⁹ See ch. 3, p. 135.

¹⁶⁰ *Wynne v Secretary of State for the Home Department* [1993] 1 All ER 574.

¹⁶¹ [1993] 1 All ER 574, 581.

‘binding effect’, was in place of any principled exposition of the possible limitations of the prisoner’s right of access to justice. Thus, in much the same manner as *Hone v McCartan*,¹⁶² Lord Goff sought to highlight the pragmatic undercurrents of European Convention jurisprudence. He argued that the admissions in *Golder* that ‘the right of access to the courts was not absolute’ and ‘that it is not the function of the court to elaborate a general theory of limitations to the right admissible in the case of convicted prisoners’ provided ‘support for the view that a search for practical solutions may be desirable’.¹⁶³ In his brief examination of this issue,¹⁶⁴ Lord Goff made no mention of the extent of the possible protections of the prisoner’s Convention rights, nor did he mention that proportionality requirements might give rise to certain considerations being taken into account or certain standards being applied. In *Wynne* we see once again the adoption of pragmatic style in the interpretation of Convention rights. Despite the recognition that a fundamental right was at stake in this case, Lord Goff failed to provide any clear guidelines on the proper balance to be struck between this right and the undisputed need for general safety and security. Instead he suggested that the practical questions arising should be resolved on a case by case basis.

This pragmatic approach to human rights interpretation was starkly contrasted in *Leech (No. 2)* which arose as a result of administrative measures undertaken pursuant to Prison Rule 33 (3).¹⁶⁵ Under this rule the governor could censor and stop correspondence between a prisoner and a solicitor regarding civil actions which the prisoner was contemplating in the future. Thus, although the Prison Rules protected correspondence with respect to legal actions where a writ had already been issued, the same protections did not apply to correspondence regarding possible legal actions in the future. The Court of Appeal, led by Lord Justice Steyn, recognised that the actions under this rule restricted a number of the prisoner’s common law rights, namely: the citizen’s right to confidentiality of letters, the right to confidentiality of communications between solicitors and their clients, the right of unimpeded access to a court and, to this end, the right of unimpeded access to a solicitor for the purpose of receiving advice and assistance.¹⁶⁶ The

¹⁶² See p. 227 above.

¹⁶³ *Wynne v Secretary of State for the Home Department* [1993] 1 All ER 574, 581.

¹⁶⁴ The consideration of the European Convention took 9 lines. [1993] 1 All ER 574, 581.

¹⁶⁵ *R v Home Secretary, ex p Leech (No. 2)* [1994] QB 198, 217.

¹⁶⁶ [1994] QB 198, 209.

Court accepted that under section 47 (1) Prison Act 1952 the Home Secretary was authorised to make ‘rules for the regulation of prisons’ which, by ‘necessary implication’, allowed ‘some interference’ with these rights.¹⁶⁷ Nevertheless, the Court insisted that ‘it will be a rare case in which it could be held that such a fundamental right was by necessary implication abolished or limited by statute’ and ‘an even rarer case in which it could be held that a statute authorised by necessary implication the abolition or limitation of so fundamental a right by subordinate legislation’.¹⁶⁸ Instead Steyn argued that ‘an objective need’ must be ‘demonstrated’ that such interferences could be shown to be ‘in the interests of the regulation of prisons’.¹⁶⁹ Thus, he stated that ‘the question is whether there is a self-evident and pressing need for an unrestricted power to read letters between a prisoner and a solicitor and a power to stop such letters’.¹⁷⁰ The court did not accept that the Home Secretary had demonstrated an objective need for ‘an unrestricted power to read and examine letters and for a qualified power to stop letters on the grounds of objectionability’.¹⁷¹ It certainly did not see ‘the sense of the distinction between the prisoner’s right of access to justice dependent on whether a writ had been issued or not?’.¹⁷² Thus, the Court concluded that Rule 33 (3) was ultra vires in so far as it applied to correspondence between prisoners and their legal advisors. Whilst it recognised that s. 47 (1) of the Prison Act 1952 by ‘necessary implication’ authorised some screening of correspondence passing between a prisoner and a solicitor, it stipulated that ‘the authorised intrusion must, however, be the minimum necessary to ensure that the correspondence is in truth bona fides legal correspondence’.¹⁷³

As indicated in chapter five, *Leech (No. 2)* represents the high water mark of prisoners’ rights reasoning in England. The ‘minimum interference necessary’ test invites courts to test the merits of prison administrative measures which limit the prisoner’s civil and political rights.¹⁷⁴ As Owen states:

¹⁶⁷ [1994] QB 198, 209.

¹⁶⁸ [1994] QB 198, 212.

¹⁶⁹ [1994] QB 198, 212.

¹⁷⁰ [1994] QB 198, 212.

¹⁷¹ [1994] QB 198, 213.

¹⁷² [1994] QB 198, 213.

¹⁷³ [1994] QB 198, 217.

¹⁷⁴ T Owen ‘Prisoners and Fundamental Rights’ (1997) *JR* 81, 82–83.

the Court was not standing back and asking the traditional question ‘could a decision-maker acting reasonably have reached this decision?’ Rather it was placing the burden on the executive to persuade it, as a matter of evidence as much as legal principle, that in an area not expressly authorised by Parliament a fundamental right is to be curtailed or burdened in its exercise via a process of necessary implication.¹⁷⁵

As the outcome of the case shows the test has the potential to increase judicial scrutiny of prison administration by providing a standard against which to evaluate whether specific administrative measures are acceptable limitations of negative rights. This is clearly an advance on previous English reasoning on prisoners’ rights. But the decision is not without its limits. As discussed in chapter four, the test does not give us a broader framework within which to evaluate the limitation of rights in the prison context.¹⁷⁶ Perhaps for this reason, courts, when confronted with the claims of other categories of prisoners or the vindication of other civil and political rights, have not always been consistent in their application of the *Leech* test or with the standard and rigour with which it was initially applied. When put to the test, where prison security arises or public protection is at stake, courts have retreated from the principled approach taken in *Leech*.¹⁷⁷

