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Prison leave and access to justice: An insight into Danish and German law in action

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Abstract

In this article, we use the example of prison leave to discuss prisoners' access to justice. Based on a functional comparative analysis of the situation in Denmark and Germany, we study the law in action. In Germany, prisoners have a legally entrenched right of access to the courts in cases of denial of prison leave. However, in Denmark prisoners face more barriers when trying to access the court. In our analysis, we have compared Danish court cases with letters from German prisoners referring to their struggles with prison administrations and courts. The materials from both countries show more similarities than one would expect, given the significant differences between the substantive law in the two jurisdictions. While acknowledging the need for further empirical investigation, we introduce a concept we term "genuine justice", with the aim of paving the way for other and more radical remedies supplementing the economic, legal and social measures already in place.

Key words

Access to justice; prison leave; discretion; law in action; comparative criminal justice

Resumen

En este artículo, utilizamos el ejemplo de los permisos penitenciarios para analizar el acceso de los presos a la justicia. Basándonos en un análisis comparativo funcional entre Dinamarca y Alemania, estudiamos la ley en acción. En Alemania, los

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presos tienen un derecho legal de acceso a los tribunales en caso de denegación de permisos penitenciarios. Sin embargo, en Dinamarca, los presos se enfrentan a más barreras cuando intentan acceder a los tribunales. En nuestro análisis, hemos comparado casos judiciales de Dinamarca con cartas de presos alemanes en las que se refieren a sus luchas con las administraciones penitenciarias y los tribunales. Los materiales de ambos países muestran más similitudes de las que cabría esperar, dadas las importantes diferencias entre el derecho sustantivo de las dos jurisdicciones. Aunque reconocemos la necesidad de seguir investigando empíricamente, introducimos un concepto que denominamos "justicia auténtica", con el objetivo de allanar el camino a otras soluciones más radicales que complementen las medidas económicas, jurídicas y sociales ya existentes.

Palabras clave

Acceso a la justicia; permisos penitenciarios; discrecionalidad; derecho en acción; justicia penal comparada

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1. Introduction

This article relates to legal principles and the way they work in "action" with regard to prison leave in two northern European neighbour-countries: Denmark and Germany. By 'prison leave' we refer to any legal framework that allows prisoners to spend a certain amount of time outside prison at their request. The legal construction of prison leave is fundamentally different in the two jurisdictions. In Germany, prisoners have a legally prescribed right of access to the courts in the case of a denial of prison leave; however, in Denmark the courts are less accessible in these matters. In Germany, the basis for legislation relating to prison leave is the Constitution, and the main regulation concerning it is found in the law, whereas in Denmark only the very initial regulation is legally inscribed. The essential details are regulated in a large number of administrative regulations with a status below that of legislation. Accordingly, we have analysed published court cases from Danish courts concerning prison leave. Since the situation is different in Germany, we conducted an exemplary analysis of prisoners' correspondence with a German NGO. The letters analysed deal with their struggle for justice while having access to a court. As a result, we were able to understand the obstacles to prisoners' access to justice in both jurisdictions. We use Denmark as an example of a system with a high threshold for bringing a prisoner's case to court. We compare this to the obstacles to prisoners' access to justice that exist in Germany, even though prisoners are broadly able to access courts there. Using the example of prisoners' rights enables us to understand the kinds of problems that could occur even if access to the courts were granted (e.g., in Denmark, by means of reform).

By using a functional comparative method, we discuss whether the regulations on prison leave "in action" in the two countries guarantee appropriate access to justice (AtJ) for prisoners.

Prison leave is a narrow topic, and just one aspect of prison law. However, due to its importance for prisoners and its role as a frequently used test run for gaining earlier release in both countries, it serves well as the subject matter for a comparative analysis of prisoners' AtJ.

2. Methodological and conceptual framework

According to Zweigert and Kötz (1998), instead of focusing on the legal-dogmatic category of a phenomenon, one should study the legal function of the regulation related to the specific societal problem (p. 34). This is even more important in comparative legal analyses, as focusing solely on legal categories in two or more jurisdictions may lead to fatal misinterpretations. In essence, comparative law seeks to analyse the way in which different legal systems solve roughly equivalent problems. The function – not the wording of the law – should be the *tertio comparationis*. Despite critical studies that have been carried out in reference to Zweigert and Kötz (e.g., Michaels 2006), this study will prove the relevance of one of their initial main arguments – namely, the necessity of focusing on the function and not only the legal categories as such.

In the literature, access to the courts and access to legal advice are often mentioned as the main criteria for AtJ, or even as synonymous with it. In *Outsourcing Legal Aid in the Nordic Welfare States,* Jon T. Johnsen (2018, p. 238) builds on Francesco Francioni's work

when he suggests that the concept of AtJ in general signifies an opportunity for an individual to bring a case before the court.

It has often been highlighted that the barrier to people bringing their cases before the courts in practice is their own difficult economic situation. Insofar as this is the case, free legal aid is obviously an appropriate remedy (e.g., Schoultz 2018, p. 44; Kristiansen 2018, p. 113). Legal aid should, therefore, also include aid at earlier stages, for which Denmark may well serve as a model (Kristiansen 2018, p. 101). Applying the words of Kristiansen, which are directed at the population in general, we specifically outline the need for broad, systematized, and complimentary legal advice for prisoners. Even if sufficient access to "formal" justice is communicated and provided via free legal aid, our studies indicate that the law "in action" places further barriers in the path of a prisoner's access to justice.

Many problems exist with respect to prisoners' access to legal advice and legal aid in both countries (cf. Germany, Graebsch, forthcoming), and the fact that they are not dealt with in this article does not mean they are not important. Nevertheless, we decided to focus on cases in which prisoners had already found a way to access the court and had their case financed in one way or another, well knowing that this approach engages specifically with a selection of prisoners.

Our aim is to provide an in-depth understanding of whether access to the courts in the case of prison leave is likely to provide what we term access to genuine justice. If this is the case, a recommendation for a "legal transplant" of access to courts (cf. critique Nelken/Feest 2001, Nelken 2010) might seem to be the solution. However, this would not satisfy the ambitions of a functional comparison. In addition to understanding the impact of obstacles to prisoners' access to judges, we wish to analyse whether hindrances would still occur in Denmark if free access was available. Consequently, we use the legal situation in Germany to understand whether obstacles to prison leave may occur even when access to the courts exists. These obstacles, however, cannot be traced merely by analysing published court decisions. Thus, we decided to use as the basis for our analysis prisoners' correspondence with the *Prison Archive* (*Strafvollzugsarchiv*), an NGO attached to the University of Applied Sciences and Arts in Dortmund, Germany.[1] The *Prison Archive* receives letters from prisoners all over Germany seeking legal advice in matters of prison law. They receive replies on a voluntary basis, free of charge. For the purposes of our analysis, we selected 79 letters pertaining to correspondence with 33 prisoners, as well as the complete files of five prisoners who were represented by the *Prison Archive*'s lawyers in court.[2]

3. Prisoners' access to the complaints procedure and the court in Denmark

After having been prepared for 10 years, the first Corrections Act finally came into force in Denmark in July 2000 (31-05-2000 no. 432, the newest revised edition being 09-12-2019 no. 1333, and the latest revision 15-12-2020 no. 1942). Until then, the prisons were run in terms of statutory instruments or internal guidelines, etc. After the implementation of the Corrections Act, there were still innumerable internal instruments concerning day-

[1] For further details, go to https://strafvollzugsarchiv.de/?lang=en.

[2] Christine Graebsch, one of the authors of this article, is one of the lawyers involved with the *Prison Archive*. The other lawyer is Sven Burkhardt, whom we wish to thank for his co-operation.

to-day routines, as well as specifics regarding essential matters such as release on parole, temporary leave, release plans, disciplinary sanctions, visits, communication, etc.

Apart from the ombudsperson, who is probably well known in many countries and is not discussed further here, there are three ways in which prisoners in Denmark can lodge a complaint.

- Section 111 of the Corrections Act refers to internal instruments which regulate administrative review (i.e., an administrative complaints procedure within the prison system).
- Section 112 of the Corrections Act identifies nine grounds on which decisions made by the prison and probation system may be taken to court.
- Section 63 of the Constitution allows all individuals bringing charges against a public administration to have the legality and impartiality of its decisions assessed in court.

3.1. Section 111 Corrections Act (administrative review)

The first way in which prisoners can complain is to lodge an administrative review in terms of section 111 of the Corrections Act. Administrative review does not involve the courts, but is still relevant from an AtJ perspective, as it initiates a process within the administrative authority itself. For example, a prisoner can request that a decision made in the prison be evaluated and possibly overruled by the regional office, which is an administrative level between the prisons and the national prison authority – i.e., the Department of Prisons and Probation Service.

