Imprisonment Today and Tomorrow

International Perspectives on Prisoners' Rights and Prison Conditions

Edited by:
Dirk van Zyl Smit and Frieder Dünkel

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Preface

Problems of imprisonment may have been neglected as researchers have focused increasingly on the alternative forms of punishment. This perception was one of the reasons for holding a seminar in September 1989 at Buchenbach, near Freiburg in the Federal Republic of Germany, where most of the papers contained in this volume were first presented.

It soon became apparent that several aspects of imprisonment remained problematic. In many countries the emphasis on non-custodial sanctions has not led to a decline in the use of imprisonment. Even in those countries where there has been a numerical decline in the prison population, the sentence of imprisonment has continued to play a central role in the system of punishment. Living conditions in prisons have certainly not improved uniformly in the past decade and in many countries overcrowding has made these conditions even worse. The recognition of the rights of prisoners across jurisdictions is uneven and progress uncertain.

There is very little information about the importance of imprisonment in the different penal systems. One of the primary functions of the seminar was to describe empirically the purposes of incarceration in various societies. The question was not only whether serious or petty crimes were punished by imprisonment, but also how many people were detained as awaiting trial prisoners or were incarcerated for other reasons. The emphasis throughout was on the law in action rather than the law in books. Thus, not only prisoners' rights but also the actual conditions of detention had to be accurately described. Comparative empirical research was brought to bear also on the conditions of detention of specific classes of prisoners as diverse as women, juveniles, ethnic minorities and political detainees, who might all be subjected to 'special' regimes of one kind or another.

The intention was to use empirical research to address broad questions of penal policy. Valuable standards have been set by bodies such as the United Nations and the Council of Europe. Inevitably, national prison services are responsible for their implementation. The evaluation of the efficacy of such standards and the question of whether they should be expanded is, however, better left to 'outside' observers. A measure of critical distance also allows the insight that some problems cannot be solved by applying international standards. Instead, they require a direct exercise of national political will and the active commitment of the authorities in general, and of prison officers in particular, to the recognition of the essential humanity of the prisoners in their charge. (A point of departure in establishing such a commitment would be the acceptance that the sentence of death, which still exists and is carried out in many countries, is inherently cruel and inhuman.)

The Buchenbach seminar brought together people from very different backgrounds, societies and political systems. Of particular significance was the interchange between scholars from Eastern and Western Europe a few months before the borders between them were opened. Participants from wider afield, from the United States, Hong Kong, the Peoples Republic of China and South Africa, contributed further to an understanding both of the universality of the problems faced by prison systems and, in contrast, of the very different degrees to which governments recognise the basic human rights of prisoners.

Participants were given a table of contents which they were invited to follow in their papers. Apart from the broad question of the significance of incarceration in the general system of social control, they were also asked to provide an overview of the prison systems in their respective countries. In this overview they were to specify quantitative developments, types of prisons and organisational structures. In addition, they were asked to deal with the philosophical approach and the legal framework defining their prison systems. Specific problems of the prison systems were also to be addressed. These included: the complaints procedures and the judicial control of the prison administration; the political control of the prison system; the medical treatment of prisoners and, in particular, the question of involuntary treatment in respect of hunger-strikers; problems relating to prison labour; disciplinary and security measures; visits and other contacts with the outside world; the liberalisation of prison regimes through the introduction of open prisons, prison furloughs and other similar programmes; and the broader question of judicial and administrative control of the early release of sentenced prisoners.

Some participants chose to follow this scheme. Others concentrated on specific aspects of their prison systems which, in their view, deserved to be given particular prominence. Thus, for example, a major part of the paper on the Netherlands is devoted to describing the highly developed system of dealing with complaints from Dutch prisoners. The Italian contribution, again, focuses almost exclusively on the right of prisoners to communicate with the outside world, whilst in the contribution on Hong Kong particular attention is paid to the Vietnamese refugees who are held in 'closed centres'. No attempt was made to force the contributions into a uniform mould, for the intention was not to produce an encyclopaedic compilation.