This is evident in the Court of Appeal decisions of *Simms and O’Brien* and *O’Dhuibhir*. In *O’Dhuibhir* the case concerned the claims of two prisoners who had been categorised as exceptional risk category A who were required to have all legal and family visits in closed conditions (i.e. a glass screen was placed between the prisoner and the visitor).¹⁷⁸ The policy was adopted by the Prison Service after the escapes at Whitemoor and Parkhurst prisons in 1994, despite the recommendations of the Woodcock report that security measures be balanced against the ‘humanitarian factors of the consequence of no physical contact with family and close friends over many years’.¹⁷⁹ However, prior to the Court of Appeal decision the Learmont Report, in opposition to the Woodcock report, recommended mandatory closed visits for exceptional risk category A prisoners. As John Woodcock was himself part of the Learmont Enquiry, the Court of Appeal saw this as evidence that he had changed his mind and retracted his earlier recommendations.¹⁸⁰

¹⁷⁵ ‘Prisoners and Fundamental Rights’ (note 174 above) 83.

¹⁷⁶ See ch. 4, pp. 197–207.

¹⁷⁷ See J Schone ‘The Short Life and Painful Death of Prisoners’ Rights’ (2001) 40 *Howard Journal* 70.

¹⁷⁸ *R v Home Secretary, ex p O’Dhuibhir* [1997] C.O.D. 315, 316.

¹⁷⁹ [1997] C.O.D. 315, 316.

¹⁸⁰ [1997] C.O.D. 315, 317.

Counsel argued in the Court of Appeal that closed visits interfered with the free flow of communication between prisoner and lawyer and violated the principles which had been established in *Raymond v Honey*, *Anderson* and *Leech* (No. 2). Moreover, it was argued that ‘prisoners retained the residual right to a degree of physical contact with their immediate families and that to deny such contact, potentially for years on end, was calculated to result in family break up and to increase the risk of mental illness in prisoners’.¹⁸¹ Instead, it was argued that the requisite level of security could be achieved by less intrusive methods such as screening and searching or by the application of the closed visit policy on a case-by-case basis.¹⁸² In the Court of Appeal, Kennedy LJ argued that glass screens do not impede the free flow of communication between solicitors and clients.¹⁸³ Moreover, he denied that there is a fundamental right of physical contact between prisoner and family under Article 8 of the European Convention. He cited the ECtHR decision in *X v UK* as evidence that risks to security could justify limitations of this right and be shown to be ‘necessary in a democratic society’.¹⁸⁴ But Kennedy LJ argued that ‘it would be an impossible position if judges, not prison service officials, become the ultimate arbiters of what security demands’.¹⁸⁵ As a result, Kennedy LJ distinguished *Leech* (No. 2) arguing that ‘it was doubtful whether the *Leech* test of ‘self-evident and pressing need’ could be applied in the instant case’.¹⁸⁶ Instead he argued that the question turned on whether the direction could be shown to be *Wednesbury* unreasonable. He held that the policy was not unreasonable and in support cited the Learmont Inquiry’s ‘unequivocal recommendations’, setting these above humanitarian considerations indicated in the Woodcock Report and Acheson Review.¹⁸⁷

In *Simms* and *O’Brien* two questions arose. First, whether a blanket prohibition on journalists using material gleaned from prisoners which was justified in the interests of security, discipline and control was lawful. Secondly, whether arrangements for cell searching that allowed the examination of the prisoner’s legal correspondence in the prisoner’s absence constituted an obstruction of the right to privileged legal

¹⁸¹ ‘Prisoners and Fundamental Rights’ (note 174 above) 84.

¹⁸² ‘Prisoners and Fundamental Rights’ (note 174 above) 84.

¹⁸³ *R v Home Secretary, ex p O’Dhuibhir* [1997] C.O.D. 315, 317.

¹⁸⁴ [1997] C.O.D. 315, 317.

¹⁸⁵ [1997] C.O.D. 315, 317.

¹⁸⁶ [1997] C.O.D. 315, 317.

¹⁸⁷ [1997] C.O.D. 315, 317.

correspondence. With respect to the first question the Home Secretary drew upon *O'Dhuibhir* to argue before the Court of Appeal that the decision turned on whether the policy was reasonable on 'conventional' Wednesbury grounds.¹⁸⁸ Counsel for the prisoner argued that the question turned on the prisoner's right to freedom of expression under both common law and Article 10 of the European Convention and on whether the policy passed the 'minimum interference' test.¹⁸⁹ Kennedy LJ did not wish to 'dwell' on either domestic or European authorities on the prisoner's behalf and negated the application of the 'minimum interference test'.¹⁹⁰ He held that the prisoner 'had no right to communicate orally with a journalist' as 'the loss of that right ... is part and parcel of the sentence of imprisonment'.¹⁹¹ In a short justification of one paragraph and in a tone reminiscent of the discussion on false imprisonment in the House of Lords in *Hague*,¹⁹² Kennedy LJ employed an indivisible conception of the prisoner's liberty and baldly interpreted the European Convention from this perspective:

the loss of such a 'right', if it can properly be so described, is part and parcel of the sentence of imprisonment. He (the prisoner) can no longer go where he wishes. He is confined. He can no longer speak to those outside prison or receive visits from anyone other than his lawyer and his relatives and friends. I entirely accept that, in the language of article 10, the freedom 'to receive and impart information and ideas without interference by public authority' is curtailed by imprisonment but that is what imprisonment is all about, and that too is recognised by the European Convention.¹⁹³

At no point in Kennedy LJ's argument on this matter did he indicate how limitations of a prisoner's Convention rights might be measured in such circumstances. He declined to comment on whether the 'minimum interference test' or the Wednesbury test should apply. He simply rejected, at the outset, the existence of the right to communicate orally with a journalist by recourse to a vague notion of imprisonment.