Section 111 has undergone a remarkable development since the first edition of the Corrections Act stated that prisoners had a general right of access to file an administrative review against any decision made by the prison and probation service or the police. The first version of section 111 authorised the minister of justice to delegate the power to process and evaluate complaints from prisoners to the Department of Prisons and Probation Services.

Section 111 of the Corrections Act was amended in 2014. Since then, prisoners have not been able to file an administrative review against any administrative decision made by the prisons or the police. Now the minister of justice is authorised to lay down in internal instruments the decisions that prisoners may bring forward for evaluation by the Department of Prisons and Probation Services. The specific topics open for such administrative review are to be found in 23 discrete regulations, which are again specified in numerous directives and guidelines for the prisons. The main regulations are passed by Parliament in an expedited process, but not published in the same way that laws must be. The specific directives and guidelines are decided by the Ministry of Justice. Prisoners cannot claim their right based on any of the legal sources mentioned. In the following they are often mentioned as internal instruments.

Concerning prison leave, the most relevant internal instrument is the Ministerial Order no. 182 of 2 February 2019 (*Bekendtgørelse* no. 182 of 2 February 2019 (*Udgangsbekendtgørelsen*), referred to as "MO no. 182"). Section 82 of MO no. 182 defines the situations in which a prisoner may demand a review of a denial of prison leave. This may, for instance, take place when a prisoner's request to attend the funeral of a close

relative or visit a loved one who is seriously ill is denied. A review is also possible if a court requires a prisoner's attendance at judicial proceedings, but the prison has denied prison leave, or if it is necessary for a prisoner to be seen by a doctor outside the prison. On the other hand, a review is not possible if attendance at an important family event is refused. This may be the baptism of a prisoner's child or his/her parents' silver wedding anniversary. Furthermore, there is no access to a review if prison leave is refused in respect of the necessity of attending a job interview, looking for accommodation prior to release, or attending a meeting with the probation service in preparation for release from prison.

3.2. Section 112 Corrections Act (review by a court on selected topics)

The second way in which prisoners can complain entails a specific route to the court, which was made available during the preparation of the Corrections Act. It had become clear that the known, but rarely used, constitutional access to the courts was complicated and limited (see below), and therefore the drafters of the Corrections Act decided to extend access to the courts and open up a more intensive court procedure for a limited number of complaints. It was stressed that the existing constitutional court process did not include substantial evaluations of the appropriateness of the concrete discretion on which a decision was based (Engbo 2005, p. 380).

After some debate, nine topics were included in section 112, where the issues that may be brought before the courts are defined. Section 112 is exhaustive. The nine grounds were identified either as being somewhat similar to punishment or as pertaining to the protection of the victim. Prison leave was not included. One of the nine topics is of relevance to prison leave – namely, the refusal to release a prisoner on parole after he/she had served two-thirds of the full length of the sentence.

The procedure in these cases is simpler than in regular civil cases. When no further possible access to administrative review remains, a prisoner has four weeks in which to let the prison know that he/she wishes to appeal to the court. In that case, the prison authority is obliged to inform the local court.

In these cases, a court order is essentially based on written statements from each party (i.e., a standardized form or a short note from the prisoner plus the prison file containing reasons for the prison's decision). The process is simple and relatively quick. Should the court deem it necessary, a lawyer may be appointed for the prisoner. A court order may be escalated to a higher court (i.e. from the city court to the high court), which will make its decision based on the written statements as well. As a rule, there is no court fee in these cases, and the prisoners' (potential) lawyers are paid by the state[3] (section 119).

3.3. Review by a court according to the Constitution

The third way to complain is found in the Danish Constitution (Lov 05-06-1953 no. 169 *Danmarks Riges Grundlov*). Section 63 allows individuals to raise complaints regarding certain decisions made by the public administration before the court.[4] If there is a

[3] In contrast, the defendant must pay the defence lawyer in a criminal case if he/she is found guilty.

[4] This is not, as is the case in some other countries, an administrative court, but the same court system in which both civil and criminal cases are handled.

possibility of internal review (section 111), this must be exhausted before the case is taken to court. Appealing to the court has no suspensive effect. The courts can decide on the legality and objectivity (impartiality) of a decision by a public administrative authority, but not on the appropriateness of a decision or the actual use of discretion. For instance, if a prisoner, via a lawyer, wishes to complain about the refusal of prison leave, the court cannot overrule the discretion of the prison system. However, the court is able to judge that judicial discretion was exercised, and that subjective reasoning was not involved.

A court case in accordance with the Constitution follows the ordinary regulation of civil proceedings. Charges must be brought against the Department of Prisons and Probation Services. Formally, the prisoner is not obliged to be represented by a lawyer, but in most cases he/she will need one, as those cases involve pleadings and require access to the internet in order for them to be referred to the court. It may happen that the prisoner is released before the case reaches court, owing to waiting times in courts of one to two years. The court may require the prisoner's presence in court, and in these cases prison leave may be granted (Dragsted and Schiøler 2017, p. 213).

There is no statistical data relating to the number of court cases in terms of the Constitution, but a few examples have been found in the form of published court rulings.

4. Prison leave in a Danish context

4.1. Methodological approach to the study on Denmark

During the period 2000-2020, we found and analysed five published court decisions on prison leave that were reported to the courts in accordance with section 63 of the Constitution. There have probably been more relevant cases, but these were not published. There are no published statistics in relation to this specific type of case.

We also analysed all court orders published since 2000 concerning ordinary parole after two-thirds of the sentence had been served. Like prison leave, the decision to grant parole is in the hands of the prison system. However, decisions to refuse parole may be brought before the court in accordance with section 112 of the Corrections Act. We found 15 published court orders of some relevance.[5] These orders are taken into consideration because prison leave is mentioned in internal instruments as a precondition for parole, and sometimes a prison administration refuses parole because prison leave had not been granted during the time of imprisonment.

4.2. Prison leave in terms of legal regulations

Under the heading "Prisoners' contact with the Society", chapter 9, sections 46–50, of the Corrections Act sets out the key regulations governing prison leave. Contrary to other types of contact with society, such as letters and telephone calls, prison leave is not a legal right for prisoners. Prison leave must be applied for, and may or may not be granted.

[5] The actual court decisions and court orders are selected for publication by the editorial board of the weekly magazine for legal professionals, where they are published (*Ugeskrift for Retsvæsen*).

Prison leave is granted only if the following minimum conditions are met: a) it must be justified; b) there must be no reasonable suspicion the prisoner will commit a new crime, abscond, or breach any individual conditions; and c) public trust in the justice system would not be violated if prison leave were granted. The individual conditions under b) may, for example, prevent a prisoner from contacting specific individuals or visiting specific places, or may obligate a prisoner to wear an electronic ankle tag or take Antabuse. Weekend leave may involve the prisoner staying overnight in a local custody unit (jail or detention centre) if for some reason the prisoner cannot stay with the registered host.

According to section 46 of the Corrections Act, the aforementioned minimum conditions for obtaining prison leave must be met in all cases. According to section 46.2, some factors require extra attention before it can be granted (e.g., a conviction for a dangerous crime or the commission of new crime while in prison).

It is noteworthy that, even with detailed regulation, discretionary power is left to the prison system, as for instance regarding whether prison leave is justified, or how and to what degree it can be assessed that the grant of prison leave may violate public trust in the justice system.

The aforementioned regulation may seem detailed, but this is only the beginning. More details on prison leave can be found in the important internal instrument MO no. 182.

Firstly, the prisoner must apply for prison leave and explain the reasons for the application. The explanation need not be long. Depending on who the prisoner is, relevant considerations might include what he/she has been convicted of, the prison regime, why he/she has applied for prison leave, etc. The application is processed at different levels, from a rank-and-file prison officer to senior officials in the Department of Prisons and Probation Services. A prison officer may, for instance, decide on applications for short leave to attend a funeral or see a dentist, if none of the aforementioned reasons preclude the permission. Conversely, if a prisoner is sentenced to life in prison, has been convicted of terrorism, is suspected of having become radicalized, or is to be deported in terms of the criminal conviction, the application is always processed by the Department for Prisons and Probation Services. However, most cases are decided by either the regional offices of the Department of Prisons and Probation Services or the relevant prison governor.

Prison leave which is granted on a regular basis can be revoked, according to section 49 of the Corrections Act. Such revocation may be challenged by the prisoner by means of administrative review.[6]

In relation to section 50 of the Corrections Act, the minister of justice decides whether prisoners must have served a certain amount of time before prison leave is granted. Currently, the main rule is that prisoners in open prisons must have served a minimum of 30 days, while prisoners in closed prisons must have served at least a quarter of their sentence before prison leave is granted.