In the course of the deliberations at the seminar, several issues began to emerge which were significant in most countries. In our concluding chapter, we have returned to the original scheme and looked comparatively at the various systems under our original headings. At the same time we have attempted to incorporate some of the concerns expressed in the Buchenbach deliberations and to record those strategies and innovations which seemed to us deserving of wider application. The mix of comparison and (cautious) prescription is therefore deliberate.

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The evolutionary processes described in this volume have not stood still in the time it has taken to produce it. In many eastern European countries there have been fundamental changes. The German Democratic Republic has ceased to exist as a separate state. We have decided, nevertheless, to leave the chapter on the German Democratic Republic unchanged, as it contains valuable material on its penal system and on how it might have evolved, had history taken a different course. Our concluding chapter also refers to the German Democratic Republic. This has not been modified as, in substance, our views have not been altered by recent events. If anything, the dramatic changes in eastern Europe underline the need for equally fundamental penal reform.

The task of editing the contributions and translating those which were initially presented in German proved to be much more complex than we had initially envisaged. Although prison systems are characterized more by their similarities than by their differences, the similarities do not extend to a universally recognised terminology. Even where the same terms are used they do not always describe identical practices. Where possible we have tried to clarify such ambiguities by suggesting alternatives and then asking our contributors to confirm whether these amendments conveyed what they had initially intended.

In this editorial task we have been greatly assisted by Roelien Theron, who was actively involved in editing the English versions of all the manuscripts. Jon Vagg undertook the difficult task of reformulating the contribution on China which could not be returned to the author. Many others assisted with translations and the processing of the manuscripts. In this regard we are particularly grateful to Jeanette Matthews, Beate Lickert, Mary Shears and Camilla McGaffin.

We would like to thank the German Research Foundation which funded the Buchenbach Seminar. Furthermore, we are grateful to Professor Gunther Kaiser, the Director of the Max Planck Institute for Foreign and Comparative Criminal Law in Freiburg, for his encouragement. The Max Planck Institute and the Institute of Criminology at the University of Cape Town gave us the necessary financial support to complete the editing process.

It is our fervent hope that this volume will contribute not only to knowledge about the various prison systems but to international co-operation in reducing the prison population and improving conditions for those who remain.

Dirk van Zyl Smit and Frieder Dünkel
Cape Town and Freiburg
November 1990

Contents

Austria

Klaus W. Krainz

1. The Importance of Incarceration in the General System of Social Control

'Imprisonment is the ultimate tool of society's reaction against considerably deviating, socially harmful behaviour...' (Huber, 1988:5).

The proposition that imprisonment is merely an *ultima ratio*, i.e. that it is applicable only when all other possible reactions of society, from a warning and official instructions to a pecuniary fine, hold no prospect of success[1], is of doubtful applicability to Austria, at least as far as the last few years are concerned. According to the data of the Council of Europe on prison populations, it was recorded that in 1987 Austria was one of the countries with the largest number of convicted and unconvicted prisoners.[2]

The imposition of imprisonment in relation to pecuniary fines has declined from 43:57% in 1971 to 28.6:71.4% in 1987, and the fine has accordingly become more prominent. However, in 1987 there were still 21 187 offenders who were sentenced to imprisonment (with or without suspensive conditions) (see Table 1). At the same time one should note that 7 957 (37.7%) of the sentences of imprisonment were imposed unconditionally. This meant that 10.8% of all convictions ended with the accused being imprisoned unconditionally.

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1 'Prospect of success' here is to be interpreted not only as a special, but also as a general preventive consequence of the sanction (Foregger and Serini, 1988: 5).