With respect to the second question in *Simms*, which dealt directly with legal correspondence, Kennedy LJ accepted that the *Leech* test at least applied. He acknowledged that legal professional privilege attached to legal correspondence in a prisoner's cell and thus that the policy of searching letters without the prisoner present

¹⁸⁸ *R v Secretary of State, ex p Simms* [1998] 2 All ER 491, 499–500.

¹⁸⁹ [1998] 2 All ER 491, 500–501.

¹⁹⁰ [1998] 2 All ER 491, 501.

¹⁹¹ [1998] 2 All ER 491, 501.

¹⁹² See pp. 237–240 above.

¹⁹³ *R v Secretary of State, ex p Simms* [1998] 2 All ER 491, 501.

was an ‘impairment of the privilege’.¹⁹⁴ But, in light of the Whitemoor and Parkhurst escapes, he was convinced that there was a ‘self evident and pressing need’ for such a policy and thus that the activities taken there under constituted ‘no more than the minimum interference with the prisoner’s rights which are necessary to ensure that security is maintained’.¹⁹⁵ But Kennedy’s application of two different tests to the two rights involved in this case clearly reflected his intention to limit the application of the *Leech* test to the right of access to the court and legal advice. This view was equally held by Lord Justice Judge, who argued that the *Leech* test ‘cannot be used by straightforward analogy to evaluate the rights of the prisoner to communicate with those who are *not* his legal advisers’.¹⁹⁶ In short, this aspect of the judgement suggested that the test for establishing how limitations of fundamental rights in prisons should occur would differ depending on the right in question and the weight accorded to it by the judiciary.

Further, aspects of Judge LJ’s reasoning are of particular importance in this respect. Whilst setting out the *Raymond v Honey* dictum at the outset of his argument, Judge LJ went on to subtly reformulate the test in terms less rigorous than *Leech*. First, he averred that restrictions of rights were the ‘automatic’ and ‘inevitable’ consequence of incarceration and that ‘it was not the Secretary of State, nor the operation of powers granted by s 47 of the 1952 Act which deprives prisoners of their rights to liberty and freedom of movement and association’ but ‘a consequence of the order of a court’.¹⁹⁷ On this basis, Judge LJ set out his conception of the prisoner’s legal status:

There is no catalogue of civil rights which remain available to the prisoner. Some have been identified beyond argument by earlier decisions of the courts. Some are so obvious they would immediately be included in a list if anyone for a moment doubted their existence, for example the right not to be subjected to physical or psychological assault or torture. As time goes by further rights will no doubt be recognised. In view of the axiomatic principle the starting point is to assume that a civil right is preserved unless it has been expressly removed or its loss is **an inevitable consequence of lawful detention in custody**.¹⁹⁸

The argument above represents a compromised version of the *Raymond v Honey* test, and a denial of the stringency of the additional ‘minimum interference’ test in *Leech*. Like the

¹⁹⁴ [1998] 2 All ER 491, 505.

¹⁹⁵ [1998] 2 All ER 491, 505.

¹⁹⁶ [1998] 2 All ER 491, 507. Emphasis added.

¹⁹⁷ [1998] 2 All ER 491, 506.

¹⁹⁸ [1998] 2 All ER 491, 506. Emphasis added.

comments made by Kennedy LJ with respect to limitations of the right to free speech,¹⁹⁹ Judge LJ's test rested on an indivisible conception of the prisoner's liberty. Instead of a test which assumes that a prisoner retains rights after lawful conviction which should be protected through a stringent 'minimum interference' requirement in each individual case, Judge LJ views rights restrictions as the 'inevitable consequence' of a court's order of imprisonment. He was thus anxious to stress that rights may be limited under European Convention jurisprudence by the 'ordinary and reasonable requirements of imprisonment',²⁰⁰ and that both European and domestic precedent had either upheld or acknowledged the 'inevitable restrictions on ordinary rights which follow incarceration'.²⁰¹ Moreover, it is revealing that in rejecting the right of a prisoner to communicate orally with a journalist, he stated that: '.... the starting point is simple. Communications by prisoners ... are seriously curtailed ... these are most serious deprivations consequent on the order of imprisonment'.²⁰² To conclude, in the Court of Appeal in *Simms* we saw the emergence of a test reminiscent of the European Court of Human Rights 'inherent limitations of imprisonment' test which was overturned in *Golder*. It conflates restrictions of rights pursuant to the 'court's order of imprisonment' with those which flow as a result of the daily exercise of State power in the administration of the prison. In doing this, the Court effectively abdicated its role as the guardian of the prisoner's administrative liberty. By throwing the cloak of 'incarceration' over every day life in prisons, this test places judges well outside the prison walls.

Simms and *O'Dhuibhir* represented a serious challenge to the *Leech* test for establishing limitations of prisoners' rights. Both cases sought to limit the *Leech* standard to the protection of the prisoner's right of access to justice. Moreover, the words of Judge LJ in *Simms* represented a subtle reformulation of the principles established in *Raymond v Honey* and *Leech*. Both cases showed strong judicial resistance to defining or scrutinising the substance of prison administrative decisions, in particular those made in the name of security. These recent judgements are starkly at odds with the approach taken to prisoners' administrative rights in Germany. Whilst the FCC in Germany continues to assert the protections of basic rights in the face of security concerns and rising

¹⁹⁹ See p. 251 above.

²⁰⁰ *R v Secretary of State, ex p Simms* [1998] 2 All ER 491, 508.

²⁰¹ [1998] 2 All ER 491, 509.

²⁰² [1998] 2 All ER 491, 509.

punitiveness,²⁰³ these recent English cases show a marked judicial sympathy with governmental concerns with security and public protection and a clear aversion to tinkering with the sensitive problems of internal prison security. When faced with the practical implications of asserting rights protections in prisons, these English judges abdicated their role as the guardian of prisoners' fundamental rights. Whatever their personal or policy reasons for such an abdication, it was evident that they were operating in a constitutional culture where it was still possible to do so.