In a number of cases, the commissioner of police must be consulted before prison leave may be granted (section 15 of MO 182), particularly if the prisoner has been convicted of

[6] For an in-depth introduction to the regulations relating to prison leave, see Storgaard 2020.

a serious crime, has committed a crime during his/her imprisonment, or is to be deported after serving his/her sentence. The hearing is mandatory, but the decisive power does not officially reside with the police. If the police advise against prison leave, only the Department of Prisons and Probation Services may permit prison leave, despite the competence to grant it in specific cases resting with a lower authority.

4.3. Prison leave in the courts

Below we present examples of cases brought before the courts. A presentation of four cases regarding parole, pursuant to section 112 of the Corrections Act, is followed by a summary of important published court decisions on prison leave, following the Constitution.[7]

A police hearing before the final decision is not only mandatory in some instances concerning prison leave, but also in some cases before a final decision is made on parole. In some situations, the police must be involved. However, officially the final decision rests with the Department of Prisons and Probation Services.

Two examples follow, showing both similarities and differences:

1. The prisoner brought the decision on parole before the court, pursuant to section 112 of the Corrections Act.

   The regional office (the administrative level between the prison and the Department of Prisons and Probation Services) recommended the prisoner for parole based on his good behaviour during his time in prison, the fact that he had not engaged in substance abuse while incarcerated, and his intent to return to education and move in with his wife, whom he had visited numerous times without incident, upon his release. The police advised against parole and the department agreed with the police, as the prisoner had links with a gang and had been convicted for having been in possession of weapons. The case was tried over two court hearings. Both confirmed the decision of the department and "found no reason to override"; they rejected the opinion of the prison and the regional office, both of which had knowledge of the prisoner (V.L.K. 02.09.2019 i kære 6. afd. BS-24503/2019-VLR).

2. Another case with similar facts was resolved differently:

   The Department of Prisons and Probation Services had refused parole based on advice from the police, owing to the prisoner's links to a gang, his numerous former convictions for selling drugs and active misuse of drugs, and the fact that the crime – namely, negligent manslaughter in a car accident – was committed under the influence of drugs. Accommodation had been arranged and regular prison leave had been practised for almost a year. The court decided that the prisoner should be released on parole after the department had decided on the conditions for parole (V.L.K. 13. May 2019 i kære 6. afd. BS-10911/2019).

[7] Special thanks to experienced defence lawyer Frederik Gram Blicher, Aarhus, Denmark, with whom the cases were discussed in order to prevent misunderstandings and erroneous conclusions on our side.

The two cases have much in common. In both situations, the police spoke out against parole, and in both cases the prisoner had links to a gang.[8] Although only a few cases in this regard are included, they nevertheless illustrate that the Department of Prisons and Probation Services is reluctant to act against advice given by the police, and that the prison system may be overruled by the courts. It is difficult to identify a decisive difference between the cases: both crimes were relatively serious. In the first example (V.L.K. 02.09.2019), the conviction was related to weapons, which were seized by the police without them having been used. In the second case, the crime was drug-related and a person was killed. There is no further argument in the documentation, but maybe the potential danger inherent in the prisoner's possession of weapons in the first case was seen as a stronger argument militating against the grant of parole than the prisoner in the second case actually having caused the death of a person. The court was the same, but the judges were different, with the exception of one of them (on a three-judge panel). The prisoners' legal representatives were different, and the counsel in the second case was a very experienced defence lawyer.

If there was a clear tradition of having cases heard in court, it might be easier to compare them and draw conclusions. However, very few cases find their way to court, and what can be gleaned from the court decisions does not offer much hope for prisoners. In 2019 (the year of both court decisions), the number of refusals of ordinary parole after two-thirds of the sentence had been served was 1,374 (2,046 were granted). In the same year, 88 refusals of parole were brought before the courts, and only on five occasions did the courts decide in favour of the prisoner. The collections of published court orders do not provide firm directions.

3. In another case, the court provides clarity about the expectation that a successful application for parole should be preceded by prison leave.

   The court found that a criminal conviction during prison time was an acceptable reason for the revocation of regular prison leave and a rejection of parole. With the second conviction, a total of 12 years' imprisonment had been imposed. Four years after the second conviction, the court saw no reason not to reactivate the preparation of parole. Among other things, the prison was encouraged to reconsider whether prison leave was possible, as this would be an expected element in preparation for parole (V.L.K. 10. September 2003 i kære 9. afd. B-1759-03).

4. The interconnection between prison leave and parole is even more obvious in this case:

   A prisoner who was from Algeria and had a deportation decision connected to his sentence had been refused prison leave, owing to the risk of him absconding. Since parole was refused as he had no prison leave, and since he could not be deported owing to security risks in his home country, he had to stay in prison (Ø.L.K. 27. July 2011 i kære 10. afd. nr. B-2178-11).

[8] If the police had referred to section 38.4 of the Criminal Act, parole would have been prohibited by law and this would not be a question for the courts. This rule was introduced in 2014 and prohibits the release on parole of prisoners who are members of gangs which are currently engaged in a violent conflict with other gangs. The police did not refer to this provision in any of the cases cited above.

The third and fourth cases also relate to parole, and they were brought before the courts in accordance with section 112 of the Corrections Act, which opens up a court process when parole is rejected after a prisoner has served two-thirds of his/her sentence.

On the one hand, there is a clear expectation of a prisoner having experience of prison leave before he/she is released on parole; on the other hand, positive experiences with regard to prison leave do not guarantee parole – at least not in cases where a police hearing is required. This interconnection is not formulated in the law, but it is laid down in internal instruments. As an example, the instruction regarding release on parole (VEJ nr 9766 on 11/09/2018) mentions that for prisoners below the age of 21 "it will normally be a precondition for release on parole that the prisoner has been able to successfully prepare for release in the form of prison leave to spend time with the family". Similar formulations are found in respect of other groups of prisoners. These internal instruments are binding on the administration, but are often give the officials in question a wide discretion (e.g., "normally"). The courts are not bound by these instruments, but are free to evaluate all arguments.

In case 3, we see that the prison system revoked permission for regular prison leave and rejected release on parole, owing to the prisoner having committed a new crime. Later, when the prisoner filed complaints about the rejection of parole after the second sentence, the court agreed that parole should be rejected. On the other hand, the court considered that it was time to prepare the prisoner for release, and even if prison leave could not be included in a court order pursuant to section 112, prison leave was mentioned in court as a preparatory step. Case 4 illustrates the creation of a "catch-22" for a prisoner, who, like imprisoned foreigners in general, is not granted prison leave because the deportation sentence is seen as a risk factor for absconding. When the day for ordinary release on parole arrives, this is not possible and, since the deportation cannot be effectuated, there is no option other than to keep the prisoner behind bars. On the last day of his/her sentence, the prisoner will be transferred to a so-called departure centre. The court confirmed the decision by the prison system without further comment.

One of the arguments for the introduction of section 112 was to enable courts to evaluate the actual use of discretion by the Department of Prisons and the Probation Services more closely than section 63 of the Constitution allows. Nevertheless, it would appear the courts are reluctant to overrule the prison administration and contradict administrative instruments.

We have mentioned above that five court decisions on prison leave in civil cases brought before the courts and based on section 63 of the Constitution have been published. The general topic of complaint in these cases was the denial of prison leave owing to the risk of there being a violation of public trust in the justice system. In each case, all general conditions were met, including conditions relating to time spent in prison before prison leave. Whether there has been a violation of public trust in the justice system is based on nothing other than discretion. Taking into account the fact that section 63 only allows for a court evaluation of the legality and impartiality of a case, it is no wonder that all the prisoners in question lost their cases. Only in one instance did the courts decide that none of the parties needed to pay procedural costs, which may signal some measure of sympathy for the prisoner. In four out of the five cases, the prisoners each had to pay

10,000, 10,000, 15,000 and 25,000 DKR to the Department of Prisons and Probation Services as compensation for the procedural costs.[9]

To sum up, even though the Constitution formally allows for refusal of prison leave to be challenged in court, in reality this process takes a great deal of time, success is limited, and the procedure is expensive.

5. Concluding remarks on the Danish example as a perspective for comparatively analysing the German example

Next, we will highlight the immediate conclusions from an AtJ perspective for prisoners with respect to prison leave in Denmark. We will then raise questions regarding obstacles to prisoners' AtJ and propose reforms to improve the situation in in Denmark.

In so doing, we aim to provide a link to the next section of this article, in which a comparative perspective and a detailed analysis of AtJ will be provided, before we proceed to the German example.