2 The rate of detention per 100 000 inhabitants in February 1987 was 102.5, and in February 1983 as much as 114, with the result that Austria ranked first on the list of detention rates in Europe (Council of Europe Prison Information Bulletin 2/1983 at 17 and 9/1987 at 23). Only since 1988 can one observe a steep decline (a reduction of 21% when compared to 1987) in the prison population (Council of Europe Prison Information Bulletin, 12/1988 at 17).

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The following is a brief description of the fundamental legal characteristics of the different forms of confinement, namely protective custody,[3] pre-trial detention and imprisonment of sentenced offenders.[4] Their quantitative significance will be discussed in detail in section 2.

1.1 Protective Custody (Section 175 ff of the Criminal Procedure Act (*Strafprozessordnung* - StPO))

One should distinguish between the imposition and the implementation of protective custody because the imposition of protective custody by non-judicial organs such as the police is already problematic.

1.1.1 Imposition of Protective Custody

In the following discussion a distinction is drawn on each occasion between adults and juveniles.

1.1.1.1 Adults

In terms of Section 175(1) of the Criminal Procedure Act the investigating magistrate may order the preliminary detention of someone suspected of having committed an offence or a crime,[5] if he is caught red handed; if, immediately after he was accused of having committed the crime, there is convincing indication that he was the offender; if there is a risk of his absconding or escaping (Subsection 2); if there is a danger of his obstructing the investigations (Subsection 3); or if there is a risk that he would try to complete the crime he had been attempting or that he would commit a further crime of the same kind (Subsection 4). The investigating judge must impose protective custody if the act in question is a crime punishable with a minimum of ten years of imprisonment.

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3 In terms of administrative penal law (VStG, BGBl 1950/172 most recently re-enacted in BGBl 1987/516) lawyers who are not judges may impose imprisonment of up to six weeks. This procedure contravenes Article 5 of the European Convention on Human Rights. Austria ratified the European Convention (BGBl 1958/210) with a reservation to Article 5. There are no figures of the number of persons imprisoned in terms of administrative penal law.

4 Because the regulations relating to indeterminate preventive detention (*Massnahmenvollzug*) in terms of Sections 21 to 23 of the Penal Code are very similar to those for sentences of imprisonment, there is no need to discuss them separately.

5 The German terms *Vergehen* or *Verbrechen* correspond more or less to the distinction drawn in American criminal law between misdemeanours and felonies [editors].

Furthermore, Section 177(1) of the Austrian Criminal Procedure Act allows, in exceptional circumstances, for the custody of the suspect to be ordered by the judge who is not directly responsible for the investigation, or by an organ of the security forces (police, etc.) without any specific written instructions. In practice, this power is not exercised so rarely.[6] In terms of Section 175(1)(1) of the Criminal Procedure Act, it can be exercised without restriction in all cases where offences had recently been committed. However, in the instances mentioned in Section 175(1)(2-4) it is only allowed 'if, because of the potential danger, it is not feasible to procure a judicial order'.

In terms of Section 177(2) of the Criminal Procedure Act, this protective custody which is imposed autonomously by the security forces or by a judge who is not responsible for the case, must not exceed 48 hours. If it appears in the meantime that there is no reason for the further detention of the suspect, he has to either be released immediately or brought before a competent court.

After this procedure has been followed, the competent investigating judge, or in his absence the judge of record, has 24 hours in which to interrogate the suspect. However, if the interrogation is not possible within this time, the suspect may be detained for up to three days and the reason for the delay is to be noted in the protocol (Section 179(2) of the Criminal Procedure Act). The conclusion is that, in an extreme case, a suspect can be detained in protective custody for up to five days by the security forces (or by a judge who is not directly responsible), until he is interrogated by a competent judge or until a judicial verdict is passed (Bertel, 1984: 420ff).

1.1.1.2 Juveniles

The provisions of the Criminal Procedure Act regarding the imposition of protective custody on adults are also applicable to juveniles.