Given this context it is interesting to look at the recent decision of the House of Lords regarding the cases of *Simms and O'Brien*.²⁰⁴ The case dealt with the single question of whether a blanket prohibition on journalists using material gleaned from prisoners, in the interests of security, discipline and control, was lawful. Lord Steyn, who first formulated the *Leech* test in 1994, delivered the leading judgement. Steyn started out by reasserting the *Raymond v Honey* principle that 'a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication'.²⁰⁵ He relied on *Derbyshire County Council*²⁰⁶ to argue that limitations of the right to freedom of expression in general should be shown to be 'necessary in a democratic society' and that 'necessary' requires the existence of a pressing social need, and that the restrictions should be no more than is proportionate to the legitimate aim pursued'.²⁰⁷ In addition, he asserted that any general words in the Prison Rules which might be used to justify a blanket policy would be subject to the principle of legality.²⁰⁸ The principle of legality was further elucidated by Lord Hoffman who stated that 'in the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual'.²⁰⁹ Applying these principles in his evaluation of the limitations of the prisoner's right to free

²⁰³ See ch. 3, pp. 132–148.

²⁰⁴ *R v Secretary of State, ex p Simms and another* [1998] 2 All ER 491; (2000) AC 115

²⁰⁵ [2000] AC 115, 118.

²⁰⁶ *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 550–551.

²⁰⁷ *R v Secretary of State for the Home Department, ex p Simms and another* [2000] AC 115, 122.

²⁰⁸ [2000] AC 115, 127.

²⁰⁹ [2000] AC 115, 128.

speech, Lord Steyn concluded that blanket prohibition on communications between prisoners and journalists was not lawful.²¹⁰

Whilst many in England will point to Steyn's judgment in *Simms* as a victory for prisoners' human rights, when read with German eyes the judgement is not without its problems. Lord Steyn did not establish unambiguously that the prisoner's right to free speech, or for that matter any other fundamental rights, would receive equal weight in all cases. Rather the central justification in his judgment was the link between the prisoner's right to free speech and the protection of the prisoner's status liberty. Thus, his main argument centred around the relationship between the prisoner's right to free speech and his right to challenge the safety of his conviction. Steyn laid much weight on the fact that the prisoners were seeking in their communications with the journalist 'to have the safety of their convictions further investigated and to put forward a case in the media for the reconsideration of their convictions'.²¹¹ As Steyn saw it, these interviews were central to the avoidance of a possible miscarriage of justice. Lord Steyn conceded that the prisoner's right to free speech was 'outweighed by the deprivation of liberty by the sentence of a court, and the need for discipline and control in prisons'.²¹² He did not, therefore, think that a prisoner could 'claim to join a debate on the economy or on political issues by way of interviews with journalists'.²¹³ But Steyn maintained that the free speech in question in the *Simms* case was 'qualitatively of a very different order', namely that 'the prisoners are in prison because they are presumed to have been properly convicted. They wish to challenge the safety of their convictions. In principle it is not easy to conceive of a more important function which free speech might fulfil'.²¹⁴ As a consequence, Steyn reformulated the prisoner's right to free speech in this case as 'the right of a prisoner to seek through oral interviews to persuade a journalist to investigate the safety of the prisoner's conviction and to publicise his findings in an effort to gain access to justice for the prisoner'.²¹⁵ This suggested that prisoners' right to free speech would receive greater weight if the use of the right was directed towards the protection of their status liberty.

²¹⁰ [2000] AC 115, 127.

²¹¹ [2000] AC 115, 117.

²¹² [2000] AC 115, 124.

²¹³ [2000] AC 115, 124.

²¹⁴ [2000] AC 115, 124.

²¹⁵ [2000] AC 115, 126.

A further cause for concern, from the perspective of the prisoner's administrative rights is Lord Steyn's partial acceptance, of Lord Justice Judge's reasoning in the Court of Appeal decision in *Simms*. At the beginning of his judgement Lord Steyn restated the *Raymond v Honey* principle, but then instead of immediately invoking 'the minimum interference necessary' test which he had articulated in *Leech*, he confirmed Lord Justice Judge's judgement that 'the starting point is to assume that a civil right is preserved unless it has been expressly removed or its loss is an inevitable consequence of lawful detention in custody'.²¹⁶ It was only later in his judgement when explicating the general limitations permissible of the right to freedom of speech under the Convention that he referred to the proportionality test of 'necessary in a democratic society'. Whilst this might simply have been an oversight on Steyn's part, it is submitted that there is a strong difference, in terms of the protection of prisoners' administrative rights, between viewing rights limitations as 'the inevitable consequence of lawful detention in custody' and viewing **all** rights limitations in prison in terms of the 'minimum interference test'. Lord Steyn's judgement is not clear on this point. This ambiguity is only amplified when taken together with Lord Steyn's position, stated above, that the prisoner's right to freedom of speech could be 'outweighed by the deprivation of liberty by the sentence of a court, and the need for discipline and control in prisons'. In sum, from the perspective of the prisoner's administrative rights, the damage done to the *Leech* principle in the Court of Appeal in *Simms* has not been entirely remedied by Lord Steyn in the House of Lords.