5.1. Prison leave in Denmark – immediate AtJ-related conclusions

Prison leave is not a legal right in the Danish prison system. A complex number of conditions, to a large degree set out in internal instruments, must be met before an application for prison leave is subject to discretion. Two crucial AtJ-related matters derive from this. Firstly, even if some of these instruments are passed by parliament, public access to them is more difficult than is the case with law, and citizens cannot claim rights in respect of them. Secondly, the decision-makers within the prison system are legally obliged, not only to follow the explicitly legally defined conditions for prison leave, but also to evaluate each case individually, since certain elements of the decision must be based on discretion. This has led to the creation of detailed instructions from the department on how officials must practise the individual evaluation. This state of affairs poses an obvious risk of rule-based discretion, which is unacceptable in terms of administrative-law principles.

Prison leave is broadly considered as a "pilot test for rehabilitation" (Larrauri 2020, 151), and is thus highly relevant to decisions relating to release on parole. As previously shown, this is also the case in Denmark, and is reflected in Danish internal instruments as well as in court orders (see examples 3 and 4 above). On the other hand, the fact that a prisoner passed the pilot test is not a "free ticket" to parole (see example 1 above).

Prison leave and release on parole are interlinked since, to a large degree, the same conditions for both must be met before they can be granted. It therefore stands to reason that swift access to the courts must be available in respect of both issues, not only issues of parole. In addition, the courts must have the power to consider all aspects of the case, not only questions of legality and impartiality, which is the case in matters concerning prison leave.

Regarding access to the courts in matters of prison leave, it can be concluded that access to the courts is almost non-existent in the Danish system. We therefore state that, with

[9] 1 Euro is approximately 7.50 DKR.

respect to prison leave, a substantial lack of AtJ, occurring at the stage of access to the courts, can be observed in Denmark.

As for the Danish example, we wish to highlight the need for reforms to ensure easy and transparent access to a second opinion in matters of prison leave, which for obvious reasons is very important for prisoners and their relatives. Primarily, there is a need for timely access to the courts, and for these to be empowered to try all aspects of the case. Access to administrative review should also be a general legal right.

Our findings with regard to the Danish example also indicate the need for more extensive research into the role of the police in decision-making within the prison system. In our experience, there is a risk that the influence of "police hearings" reduces prisoners' chances of strengthening their credibility and proving to the prison system that they are prepared to proceed to the next step.

5.2. Comparing different legal models, with a focus on AtJ for prisoners

We wish to compare whether improvements that seem inevitable in one national system have turned out to be successful in another national system, in which similar reforms were implemented some time ago. We will therefore proceed from the Danish example to the German one. We will analyse how regulations that seem necessary in Denmark work in practice in Germany, and to what degree they actually secure prisoners' AtJ.

The aim of this analysis is not to recommend "legal transplants" from one system to the other without respecting their different ways of functioning in the respective legal cultures and societies (cf. critique Nelken and Feest 2001; Nelken 2010). Similarly, we do not suggest that if an identical legal programme were implemented in two different societies, the result would be a similar legal practice, or that identical advantages and disadvantages would be prevalent in both societies.

Our *tertium comparationis* will be prisoners' complaints when the conditions for prison leave as laid down by law are met, but prison leave is denied. In the comparison we will analyse the options available to prisoners to file complaints, with a special focus on prisoners' access to the courts as well as their chances of success.

By showing the discrepancies between aspirations (formal justice, "law in the books") and realities ("law in action"), we can point to some caveats for an AtJ approach that relies mainly on access to courts rather than what happens in court. We will also focus on how and which decisions are taken, as well as how they influence administrative practice.

Having examined the materials from Denmark, we are so far unable to exclude the obvious counterargument that there are so few (successful) complaints because the prison administration complies with the law, leaving no grounds for complaint in respect of its decisions. As regards Germany, this argument has been used to explain the low success rate (below 5%)[10] of prisoners' complaints to court (Morgenstern and Dünkel 2018, 24). We will take this argument as a starting point and analyse whether it is convincing, at least with respect to Germany.

[10] This is a continuous result, apart from the difficulties of gathering and counting this data (e.g., Feest *et al.* 1997, 49 et seqq).

In the case of Denmark, the lack of a clear right to appeal against the denial of prison leave poses a major problem for AtJ, even at the stage of accessing a court. Thus, we will take a closer look at whether the promise of AtJ in a material sense can be fulfilled by the existence of the right of complaint granted to prisoners in Germany.

However, when approaching the subject of prison leave from an AtJ perspective, the frequency of prisoners seeking the decision of a court and whether the result is successful from the vantage point of the prisoner may not seem to be important. From an initial AtJ perspective, access to court can be considered a value in itself. Prison leave is essential for a prisoner and his/her relatives, and it is important for a prisoner to have the opportunity to file a complaint if he/she perceives a prison administration's decision to be unjust. Additionally, it is important from the perspective of public trust in a constitutional democracy to know that any person – not least persons whose right to liberty has been limited or entirely curtailed by decisions of the state – has access to an impartial court trial.

The last point to stress is that the involvement of the courts may not in any case lead to better and genuine justice for prisoners. In Spain, for instance, a decision to grant prison leave can be overruled by a court, whereas a rejection of prison leave remains without judicial control (Larrauri 2020, 151). From an AtJ perspective, the involvement of a court in the Spanish context must be considered to be counterproductive (Larrauri 2020, 151).

We will now turn to the German system, in which the right of access to a court is granted by the Constitution in the case of any possible infringements of the law by any public authority (Art. 19, para 4, Basic Law).

According to Feest and Murayama (2021), a productive way of comparing legal systems is to evaluate how one case would be handled in different legal systems. While we did not have a very detailed case at hand, we nevertheless dealt with the opportunities available to a prisoner should his or her application for prison leave be rejected by a prison administration in Denmark and, alternatively, in Germany.

6. Access to the court in German prison law

Prisoners in Germany have the right to complain individually to a court regarding any conditions or circumstances with respect to their imprisonment which are laid down in a legal regulation. This right is stipulated in Article 19, Para 4 of the Constitution, which grants every person access to the court to enforce any right that is guaranteed by law. As the Federal Constitutional Court (FCC) stated in its seminal decision of 1972 (BVerfG, 14.03.1972 – 2 BvR 41/71 (BVerfGE 33,1)), all constitutional rights apply to prisoners as much as they do to any other citizen. While a sentence of imprisonment deprives the prisoner of his or her liberty, further infringements of fundamental rights may only take place on the basis of a specific formal law. As a consequence, the Federal Prison Act was passed in 1976. Since the federalism reform of 2006, the legal regulation of prisons has been reconfigured. Today, the 16 federal states have individual prison acts, each of which deals with all aspects of prison life, such as visits, communications by and with prisoners, work, education, rehabilitation plans, security measures, disciplinary sanctions, etc. Only certain sections of the Federal Prison Act are still in force – namely, those dealing with the procedure for accessing the courts (sect. 109 et seqq. StVollzG, Federal Prison Act).

The most important principle in German prison law is that of rehabilitation, which is the aim of imprisonment (e.g., sect. 1, Prison Act North Rhine-Westphalia (StVollzG NRW)).[11] The right to rehabilitation has been elevated to constitutional status by the FCC (BVerfG, 05.06.1973 – 1 BvR 536/72 (BVerfGE 35, 202 ff.)). This constitutional principle must be respected in relation to any decision of the prison administration, the courts, and the legislature.

A prisoner can complain to the court within two weeks after having received a written, negative decision from the prison administration (sect. 112, Para 1, Federal Prison Act; there is no strict time limit in the case of an oral decision), or after three months of waiting for a decision regarding his or her application (sect. 113, Federal Prison Act).

Courts also decide on early release. They do not merely control the decisions of prison administrations, and it is the court's specific responsibility to decide questions of early release after granting a hearing to the prison administration, the prosecution, and the prisoner. This must happen on a regular basis after two-thirds of the prison term has been completed, or after 15 years of a life sentence. In exceptional cases, release after completion of half the sentence is possible (sect. 57, 57a Penal Code (StGB)). Usually, different judges of the same court decide on early release and prison leave.

One key consideration of the courts within the framework of a positive prognosis necessary for early release is whether the prisoner has demonstrated reliability, compliance, and the ability to withstand stress during prison leave. According to the case law of the FCC, the rejection of early release may not be based on a lack of prison leave if the denial of prison leave by the prison administration did not comply with legal requirements. In this case, an early release without prior prison leave is – at least theoretically – possible (BVerfG, 4.6.2020–2 BvR 343/19).

As a result, prisoners in Germany are – as opposed to the situation in Denmark – often able to access the courts regarding issues of prison law.

A prisoner in Germany may, in addition to legal protection, also use internal and informal ways to complain, for example, to the governor of the prison, the supervisory authority (namely, the Ministry of Justice in the respective federal state), and the board of visitors, or by filing a petition with the parliament of the federal state. An ombudsperson only exists in the federal state of North Rhine-Westphalia, and he/she deals with complaints solely if no litigation is pending at a court (for details, see Graebsch 2014, Goerdeler 2021). In the next section, we will deal only with formal complaints to the courts.