6 This is according to various statements made by the police and the courts. Official statistics regarding protective custody are not available. However, an inquiry carried out by the Federal Police in Vienna revealed that only 18% of the arrests made in 1984 were based on judicial warrants of arrest and 82% of the arrests were undertaken by the police acting on their own authority (in terms of the authority provided by Section 177(1) of the Criminal Procedure Act). Of the 82%, only 18% were brought to a competent court. On the other hand, 78% were released within 48 hours (Security Report, 1987: 220).

1.1.2 Execution of Protective Custody

In terms of Section 183(2) of the Criminal Procedure Act, the regulations relating to pre-trial detention apply also to a person held in protective custody, provided the protective custody is executed in a judicial prison. However, in practice, protective custody is carried out in police prisons. The regulations guiding protective custody will be examined here, while the rules relating to the execution of detention in judicial prisons, will be considered in section 1.2.2.

Since 1988 the execution of protective custody in a police prison has been governed by a decree (*Polizeigefangenenhaus-Hausordnung*) of the Ministry of the Interior (BMfI). Prior to the passage of this decree there were a multitude of ministerial decrees as well as several casuistic departmental decisions on questions of custody. Special features of these house rules include:

- the right of prisoners to wear their own clothes (Section 4(2));
- communal custody (Section 4(3));
- separation of men, women and juveniles, and also of smokers and non-smokers (Section 4(3));
- solitary confinement only in cases of violence, at the request of the court, to minimise the risk of infection, as a disciplinary tool, or at the request of the prisoner (Section 5);
- the prisoner's right to inform (immediately after his detention) his family, a confidant, or a lawyer, where this has not been possible earlier (Section 6(2));
- medical examination within 24 hours of first being detained (Section 7(3));
- preparation of an official medical certificate if injuries were apparently or allegedly caused by a third party (section 7(4));
- the right to provide one's own food as long as discipline and order is not hampered or disproportionately heavy expenditure caused (Section 13(1));
- the right, other than in communal cells, to use one's own battery-powered radio or television set, as long as it does not inconvenience fellow-prisoners (Section 15(2));
- the right to read books, newspapers and magazines (Section 15(3));

- permission to play social and card games, though not for money (Section 15(6));
- the opportunity to make telephone calls at one's own expense,[7] after giving reasons for wishing to make the call and, of course, under supervision (Section 19(1));
- the right to unrestricted correspondence, although subject to the same surveillance as for sentenced prisoners (Section 20(1));
- the right to receive, under supervision, a visitor for half an hour per week (Section 21(2) and (4));
- the right to submit a written or oral complaint against a violation of the prison rules to the competent authorities;
- the right to make written or oral requests to the commanding officer;
- as a penalty for disobedience the commanding officer can remove a few of the 'rights' for the prisoner (such as access to radios, TV or games) for a maximum of one week or can impose solitary confinement for three days (Section 24(3)); and
- appeal against any penalty imposed for disobedience by means of a complaint in terms of Section 23(2).

1.2 Pre-trial Detention

1.2.1 Imposition of Pre-trial Detention

1.2.1.1 Adults

Unlike protective custody, which can also be imposed by security forces, pre-trial detention can only be imposed by a competent court. The prerequisites are severe in comparison to those for protective custody. On the one hand, it must be established that there has been a preliminary hearing, or that a demand for sentence has been made, or that a bill of indictment has been brought; the material on which the suspicion is based must at least be urgent (Foregger and Serini, 1988: note 1 to Section 180; Bertel, 1984: 425); and the investigating judge must have examined the suspect about the matter and also about the prerequisites for

7 Prisoners without adequate funds must be allowed to make such calls to their families, confidants, lawyers, public authorities and members of the diplomatic corps free of charge.

his pre-trial detention. Secondly, the grounds for detention must either be the risk of escape, collusion, or the commission of the crime. Alternatively, the alleged crime should be punishable with imprisonment of at least ten years and it should not be possible to exclude the above-mentioned grounds of detention. If these conditions are met, pre-trial detention is obligatory (Foregger and Serini, 1988, note 1 to section 180).