4. Conclusion

When viewed from a German perspective, judicial development of prisoner's rights in England has been partial and uneven. Judges are tentative in their supervision of prison administration and concerned to restrict their interference with prison life. Unless the issue at hand impacts on the prisoner's personal (i.e. status) liberty or their access to the courts, judges are inclined to take a hands off approach. In sum, the judiciary continue to show clear resistance to developing rights, principles and standards to guide the activities of those working inside prisons. Thus, Livingstone and Owen, echoing the majority of prison law observers, have argued that:

judicial intervention, while very welcome and important, has been partial and ... its focus has primarily been on establishing the authority of courts over the actions of prison administrators rather than on defining and protecting the rights of prisoners. It has been at its most extensive when dealing with matters which lawyers are generally most comfortable with: issues of jurisdiction, access to courts and trial procedures. It has been much less extensive when dealing with matters that involve the control and management of prisoners, such as transfer, segregation, safety and living conditions. Yet decisions relating to these matters arguably have at least as great an impact on prisoners' lives and are just as in great a need of standards and process values ... While courts have ensured that prisoners are no longer treated as slaves of the state, they have yet to recognise them as citizen behind bars'.²¹⁷

As chapter four suggested this judicial record in England is rooted in a broader context. Unlike their German counterparts, English judges are without a clear legislative invitation to intervene in internal prison life. No matter how activist a judge might be they have always had to tread a fine line between protections of prisoners' rights and respect for a legislative regime aimed at ensuring political control and accountability. Thus, even when asserting the foundation of the prisoner's legal status in *St. Germain*, Lord Justice Shaw warned that 'judicial intervention in the domestic management of a prison would generally be not merely *irrelevant* but also *intrusive* and *impolitic*'.²¹⁸ In the very moment when prisoners' rights were recognised under English law, there was concern with parliamentary sovereignty and the practical implications of judicial intervention. In short, judicial development of prisoners' rights in England has always been tentative, resting on an uncertain legal and constitutional footing.

Whilst walking the tightrope between judicial deference to Parliament and the protection of fundamental rights, English judges have vacillated between a language of rights and principles and a language of pragmatism and sovereignty. The struggle between these two discourses hindered the advancement of judicial jurisdiction over prisons until the early 1990s, and has remained implicit in the judicial bifurcation between the prisoner's status and administrative rights since then. Although *Hague* broke down the final barrier to judicial jurisdiction over prisons, the decision still advanced the pragmatically based concern that judicial supervision of the operational and managerial powers of prison governors should remain cursory. As the case law demonstrates this pattern of judicial

²¹⁶ [2000] AC 115, 118.

²¹⁷ *Prison Law* (note 8 above) 456.

²¹⁸ (1978) 1 QB (CA) 425, 454. Emphasis added. See p. 212 above.

bifurcation between the development of prisoners' status rights and the neglect of prisoners' administrative rights continues to this day.²¹⁹

Allied to the lack of any judicial conception of the prisoners administrative rights, there is no real engagement by the English judiciary with the broader purposes of imprisonment or the basis upon which prison administration should be conducted. Unlike the German positive conception of the prisoner's legal status and the purposive approach to prison administration, English judges have little to say in this regard. Their silence on this issue is a signal of a tacit consensus, as *Hargreaves* demonstrated, that the courts should not second guess the Home Secretary in the shaping of internal administrative policy.

Given the judicial record on prisoners' rights in England it is not surprising that there are strong calls for reform of the legislative regime governing prison administration. Richardson reflects the views of many others when she argues that 'if the courts are to be used more widely as direct enforcers of prisoners' rights, the relevant legislation must be more specific, and in particular it must expressly create special rights in prisoners enforceable at law'.²²⁰ But as chapter four indicated the prospect of such reform, within the current penal climate, remains slight.²²¹ The advancement of prisoners' rights are thus likely to be defined for some time in the future by the English judiciary. If so, the prospect of prisoners' obtaining administrative rights remains small.

²¹⁹ This division between judicial activism with respect to prisoners' status rights and judicial timidity with respect to prisoners' administrative rights cuts across the traditional constitutional division between procedural and substantive review (as outlined by J Jowell 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' (1999) *PL* 448) As this chapter has shown, judges have developed prisoners' rights under the rubric of natural justice and fairness when their status or personal liberty is at stake (*St. Germain, Leech*), but are far less likely to develop such protections where the matter is viewed as operational or internal to prison administration (*Hague*).

²²⁰ 'Prisoners and the Law: Beyond Rights' (note 8 above) 203.

²²¹ See ch. 4, p. 158–169.

Conclusion

Cultural analysis is intrinsically incomplete. And, worse than that, the more deeply it goes the less complete it is. It is a strange science whose most telling assertions are its most tremulously based, in which to get somewhere with the matter at hand is to intensify the suspicion, both your own and that of others, that you are not quite getting it right.¹

This thesis set out to examine and explore the method and manner of conceiving of the prisoner's legal status in England and Germany. In doing so, it sought to provoke a reflection on alternative legal orders and thereby to identify the broader social, political and cultural dynamics which have shaped the conception of prisoners' legal rights. But this exploration and reflection is best viewed, to borrow from Allison, as 'explanatory rather than conclusory'.² It ends, as it began,³ with the suspicion that there is more to discover in the maze of meanings, attitudes, beliefs, sensibilities and mentalities which we identify as culture. In this sense this study can be viewed as a 'preliminary to more specific questions' about the legal conception of prisoners' rights and the social context in which they have been formed.⁴

To sum up what this thesis has argued: in Germany prisoners' rights were formed in a political and legal culture shaped by constitutional rights, characterised by faith in fundamental rights and dominated by rights rhetoric. This fidelity to constitutional rights sprang out of a 'deep revulsion against a distasteful past'.⁵ It is the signal of a culture 'finely tuned to the dark side of political expression'.⁶ In this wary and cautious political culture, Germans seek refuge in an idealist and rationalist project of constitutional principles and fundamental rights which gives them the certainty that their organic political traditions have never delivered. Thus in Germany we witness a vision of a constitutional State which derives the rationale for its very existence in its capacity to safeguard and protect fundamental rights. This faith in fundamental rights also shapes

¹ C Geertz 'Thick Description: Toward an Interpretive Theory of Culture' in C Geertz *The Interpretation of Cultures* (Basic Books New York 1973) 3, 29.