6.1 The right to prison leave and discretion

Apart from restrictions in terms of access to the courts, we have observed that another obstacle to AtJ in the case of prisoners in Denmark is that they have no right to prison leave. In Germany, too, no absolute right to prison leave exists in the sense that, if certain conditions are met, a prisoner will be legally entitled to be granted leave. Instead, the law grants discretion to the prison administration to permit leave if it is deemed that a

[11] Most legal regulations cited in this article exist in similar forms in all 16 prison acts of the federal states. Since not all of them can be covered in this article, the state of North Rhine-Westphalia will be used as an example.

prisoner is not at risk of absconding or misusing the leave. Therefore, it may seem contradictory at first glance to speak about a "right" to prison leave in Germany, when at the same time prison leave is subject to a discretionary decision. In favour of our definition of prison leave as a (conditional) right, the ECtHR has stated that the mere fact that the wording of a legal provision affords an element of discretion does not in itself rule out the existence of a right (*Boulois v Luxembourg* 37575/04, § 93). Prison leave, however, can hardly be considered a right if it is presented and dealt with in action as a privilege, and if the administration cannot be overruled by the courts when it comes to discretion on such open and vague matters as whether prison leave may affect public trust in the justice system, as is the case in Denmark.

Despite the existence of discretion, the legal situation is very different in Germany. According to all the federal prison acts, the precondition for prison leave is that there is no anticipation that the individual prisoner will abscond or misuse prison leave. While a Danish prisoner needs a fair reason to be granted leave, in Germany – at least in theory – the prison needs a fair reason for rejecting leave based on the individual case.[12]

Regarding the prediction of what an individual prisoner's future behaviour will be, the prison administration additionally enjoys a margin of appreciation. Within its scope, several different decisions are possible that adequately respect the fundamental rights of the prisoner. However, according to the FCC, the courts are obliged to examine whether the prison administration has acknowledged the right to rehabilitation as guaranteed by the Constitution. For instance, a practice which limits prison leave to prisoners who are in an open prison would violate these principles. The prison administration may not blankly refer to a risk of absconding or misusing prison leave but must disclose the relevant facts and reasons that led to the refusal within the framework of an overall assessment that considers both the pros and cons surrounding leave (BVerfG, NStZ 1998, 430). The FCC has stressed that there is always a risk of absconding and misuse associated with prison leave. The reason for denial must be specified and substantiated, and the result must be that the risk would be indefensible. While a court may not simply replace a prison administration's prediction with its own, it must assess whether the administration has considered all the relevant facts and has thus made a well-informed decision (BVerfG 21.09.2018 – 2 BvR 1649/17 – Rn. 28, juris). An insufficient exploration of the facts, not only by the prison administration, but also by the courts, with respect to prison leave is one of the most frequent issues dealt with by the FCC in the field of prison law. The facts must refer to each individual case and may not simply be based on "experience". For instance, the FCC rejects the assumption of a general relationship between the remaining time that must be served in prison and an allegedly higher risk of absconding (BVerfG, NStZ 1998, 434).

In addition to parliamentary laws and the Constitution, the federal states have individual internal regulations that are binding on the administration but not the courts. The administration may not generally refer to internal regulations instead of acknowledging the details of an individual case. Often, internal regulations have created

[12] There are also further conditions (e.g., the minimum time already served) which vary between the different federal states. These must be met before the prognosis is established and are not discussed further here.

a hidden system of course correction (rule-based discretion) which is more restrictive than the law (Burkhardt 2021, marginal no. 76).

One important example of this is the obligation created by internal rules to obtain an expert assessment before prison leave is allowed. Such an assessment would be carried out by a psychiatrist and/or psychologist, who would explore the potential danger associated with an individual prisoner. In the case of conviction for certain sexual or violent crimes, life sentences or preventive detention, etc, the court is obliged to obtain an expert opinion as a precondition before making a decision on early release (sect. 454, para 2, Code of Criminal Procedure). However, with respect to prison leave, this obligation is not stipulated by law, but is often mandatory according to internal administrative rules in more severe cases.

It is known from international research that the permanent assessments of prisoners are a form of soft power due to the threat of negative reports. Prisoners are lured into compliance based on the hope of obtaining some concession, such as parole. However, these hopes are often dashed, and the psychological power turns out to be a form of "responsibilization" (Crewe 2011, Larrauri 2020). There are indications that this is the same in Germany (Graebsch 2017a). The experts who give their opinion are selected by the court or the prison administration. A survey of medical and psychological experts working for the courts confirmed that they often receive guidance from judges regarding their expectations for the expert witness, and that many of them are economically dependent on receiving further assignments from the courts (Jordan 2016). Expert opinions often do not represent a new and independent evaluation of a case, but are based on files belonging to the authorities given to the experts, and confirm the preconceptions of the prison administration, the court, or the prosecution. As a result, they may turn out to be an obstacle preventing prisoners from receiving a positive decision.

Moreover, internal administrative rules compel prison administrations to seek the consent of certain public authorities before a prisoner is granted leave. Depending on the case, this can be the consent of the Ministry of Justice, the prosecutor, or, in the case of foreign nationals, the immigration office. According to the law, the prison administration must decide independently of these bodies and is only required to consider whether there is a risk of the prisoner absconding or misusing the leave. However, it is unlikely that the opinion of these authorities – which are often opposed to prison leave – does not unduly influence the decision of the administration (Burkhardt 2021, marginal no. 102 et seqq.). Although there are no systematic statistics available, it is known that foreign nationals are only very rarely granted prison leave, and as a consequence experience a very different kind of de facto prison regime that is lacking in rehabilitative interventions (Graebsch 2017b, 2021, marginal no. 102 et seqq., for prison leave 121-129). Despite differences regarding the "law in the books", the practical outcomes and results appear in the final analysis similar to the situation in Denmark.

However, as mentioned above, the courts in Germany, unlike those in Denmark, must still assess whether the prison administration based its decision on an exhaustive evaluation of the facts, and whether it has exercised its discretion in an appropriate manner.

7. Methodological approach to analyse cases in Germany and its limitations

In international discourse on prisoners' rights, Germany is usually considered as a state with rather high standards, due to its successful system of judicial review (Morgenstern & Dünkel 2018: 24). We will challenge this perspective by highlighting obstacles prisoners usually experience when applying for prison leave.

To understand how prison-law in the books relates to legal practice, we will analyse the correspondence between prisoners from all over Germany and the *Prison Archive.*

In our analysis we concentrate on letters in which prisoners do not simply complain that the prison administration has denied them prison leave, but in which they describe the reasons given for the denial. On some occasions, they have already reached out to the court, and we are able to follow up on their experiences. We will analyse the obstacles they encounter with respect to prison leave. We have selected communications with 33 prisoners between 2015 and 2020. The correspondence primarily deals with the subject of prison leave and often includes several letter exchanges. We used the MAQDA software for qualitative data analysis and analysed 193 codings referencing obstacles to prison leave. From this material we drew on examples pointing to structural problems and demonstrate these using model cases.[13]

We also included five cases in which the lawyers for the *Prison Archive* decided to represent the prisoners in court, mainly on a pro bono basis, as the cases were too complex and/or important for the legal counsel simply to advise the prisoners on the best course of action. This approach allows for the court decisions and arguments used by the prison administration, as well as the experiences of prisoners, to be analysed.

However, we must firstly outline an obvious blind spot in this analysis. The court procedure in prison law is a written procedure; judges have the right to proceed by way of an oral hearing, but they seldom do this. In this respect, there is no difference between the German and the Danish systems. Applications are expected to be in writing or may be given to the court's registry in the language of the court, which is German (sect. 184, Code on Court Constitution, *Gerichtsverfassungsgesetz*), with a minor exception in the case of Sorbs. This procedure is different from that in Denmark, where the prisoner must inform the prison administration of his or her intention to appeal against a decision. The impression one gains is that the German system is more independent of the prison administration. However, one of the remaining obstacles in this context is that dictating a complaint only solves the problem of being unable to (physically) write, but does not address the problem of a prisoner being unable to phrase a text that adequately serves the purpose of juridical proceedings. Moreover, there is no obligation on the part of the prison to inform a prisoner of the complaints procedure to contest a certain decision. In contrast, administrations outside prison always have the duty to give this information to those affected by their decisions. This difference is usually justified by the prison authorities referring to the general information relating to complaints procedures that is given to prisoners upon their reception in the prison. However, the latter is often overlooked, or the information is incomplete, despite criticism of this state of affairs by the Council of Europe's Committee for the Prevention of Torture (cf. Cernko 2014, 321 et seqq.). Moreover, not all federal states have enacted a clear provision preventing prison

[13] Shorthand symbols of an exemplary letter or case will be found in brackets.

administrations from supervising letters sent to a court (Knauer 2021, marginal no. 24). Access to a lawyer is also restricted in prison law. The court fees are low, the argument being that these are aligned with the wages of prisoners, who could potentially have to pay them if they lost the case. However, since lawyers' fees are calculated accordingly, these are too low to allow them to earn a living. Thus, lawyers rarely take prison law cases. The approval for legal aid[14] depends on a decision by the very same court postulating a good prospect of success for the case. Often the court's final decision is negative, and the negative decision on legal aid is given only together with the final one at the end of the proceedings.[15] Consequently, the prisoner often does not know in advance whether the state will pay for the lawyer or not.