According to Section 193(1) of the Criminal Procedure Act, 'all the authorities involved in the process are duty-bound to ensure that the period of detention will be as short as possible'. Thus, as soon as the pre-conditions fall away, or if the period of detention is disproportionate to the expected penalty, the detention should be terminated.

Pre-trial detention imposed exclusively because of the danger of collusion, must not exceed two months and detention imposed on other grounds must not exceed six months (Section 193(3) of the Criminal Procedure Act). In exceptional cases of collusion involving extensive investigations, pre-trial detention can be imposed up to a maximum of three months, and detention on other grounds up to a maximum of 12 months. Where the offence is one for which imprisonment of more than five years can be imposed, the upper limit may be extended to 24 months. In about 3% of cases (Krainz, 1986: 5) the period of pre-trial detention is extended beyond the regular time limit. However, it should be mentioned that there is an increase in the number of extensions to more than one year and that the judicial verification of the petition for extension of confinement made by the investigating officer is a mere formality. This is also true for most of the review proceedings which were instituted as a matter of official routine, or as a result of an appeal against the decision to order pre-trial detention (Section 194 of the Criminal Procedure Act; Krainz, 1986a: 20ff).

It is doubtful whether protective custody or pre-trial detention is imposed only when it is really necessary and justified and if the period of time is limited as strictly as it ought to be (Section 193 of the Criminal Procedure Act and Article 5(3) of the European Convention on Human Rights). It seems that in Austria the right of the authorities to infringe upon the freedom of other persons is (still) 'generously' interpreted by the courts.

1.2.1.2 Juveniles

The Juvenile Justice Act (*Jugendgerichtsgesetz* - JGG 1988) regards the imposition of pre-trial detention or protective custody on a juvenile as an exception. They are only to be considered when their purpose cannot be achieved through measures provided for in family law and juvenile welfare law (Section 180(5) of the Criminal Procedure Act).

In addition, Section 35(1) of the Juvenile Justice Act demands the consideration of the principle of 'suitability'. Pre-trial detention can only be imposed if its disadvantages in respect of the personality and development of the juvenile are not out of proportion to the gravity of the offence and the punishment which may be expected for it.[8]

Pre-trial detention of a juvenile may not exceed three months prior to the trial, if the accused is to be tried by a single judge, or six months if the accused is to be tried by a larger court. If the proceedings before the court are particularly complex or the charges very extensive, the period of detention can be extended to one year (Section 36(3) of the Juvenile Justice Act).

Of particular importance to juveniles is the recently introduced provision that the guardian of a person or persons living with the juvenile (relatives, etc.) have to be informed about the detention of the juvenile. An exception can be made only when the juvenile himself expressly declares that it must not be done.[9]

In addition, grounds for pre-trial detention of juveniles have to be closely examined. There must be an official review within 20 days if such a review has not already taken place, for example because there has been a complaint, or if the accused, represented by his lawyer, explicitly declares that he does not want such a review (Section 35(2) of the Juvenile Justice Act).

It is to be noted that since the re-enactment of the Juvenile Justice Act in 1988, the number of pre-trial detentions recorded at the juvenile court in Vienna has diminished drastically.

1.2.2 Execution of Pre-trial Detention

1.2.2.1 Adults

In terms of Section 183(1) of the Criminal Procedure Act, the provisions of the Prison Act (*Strafvollzugsgesetz* - StVG) which relate to the execution of a sentence of imprisonment for less than one year (Sections 153 to 156 of the Prison Act) are basically applicable to pre-trial detention as well. However, as the wholesale application of the Prison Act would lead to unsatisfactory results,

8 To clarify this question one may consult the Juvenile Probation Service (*Jugendgerichtshilfe*).

9 This declaration must be recorded in a protocol and signed by the arrested juvenile (Reissig, 1988: note 3 to Section 36).

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