² J Allison *A Continental Distinction in the Common Law* (OUP Oxford 2000) 235.

³ See Introduction.

⁴ R Cotterell 'The Concept of Legal Culture' in D Nelken, (ed), *Comparing Legal Cultures* (Dartmouth Aldershot 1996) 13, 29.

⁵ P Merkl *The Origin of the West German Republic* (OUP New York 1963) 176.

⁶ J Steinberg 'German constitutionalism: a lesson for South Africa?' *Business Day* (11 Nov 1999) 5.

legal and political relations generally and in turn has led to the dominance of ‘rights rhetoric’ when invoking arguments concerning social, legal and political change.

The imperatives of the German Basic Law, and the dynamics of German political and legal culture, meant that talk of legal or penal reform was unlikely to occur without evidence of its basis in, and accordance with, constitutional rights and principles. In this climate, the symbolic and institutional power of the German Federal Constitutional Court was substantial. The Court was in a unique position to effect penal reform through the invocation of constitutional rights and principles. It drew on and built upon the pre-existing arguments of the penal reform lobby, and through its important decision in the early 1970s, gave these arguments legal and political legitimacy of the highest order. Moreover, the Court eliminated the possibility of prevarication or delay in the implementation of these penal reforms in Germany.

The constitutional arguments for penal reform presented during the late 1970s and adopted by the German Federal Constitutional Court, were intertwined with the distinctive conception of fundamental rights which has been developed within German constitutional jurisprudence and ‘rhetoric about rights’ post-1945. Fundamental rights thinking in Germany has gone beyond the notion of rights as regulating bipolar and uni-directional relationships between the individual and the State, with the State as aggressor and the individual as the victim. Rather, fundamental rights are conceived of as multi-faceted: as negative (*Abwehrrechte*) and positive rights (*Leistungsrechte*), as subjectively held and as a system of objective norms, and as regulating a complex network of social relations both between the State and the individual, between individuals within society and for the development of society as a whole. This multi-faceted conception of fundamental rights underpinned the conception of prisoners as bearers of rights both to protection from State intervention and to State assistance in the realisation of their resocialisation.

The conception of the prisoner’s fundamental rights status and the receptivity of the German Federal Constitutional Court to the ideas of the penal academy and reform lobby rested also on a number of associated factors. As chapter two indicated the impulse for the codification of prison law had been present in Germany since the late nineteenth century and the political pressure for this to be achieved by the early 1970s was intense.

Codification arguments were founded on a particular view of the ‘internal relationship’ between prison law and criminal law, which was itself the object of intense codification activity since the late nineteenth century. Codification arguments were also centred around the definition of the prisoner’s legal status, and, while differing in focus and emphasis over time, had always been rooted in broader constitutional principles.

The commitment to the codification of prison law was bound up in a broader historical context. Crucial amongst these were the imperatives of German unification in the 1870s and the achievement of legal unity (*Rechtseinheit*) across the German states, the reformist climate of the Weimar period, the resolute commitment to the ‘rehumanisation’ of prison law after 1945 and the aggressive reformism of the social liberal alliance in the 1970s. The historical depth of the codification impulse contributed in no small measure to a political climate ripe for fundamental penal reform. It was in this climate of imminent change in which the German Federal Constitutional Court declared existing prison law unconstitutional and required the legislature to deliver a new Prison Act.

In this climate of penal change there was a complex and reflexive relationship between the codification impulse, the arguments adopted by the Federal Constitutional Court, the governmental proposals for penal reform and the cultural status of the legal and penal academy in Germany. The academy both initiated calls for codification and dominated the substance of arguments associated with penal reform. In particular, the power of the academy was key to the achievement of a unitary resocialisation purpose of prison administration, and the establishment of the ‘constitutional resocialisation principle’, in Germany. That this was achieved at a time when the ‘resocialisation’ ideal was declining internationally was a testimony to the continuing faith in the resocialisation ideal within the academy, the dominance of domestic academic opinion within legal, political and popular culture, and the deeper relationship between social liberal politics and the ideal of resocialisation. Moreover, the entrenchment of the resocialisation purpose was the product of the academy’s creative use of constitutional rights and principles in advancing this ideal. Equally, it was a signal of the efficacy of the use of ‘rights rhetoric’ as a strategy for penal reform within wider German political culture.

The German Prison Act, and the prisoner’s legal status, was also marked by the consensus style of German politics and the imperatives of German style federalism. The

compromises made in the final stages of legislative drafting led to the creation of what many called a ‘compromise Act’ (*Kompromißgesetz*). The Act consequently reflects the competing imperatives arising out of the achievement of penological and constitutional principle and the concern to ensure administrative flexibility, fiscal restraint and public security. While these compromises hindered the immediate achievement of a number of central reforms, particularly through the use of ‘transitional provisions’, they did not strike at the spirit of the Act, however, which remains rooted in deeper constitutional and penological principles. This spirit has sustained the development of prisoners’ rights in a time of increasing hostility within the penal environment to the welfarist and liberal ideals of the 1970s.

Since the German Prison Act came into force, the development of prison law and the prisoner’s legal status has been characterised by a tension between the realisation of constitutional and penological principle and the institutional and political obstacles in the way of their realisation. As a result the early promise of the Prison Act remains to be properly fulfilled. The prisoner’s legal status has been weakened by the legislative compromises made in the 1970s, the continued resistance of State administrations to the foundational ideals of the Act, the refractory behaviour of prison administrators, prisoners’ lack of access to legal support, the slowness of the Higher Regional Courts to develop substantive principles of prison administration and the failure of the special Prison Courts to develop into an informal and constructive conflict resolution forum for prisoners and prison administrators. Yet these obstacles, while not insignificant hindrances to the development of prisoners’ rights, are countered by the pursuit of constitutional and penological principle. The continued pursuit and development of these principles is the project of a highly active and critical penal academy whose opinions have fed directly into the numerous judgements of the federal courts, in particular the Federal Constitutional Court. The relationship between judges and academics in sustaining and creating the law, a central facet of German legal culture, has underpinned the continuing pursuit of the realisation of the Prison Act’s ideals. The broad based consensus between leading judges and leading penal academics around the fulfilment of these ideals has been central to the continuing development of German prisoners’ rights in the face of institutional and political pressure.