The service offered by the *Prison Archive* is based on written communication with the prisoners, which requires them to have the ability to write (in German or English), or to have someone to help them with their writing. As a result, the threshold for consultation with the *Prison Archive* is very similar to that for going to court, with the exception of the question of costs. Therefore, we will not be able to track obstacles to access below this threshold. However, the following example[16] gives an insight into how these kinds of obstacles are dealt with:

An English-speaking prisoner tried to convince the prison administration and courts to communicate with him in English. When this was denied several times, he wrote a letter to the North Rhine-Westphalian ombudsman for prisons –in English. He received the answer – in German – that they could deal only with complaints written in German, and the ombudsman advised him to ask a cellmate to translate his complaint (CC1).[17]

Thus, the first obstacle to accessing justice is the ability to file an application. Even prisoners who can write in German are often unable to meet the (legal) language expectations of the court, make their concern understood, and frame their arguments legally. In contrast, communications between the prison administration and the judge are much easier and often take place on a par with each other, and in an informal setting (Feest *et al.* 1997, 92 et seqq.).

8. Barriers to successfully applying for prison leave

8.1. Difficulties with the application as such

Prisoners are expected to apply for prison leave using a standard form. However, the response they receive will often be less formal (e.g., the form is given back to the prisoner who is told that the application has been unsuccessful, instead of the response being filed and the main reasons for its rejection outlined (Feest *et al.* 1997, 72 et seqq.). This can

[14] In cases of indigence, legal aid encompasses litigation free of charge using a lawyer of one's own choice (sect. 114, Code of Civil Procedure). As opposed to fees for a criminal conviction, the costs will not be recovered from the prisoner later like they are in Denmark.
[15] Cf. this and further obstacles, Eupretrialrights 2019, with many of them also applying to convicted prisoners.
[16] Case examples are based on the file summarized by Christine Graebsch. They are in italics to separate them from the rest of the text.
[17] This approach violates international standards (Kirs 2021, p. 33).

happen several times for various reasons, and often without any written notification (e.g., K20).

Verbal rejections allow the prison administration to change their arguments at a later stage in case of a court procedure, as well as open up opportunities for different kinds of deceit and miscommunication (Feest *et al.* 1997, 66 et seqq.). These are often connected to reasoning that constitutes a rather obvious violation of the law. Examples of this are:

- the respective prison institution has no "tradition" of granting leave (W15);
- leave is granted, in general, in open prisons and not in closed ones (CC1; K20);
- denial is owing to a need for deterrence (K19);
- denial is owing to a lack of consent from the migration office (Y15);
- the announcement by the prisoner that he will seek legal protection in the case of denial is interpreted as being coercive (P18, later overridden by the court of second instance); and
- an application from the prisoner regarding a parallel issue (leave for another date) is pending at the court, and a decision about the new application is only possible after its withdrawal (CC1).

A frequent reason given for the rejection of leave is that there are not enough staff members to accompany prisoners should they require an escort. Prisoners are in practice regularly required to be accompanied during their initial prison leave and will later be permitted independent leave. Rejection of an application due to a lack of staff is against the principle of rehabilitation protected by the Constitution, as stipulated by the FCC numerous times.[18] This does not diminish the popularity of the argument (e.g., D16 overridden at – but not before – the court of second instance; F16; F18).

Another strategy that Feest, Lesting and Selling (1997, 71 et seqq.) have already described is for officials to claim that the hands of the administration were tied by legal regulations without mentioning that, in fact, the administration is obliged to use its discretion and to decide the issue in accordance with the specifics of the individual case.

8.2. Discretion

As already mentioned, the prison administration may (in German, *kann*) allow a prisoner to leave prison (e.g., for a period of time during one day or for longer) if there is no danger of the prisoner absconding or misusing the leave (e.g., sect. 53 StVollzG NRW). However, discretion may only be exercised in line with criteria that are accepted by law. A misuse of discretion, a failure to use discretion, or simply refraining from weighing up the arguments would be a violation of the law.

If the prison administration denies a prisoner leave for reasons that are not compliant with the law, the prisoner who complains to the court and is successful will only receive a decision stating that the rejection of prison leave was against the law, and that the administration is, therefore, obliged to consider the application once again. The prisoner may then receive a new decision regarding leave that may also be negative. However, different arguments may have been used for the refusal. This is more or less similar to

[18] E.g., BVerfG, 26.11.2011–2 BvR 1539/09.

the situation in Denmark. Should the Danish court deem no obstacles to prison leave to exist, the court cannot overrule a rejection by the administration; instead, the court may only encourage the administration to formulate the necessary individual conditions.

In Germany, in exceptional cases in which the court considers the decision of the administration to be seriously flawed, the court may, however, consider a reduction of discretion to zero (*Ermessensreduzierung auf Null*), which means that there is no margin for discretion left, and then the court may make the decision itself. As a result, the prisoner being entitled to a flawless decision will then amount to his/her being directly entitled to the desired outcome, which in our case would be prison leave. This happens in practice, although not often.

8.3. Playing for time and avoiding transparent decision-making

Prison administrations use several strategies that result in delays in the decision-making process. The structure of the procedure in a case involving the exercise of discretion – in almost any area of prison law – obviously facilitates the option of stalling for time. The risk that this strategy will be pursued by the authorities is intensified since, for reasons of discretion, as explained above, it is unlikely that the first application to the court will be successful. Feest, Lesting and Selling (1997, 70) have already described the methods used by prison administrations to play for time (e.g., by generally making use of the three-month timeframe required before a prisoner can file a lawsuit based on failure to act). From the letters we have analysed, we can also identify this as a prominent strategy used by prison administrations that occurs at all stages of the decision-making process. This ploy often takes the form of avoiding making a decision on an application or refusing to give clear and transparent explanations for its rejection. Paradoxically, prisoners often report that the administration (orally) stated they were not allowed to decide on an application before three months had elapsed. This turns the right into a burden.

When a prisoner actually hands in a written application for prison leave, he/she will, as a rule, be denied a receipt. Sometimes they are informed weeks or months later that the application has "disappeared". Lacking a receipt, they cannot prove their application.

The lodging of a duplicate application is especially relevant in cases where the prison administration does not directly reject an application, but keeps the prisoner waiting for months for a decision. If the prisoner is unable to prove the former application, he/she cannot successfully go to court with a complaint based on failure to reply. The situation is even worse in the case of applications for prison leave made in terms of a prisoner's preparation for release, given the regular minimum waiting period of three months for a complaint that is based on a failure to act.

At some point in time before release, the aim of prison leave is slightly different from its function in earlier phases of a prison term. Near to a prison term's end, leave serves the purpose of establishing adequate re-entry into society, while during earlier phases its most important aim is rehabilitation in the sense of testing the prisoner's behaviour outside prison and proving his/her reliability, etc, by returning. During the last few

months of a prison term,[19] the laws of the federal states stipulate that the prisoner may (*kann*) not only be allowed to receive prison leave, but should (*soll*) be allowed it (e.g., sect. 59, para 1, StVollzG NRW). In North Rhine-Westphalia, for instance, the law explicitly states that the risk of misusing prison leave must be balanced against the risk of an unprepared release of the prisoner (para 3). In other words, during the preparation for release, prison leave is a right for prisoners, which may only be denied in exceptional circumstances (Bahl and Pollähne 2021, margin no. 49).

However, if prison leave in terms of the preparation of the prisoner for release is rejected by the administration, or if no decision is taken at all, the prisoner will often be unable to secure a timely court decision that would enforce the right to prison leave.

A striking example is the case of T, who has now been accompanied by the *Prison Archive* for more than a decade.