This pursuit of principle has not manifested in a constitutional jurisprudence of prisoners' rights which is rooted purely in abstract argument or asserts constitutional and legal principles for their own sake. Neither the penal academy, who are trained both in penology and law, nor the Federal Constitutional Court, which is guided by the critical opinion of the penal academy, is oblivious to the institutional dynamics of prison institutions or immune to the complexity of prison life. Rather they have both sought to further the development of specialised principles of prison administration, to simplify the processes of prisoners' rights enforcement and to strive towards the elusive balance between protecting the negative aspect of prisoners' fundamental rights and realising the positive imperatives of the 'constitutional resocialisation principle' whilst remaining sensitive to the imperatives of security and order and administrative flexibility. There remains a real concern within the penal academy and the higher judiciary to realise the protection of prisoners' legal rights in practice not merely in principle. In short, German prison law can be viewed as a site of struggle between the fulfilment of an ambitious conception of the prisoner's legal status and the imperatives of prison administrative practice. Whilst much remains to be achieved in pursuing the precarious balance between these imperatives, it is suggested that constitutional and penological principle has provided an important normative compass in a time of increasing hostility to the welfarist and liberal ideals of the 1970s.

It is difficult to find clear legal principles guiding the exercise of prison administration and defining prisoners' rights within English prison law. Germans would note the absence of any attempt to root the development of prisoners' rights within a clear constitutional conception of the purpose of imprisonment, a clearly articulated conception of the prisoner's administrative rights status and a positive notion of the prisoner's fundamental rights. From a German vantage point, English conceptions of rights in prisons would not appear to include a broad based and substantive commitment to shaping the nature of imprisonment and the day to day administration of prisons in line with deeper constitutional and penological principles. The examination of this divergence between England and Germany formed the primary pursuit of the final two chapters of this thesis on the method and manner of conceiving of the prisoner's legal status in England.

Unlike Germany, the statutory regime governing prisons in England is concerned, not with the definition of the prisoner's legal status or the creation of legally enforceable

standards, but with clarifying lines of political control and accountability. Neither the general statutory framework, nor the rules governing the day to day administration of prisons ‘purport to provide a code of directly legally enforceable rights in prisoners’.⁷ In contrast to Germany, there is no official legislative invitation to the courts to take an active role in the prison context. Rather, English courts have carved out their own role through the assertion and development of their jurisdiction under public law. Conscious of their intruder status, the courts have gingerly encroached on a case by case basis on the executive terrain of prison administration.

Calls for the reform and modernisation of the statutory regime governing prisons, for the better definition of prisoners’ rights and for the provision of a truly independent adjudicative forum in which these can be properly enforced, have been present and growing in England for over thirty years. This domestic reform movement is part of, and gains support from, a broader international concern with prisoners’ rights which has intensified since the early 1970s and led to the development of what might be termed an international law of prisoners’ rights. But domestic reform initiatives in England have only had a limited impact on governmental policy and legislative reform. With little political capital to be gained from instituting a bill of prisoners’ rights, successive English governments have protected the administrative and policy discretion afforded by current legislative arrangements. The deeper explanation for this lies in the tone of English penal politics and culture.

Unlike Germany where ‘rights rhetoric’ enjoys a powerful currency and a defining influence on penal policy and law, ‘rights rhetoric’ in the English penal environment struggles for influence in the face of powerful competing discourses. This struggle occurs in a penal climate where crime has become increasingly politicised and the pursuit of ‘law and order’ occupies a central place in English political culture. In invoking ‘rights rhetoric’ English advocates for penal reform cannot claim to have a higher constitutional purchase on the definition of penal policy. Nor can it claim the backing of a powerful constitutional court or an influential penal academy. Moreover, the relative weakness of ‘rights rhetoric’ in the definition of penal policy has been compounded by the rise of ‘instrumental managerialism’ and ‘populist punitivism’ over the last twenty years. This

⁷ G Richardson ‘Prisoners and the Law: Beyond Rights’ in C McCrudden and G Chambers, (edd), *Individual Rights and the Law in the UK* (Clarendon Oxford 1993) 179, 183.

battle of competing discourses grows out of, and is constructive of, the particular circumstances of the English penal system which has operated under considerable strain since 1945 and in a broader climate of fiscal restraint, declining social empathy and increased anxiety about crime.

Without a code of prisoners rights, or access to a fully independent grievance body with full powers of rights enforcement, prisoners (with the support of prison lobby groups) have sought to enhance prisoners' rights and advance prisoners interests by arguing for greater legal protection under the Prison Rules and general principles of common law in the ordinary courts. These courts have, through the incremental extension of their jurisdiction under public law, slowly bolstered the legal protection of the prisoner under the Prison Rules, which were originally intended by the legislature as regulatory and hence as not giving rise to legal entitlements. The courts have carved individual prisoners' rights out of the general principles of public law. But the legal protection provided to prisoners under the Prison Rules continues to vary, being dependant on the rule in question and the subject matter involved. This variability is exacerbated by the absence of any judicially recognised principles of prison administration which bind the Rules together and assist in the interpretation and enforcement of the Rules and in the scrutiny of administrative discretion. The partial and equivocal protection of prisoners' rights in England can not be explained solely by recourse to the status and content of the Prison Rules, or the general legislative arrangements governing prisons, however. A deeper explanation can be found in the general constitutional environment in which judges are operating and the judicial interpretation of fundamental rights in the prison context.

In contrast to Germany's highly articulated rights culture, England experiences an ambivalent cultural relationship to fundamental rights. This ambivalence is, paradoxically, a symbol of the historical continuity and relative success of organic democratic traditions, conventions and institutions. It is grounded in the confidence gained from the longevity of England's political and legal institutions and so-called 'culture of liberty'. The rationalist project of fundamental rights protection within German legal and political culture, which is inextricably entwined with the self-doubt of Germany's political memory, is not present in England. Constitutionally entrenched fundamental rights do not hold the same symbolic meaning or significance in England.

Rather, both orthodox and radical English constitutional traditions place faith in the fluidity, flexibility and evolutionary nature of its practical constitutional arrangements and view parliament, rather than the judiciary, as the ultimate protector of individual liberty. Belief in parliamentary sovereignty is interlocked with an ‘implicit’ and ‘inchoate’ conception of the separation of powers where a broad division has been established between ‘the judicial control of legality and the parliamentary control of the political’.⁸ It is also accompanied by the deep pragmatic traditions of the common law. In an internal legal culture famously insulated from, and distrustful of, academic opinion or theoretical argument, common sense judges have guarded ‘the balanced constitution’ and protected the traditional liberties and freedoms tacitly accepted as part of the common law.

The rise of a constitutional rights discourse in England represents a cultural shift in political and legal culture. It signals a reinvention of the organic and pragmatic approach to the protection of liberty which has been the traditional hallmark of English constitutionalism. This shift to a rights consciousness, both within internal legal culture and within political culture more generally, has arisen in response to concern that traditional constitutional arrangements could not keep up with the threats to liberty posed by modern British government. Moreover, it is a sign of the impact of a global rights discourse on domestic English legal and political culture. The rise of rights discourse in England over the last thirty years has underpinned the development of a jurisprudence of prisoners’ rights. But while the development of prisoners’ rights has been intertwined with this incipient rights discourse, it has also been shaped by the competing and entrenched discourses of sovereignty and pragmatism.

In this complex and ambivalent constitutional environment, the judiciary have developed a modest conception of the prisoners’ legal status. In contrast to Germany’s ambitious definition of the prisoner’s legal status, the English conception of the prisoner’s legal status is without an explicit division between the prisoner’s status and administrative rights, any positive conception of prisoners’ rights or any broader constitutional conception of the purpose of imprisonment. This modest conception, which is closely allied to the conception developed by the European Court of Human Rights, focuses on the protection of the prisoner’s negative liberty through the assertion of the requirements

⁸ *A Continental Distinction in the Common Law* (note 2 above) 158.

of proportionality. It does not provide any overarching principles or standards by which to evaluate what limitations of fundamental rights imprisonment should represent. At best, the conception of the prisoners' fundamental rights status provides piecemeal protection of prisoners' rights in the individual case.

The legislative and constitutional context within which judges are operating, and the modest conception of fundamental rights which has been developed in this context, constitute the backdrop against which chapter five viewed the development of a jurisprudence of prisoners' rights in England. This chapter showed that, when viewed from a German perspective, the judicial development of prisoners' rights has been tentative, partial and uneven. Resting on an uncertain legislative and constitutional footing, judicial development of prisoners' rights vacillates between a language of rights and a language of pragmatism and sovereignty. It has focused on the assertion and protection of what Germans would view as prisoners' status rights whilst neglecting prisoners' administrative rights and the broader purposes of prison administration. In short while, the English conception of prisoners' rights, as developed by a common law judiciary, seeks to protect the status liberty of the offender it provides less guidance as to how fundamental rights might be protected in conditions of confinement.

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We are living in a time in England of intense change within constitutional, legal and political culture.⁹ The recent incorporation of the European Convention of Human Rights is only one symbol of this cultural transition.¹⁰ In this environment pregnant with the potential of legal and political change many claims have been made as to the future of the human rights project in England.¹¹ This is as it should be. As Ewing argues 'if we are to engage in the process of constitutional reform it is important that all relevant issues are fully addressed and that the debate is open and inclusive'.¹² But this should also be a time for careful reflection. The rise of a fundamental rights discourse in England has been

⁹ A Barnett *This Time: Our Constitutional Revolution* (Vintage London 1997).

¹⁰ Other obvious examples are the devolution of Scotland and Wales, the reform of the House of Lords, the granting of independence to the Bank of England, the creation of a London Mayor, and the changing face of the monarchy.

¹¹ See for example F Klug *Values for a Godless Age* (Penguin London 2000).

¹² K Ewing 'Social Rights and Constitutional Law' (1999) *PL* 104.

bound up with the globalisation of human rights discourse and comparative adventure has been a central part of this process. Whether in the form of judicial tourism, lobbyist activism, comparative scholarship or legal argumentation: reference to the human rights jurisprudence of foreign jurisdictions has become commonplace in human rights argument.¹³

Whilst it is accepted that comparative endeavour can enrich local human rights discourse, it is submitted that comparison should be carefully and reflectively conducted paying careful attention to the specificities of the local, revealing a full appreciation of the context of human rights argument both domestically and in foreign jurisdictions. Equally, that such an endeavour should be inclusive of a full variety of human rights traditions. In this spirit, this thesis has sought to make available to an English audience an in-depth account of the conception and protection of prisoners' rights in Germany and the broader context in which this has taken place. Equally, it has sought to provoke a reflection on the English conception of the prisoner's legal status and the broader legal, political and cultural environment in which it has been formed. Finally, the thesis has sought to demonstrate the wider point that there is a complex, but important, relationship between the political, social and cultural dynamics of a society and the conception, protection and weight of fundamental rights in any given context.

¹³ See for example Conference of the British Association of Canadian Studies (BACS) Legal Studies Group, 'The Development of a Human Rights Culture' (Canada House London 7 March 2001); M Hunt *Using Human Rights Law in English Courts* (Hart Oxford 1998) 24–25. See also Introduction, pp. 8–12 and ch. 4, p. 192f.

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