Sentenced to a prison term of around eight years, he spent six months during his last year in a different prison for educational purposes. Five months before his expected release, which was supposed to take place between Christmas and New Year's Eve, he applied for prison leave to prepare for his release and also for "Christmas amnesty", with the latter meaning that he would be released for a period of time before Christmas, when it is less difficult to find a place to stay and a job or to apply for welfare benefits, etc. However, this application was rejected (paradoxically) due to the fact that he had no place to stay outside prison. His application for prison leave was rejected verbally by the first prison: they did not know him well enough, and therefore he was recommended to apply to his "mother institution" after his return. There, it took three months for the authorities to decide on his application. The delay was explained by the fact that they needed to get to know him first (despite his long-term previous stay). They rejected his application verbally, stating that he was "not suitable" for prison leave, without giving him any further reasons. Two weeks before release, he filed a complaint, as well as an application for interim measures, to the court. He was released without having received a response from the court, without having been prepared for his release, without a place to stay, and without a job. Shortly after his release, the court decided that the case was inadmissible, due to the lack of legitimate interest in proceedings, as he had now been released. Months later, when he had still not managed to sort out his affairs, he raided the same bank that he had raided previously; he was sentenced to a prison term and a subsequent preventive detention was ordered. When he pointed out the reality of his situation and the fact that he had not been properly prepared for his release, the court perceived this as an aggravating circumstance. He was said to be shifting responsibility to others, and the court told him that he should have sought legal protection for i.a. release preparation – which obviously was what he did before, albeit unsuccessfully, due to reasons inherent in the system.

This example allows us to understand a discrepancy between the aim of release preparation as stipulated by law and the barriers to access a timely decision by the prison administration and the court. Owing to similar structural delays in the judicial decision-making process, the court's decision will often not accelerate the process but lead to further delays. After the European Court of Human Rights had convicted Germany numerous times for delays in court proceedings,[20] the instrument of an objection

[19] In many federal states, these are explicitly six months; in other states, no specific time frame is mentioned, while a span of three to nine months is regarded as reasonable (Bahl/Pollähne 2021, margin no. 59).
[20] Resulting in the pilot decision, *Rumpf v Germany*, no. 46344/06, 2.9.2010.

regarding delay was introduced (sect. 198, Code on Court Constitution). However, this must be brought to the court where the delayed procedure is pending, and not before six months as a rule. Moreover, it will not enforce a timely decision but will, at best, result in compensation, which must be sought in a separate civil process. However, in the rare case of prisoners who make use of this procedure, it could also end with a court decision affirming that the court's statement that a delay has taken place already serves as adequate compensation for the prisoner.

8.4. Prognosis, therapeutization, and soft power

As previously mentioned, another prevalent issue connected to prison leave, as well as release, is the court's dependence on an expert prognosis and positive reports by prison staff. Their relevance can hardly be overestimated as an example of soft power in prison. The pressure to prove that a prisoner is reformed pervades the experience of imprisonment, as is well known from international research (Crewe 2011) and letters to the *Prison Archive* (Graebsch 2017a). It is very difficult for a prisoner to challenge a witness's expert status, and this is something that is rarely called into question in practice (Galli 2011, 43 et seqq.). In this context, two short examples must suffice to demonstrate the way in which prognosis, the therapeutization of prison environments, and the execution of soft power are intertwined.

CC3 received an order of preventive detention after punishment, resulting in his facing an undetermined length of liberty deprivation, after he had already served a full prison term. He decided to take legal steps to secure access to an institution offering social therapy. He hoped this would bring him closer to regaining his freedom one day, as he could work intensively towards his rehabilitation there. When the prison administration learned about his endeavour, they cancelled allowances for escorted prison leave, to which they had already agreed. As a consequence of his application for social therapy and his regular contact with his lawyer, which led to "queries" by her, as well as an ongoing complaint to the court, compliance with his treatment was doubted. The argument was that he trusted his lawyer more than the prison staff. The prison administration argued that, owing to this mutual lack of confidence, leave had to be cancelled.

CC5, who was confined in preventive detention, applied for prison leave in the company of a trusted person, often a prison officer. An expert statement supported this leave as a next step for him. The prison was reluctant to accede to the request and obtained a second expert statement. When this also turned out to be positive, the prison decided to obtain a third expert statement that was, however, also at least not negative. In-between, the court had decided that the prison was not allowed to obtain a third expert statement, because there was no need for it, given that there was a clear-cut situation speaking for granting accompanied leave. Meanwhile, CC5 has won five court cases on this issue but is still denied accompanied leave. The prison now asserts – contrary to the law and the expert statements – that CC5 has to develop a trustful relationship with prison staff as a precondition for his accompanied leave. However, his trust in prison staff has deteriorated owing to their behaviour in the very same proceedings. Besides this long-term denial of prison leave, this state of affairs will also result in the prolongation of his stay in preventive detention. This is because he will need leave as a precondition for release, as explained above.

In the case of a fixed prison sentence, this category of obstacles is less important, but by no means irrelevant. Prisoners who serve a fixed term can still hope to be released on parole earlier than at the very end of the sentence. Thus, they are in a similar situation.

Even though the prisoner can gain some relief from his/her acceptance that he/she will be serving the full term, this approach will most likely result in close supervision after the prisoner's release (*Führungsaufsicht*, sect. 68f, Penal Code).

8.5. Inadmissibility and Kafkaesque situations

As shown above, one of the most prevalent problems that arises when prisoners try to enforce their right to prison leave is the long duration of court proceedings. A prisoner who applies for leave on a certain date (e.g., a birthday) will often wait in vain for a decision before this date. Afterwards, however, the complaint will become void. This can only be prevented when the prisoner is able to substantiate a persistent, legitimate interest in a declaratory judgment. The latter will only be accepted as an exception (e.g., in cases when prisoners demonstrate a danger of repetition by the prison administration or a serious violation of fundamental rights). This situation can result in very complex and ambiguous rejections of complaints being rendered inadmissible. As a result, the prisoner has access to the court, but the high threshold of admissibility denies him/her access to a material decision about the problem.

In the case of CC4, the FCC pointed out that the interpretation of the law by the courts and prison administrations may not result in a Kafkaesque situation. A Kafkaesque situation would be one in which the prison administration would be able to decide on its own whether or not complaints against its decisions were possible. This is what sometimes happens when administration and courts use and interpret the procedural law in a way that makes it impossible for the prisoner to successfully overcome concurring procedural obstacles to obtain a decision on his/her material concern, such as prison leave. The mere fact that the FCC has had to make this plain and remind prison administrations and courts, as it very often does, of prisoners' constitutional right to legal protection (Art. 19, para 4, Basic Law) speaks for itself.

However, this is just an example of the sometimes extremely complex requirements regarding the admissibility of a complaint. Problems occur mostly when the aim of the original application is unattainable because it is overtaken by time. Due to the long duration of court proceedings and the lack of effective remedies for delays, this situation occurs often. Sometimes the impression given by the courts is that they intentionally wait for this to happen before they take their decision. Clearly, a very long fuse, an in-depth knowledge of the law, a long remaining prison term, and considerable patience are necessary to bring such a case before the FCC, and many prisoners are lacking in this regard.

As a result, the legal practices described above deny AtJ for the overwhelming majority of prisoners.

9. Our findings with respect to AtJ for prisoners

9.1. Discretion, the rule of law, and AtJ

Prisoners in Germany have comparatively easier access to courts than prisoners in Denmark, but the question is whether this results in remarkable differences in AtJ with respect to prison leave. According to our findings, despite the differences in legal regulations, there are more similarities than one would otherwise expect. The margin of

discretion granted to prison administrations in both countries appears to be a weighty explanation for the similarity in judicial outcomes.

Criminological research into discretion, which is mostly based on ethnographic research in prison, regularly points to the fact that discretion on the part of prison staff is necessary for them to govern a prison successfully and decently (e.g., Liebling 2000, Liebling and Price 2011). Discretion, instead of a blind application of rules, allows for negotiation and communication-based decisions, as well as the inclusion of individual circumstances into decision-making, which ultimately promotes peace and order, and prevents conflicts.

In contrast, literature dealing with the granting and denial of prison leave tends to perceive discretion as unjustly hindering prisoners' access to what should be a guaranteed right (e.g., Larrauri 2020, Durnescu and Poledna 2020, Robert and Larrauri 2020). However, discretion and legal rights do not (necessarily) exclude one other. The prison ethnography literature deals with discretion in respect of the selective enforcement of rules, as well as access to an otherwise fixed and de-individualized system of accessing privileges. In contrast, we deal with an inevitable element of rehabilitation that also paves the way to an earlier release. It is a matter of debate whether and to what extent discretion can and should serve the aforementioned purposes in terms of decisions regarding prison leave.

However, even if this question is answered in the affirmative, it is important to note that we deal with AtJ in cases in which a consensual solution has failed from the prisoner's perspective. Prisoners are well aware of the soft power executed by the prison administration and its latent intensification when a prisoner files a complaint. This not only becomes visible in the example of the German prisoner CC3, whose leave was retrospectively cancelled because he complained to the court, but is also expressed in the well-known saying in prisoners' language in Germany: "S/he who writes will remain." Ironically adopted from the realm of academia, it implies that writing a complaint with respect to prison law (e.g., regarding leave) will lead to a denial of parole. Thus, a prisoner will think twice before going to court.

When we discuss access to a fair and reasonable court decision, we thus deal with a different stage of the decision-making process than the stage evaluated in the prison literature canvassed by Liebling and colleagues (e.g., Liebling 2000, Liebling and Price 2011). Spader (1984) describes the way out of the conflict between the rule of law and the rule of man (discretion) as a "golden zigzag" because it can never be resolved. In this respect, the least that would be afforded from an AtJ perspective is to grant access to a critical evaluation of a prison administration's decision with which a prisoner is dissatisfied. This would require an effective and timely remedy, as well as a procedure that empowers the prisoner to approach the administration on an equal footing. As in Germany, the possibility for the courts to grant parole without prior leave, if the rejection of leave was unlawful, as well as stating a regression of discretion to zero are sensible attempts to use in cases of discretion. However, as the case law of the FFC as well as the examples from the *Prison Archive* show, they are insufficient in terms of overcoming the considerable reluctance to prisoners' AtJ in a material sense.

Moreover, the German system at least distinguishes between a margin of appreciation with respect to a prognosis, partly executed by experts (psychiatrists or psychologists),

and a margin of discretion, referring to a decision in which the risk prognosis allows for leave. The former advocates the use of psychological power but also acknowledges that the prison administration may have better knowledge of a prisoner. The latter, however, in conjunction with the lack of certain and adequate time frames on the part of the prison administration, as well as the decision-making power of the courts, demonstrates that discretion leads to indefinite waiting. It also has the potential for power games with respect to (alleged) formal requirements. It is necessary to stress that this would not be the case if the courts did not create obstacles for prisoners when they attempt to access effective and material justice. The FCC aims to consistently counteract such tendencies, as decisions on the possibility of parole without prior leave, as well as the aforementioned case on Kafkaesque situations, show. On the other hand, the FCC is also part of the system in the sense that it is not uncommon for decisions to take more than a year or even several years. In this regard, there is no difference in relation to complaints based on the Danish Constitution. As for Germany, only two percent of constitutional complaints (in general) are successful, while the majority are denied without any reason being given.

In addition, the German system also shows tendencies towards extending psychological powers, with the discretionary prognosis regarding potential risks during prison leave being one important example, and release on parole being another. This can seriously hinder a prisoner from having his/her position heard in court, especially if he/she does not have a say as to who these experts are.

Apart from meaningful legal aid, the support of a lawyer, and access to suitable translation services, there need to be, at a minimum, clear deadlines for the decisions of the administrations and the courts, as well as tangible, positive consequences when the system malfunctions for prisoners – for example, granting a prisoner parole despite the fact that he/she has not been given prior leave. There is, of course, no guarantee that this would help change the prevailing culture of co-operation between administrations and courts that is detrimental to prisoners' rights.

9.2. Procedural (in)justice

A growing body of literature refers to the need for fairness and procedural justice in prison as a precondition for accepting decisions of the administration as legitimate. The German cases mentioned above are, however, examples of how procedural law is used to circumvent the guarantee of certain material rights to prisoners. These strategies can be deemed "procedural injustice" in contrast to this. This term applies in a double sense: while they deny prisoners a fair procedure, they also do this by making (mis)use of procedural regulations and arguments.

However, recent studies suggest that the legitimacy of decisions and procedural fairness are important for the prison climate, the prevention of prison violence, and even relapse prevention (e.g., Beijersbergen *et al.* 2016).

Having said this, the acceptance of fundamental rights and the possibility of enforcing them should, of course, be considered a value in itself. While the selective and discriminatory granting of prison leave may not guarantee legitimacy (Robert and Larrauri 2020, 258), this points to the importance of a judicial corrective that is more than a hollow promise. It has to grant either direct and timely access to a prisoner's requests

(in our case, prison leave) or a transparent, comprehensible and timely articulation of the reasons for rejection, enabling the prisoner to understand the expectations for a successful later application. The prisoner who is supposed to learn to be law-abiding in prison must have the opportunity to see that laws are taken seriously by the administration, and that the courts act as a role model in this regard.

10. Resumé: Access, justice and AtJ

AtJ is often described as being given the opportunity to have one's rights tried in court. Hindrances may be that the individual does not have access to legal advice to help him/her to figure out whether the problem he/she has is of a legal character and is thereby suitable for a court case (for instance, Kristiansen 2018, 100). It has also been pointed out that a judicial process entails substantial expenses, which the individual cannot afford, and which could prove prohibitive in terms of gaining access to the courts.

Regarding AtJ terminology, we started out, in compliance with many other studies, by researching access to the courts and narrowing this down to prisoners' access to the courts in respect of prison leave. We found interesting differences between the two jurisdictions and important issues that should be evaluated and analysed further. Throughout our research, we focused on the content of formal legislation and the discrepancies between the wording and practice of legal rights. Condensed into one sentence, we learned that even the principle of full and open access to the courts does not overcome all AtJ issues.

Attempting to dig deeper, we uncovered the debate regarding the "access to justice crisis" and examined the way in which it was described in the literature almost 10 years ago. Leitch (2013, 229) argued for inclusion and empowerment, and even a democratic influence on justice, when she posed the question whether the goal was to improve people's access to the legal process or to enhance their participation in it, and ultimately to effect justice as an end in itself. Rhode was concerned about the lack of clarity and consensus about the content of the term "access to justice". She introduced the term "substantive justice", which she defined as "access to just resolutions of legal disputes and social problems" (Rhode 2013, 532).

In this context, we argue that this study – however narrow – does contribute to empirical studies on AtJ. By adding the perspective of prisoners, who, as far as we are concerned, have not – at least in the European context – played a central role in AtJ research, we found aspects that indicate new considerations of value for further studies regarding access to the courts and justice. Prisoners are of special interest because they are ordinary members of society who at the same time have been cast aside on account of their having been sentenced to exclusion, owing to their own wrongdoing. Prisoners are cut off from normal societal communication and the safeguarding of their own interests. For exactly these reasons, AtJ for prisoners is a topic well suited to evaluating the real depth and scope of accessible and genuine justice in society.

We argue that prisoners should have access to the complaints system when they perceive a decision on an essential matter (e.g., prison leave) to be unjust. However, as acknowledged by the German system, in prison any aspect of daily life can be considered as "essential" because the institution holds a grip on the complete living situation of a prisoner.

We also argue that it is important from the perspective of general trust in a constitutional state that complaints can be made. This principle is independent of the actual number of complaints that are processed. A limited number of complaints cannot be seen as an indicator that there is no reason to complain. The fact that one is excluded from society, is not familiar with the complaints process, and does not know the (legal) language are obvious hindrances for filing a complaint, and are very frequent among prisoners in both countries. Moreover, it should be added that, without justified trust in the fairness and impartiality of the courts, a formal right to complain is pointless. In this study, we found examples of well-intended regulations resulting in the defeat of prisoners' interests, owing to the lack of additional safeguards to empower a prisoner in a legal dispute with an overly powerful institution. We also found courts that by no means automatically deal with prisoners' complaints within the correct time frame, and in a thorough, fair and transparent way. We see these hindrances as a practical example of the need to enhance participation, which Leitch calls for while arguing for inclusion and empowerment, and even a democratic influence on justice.

It has rightly been argued that AtJ research should not solely focus on AtJ for the poor (Albiston and Sandefur 2013). The original argument for this was that we miss the fact that rich people may also not exercise their rights, simply because they do not realize that they are able to. We highlight the risk that AtJ could be considered a social project, which would be wrong from our point of view. AtJ is a democratic project aiming for equal chances in life for all humans. In this regard, we found considerable AtJ issues in our study. In both countries, there are several layers of legal regulations on prison leave; some regulations are binding, while others have the status of guidelines or internal instruction. In short, it would require a legal qualification to successfully manoeuvre among all the legal sources and complicated formal requirements, which can amount to Kafkaesque situations. We can only think of a few groups in our societies (if any) who are subordinate to such regulations and at the same time faced with so many obstacles to safeguarding their own interests. Prison regulations are a good place to start in a society that aims for equal access to genuine justice.

References

Albiston, C.R., and Sandefur, R.L., 2013. Expanding the empirical study of access to justice. *Wisconsin Law Review*, 101.

Bahl, E., and Pollähne, H., 2021. Vorbereitung der Entlassung. *In:* J. Feest, W. Lesting and M. Lindemann, eds., *Strafvollzugsgesetze*. 8th ed. Cologne: Carl Heymanns, II § 42 LandesR.

Beijersbergen, K.A., Dirkzwager, A.J.E., and Nieuwbeerta, P., 2016. Reoffending After Release: Does Procedural Justice During Imprisonment Matter? *Criminal Justice and Behavior*, 43(1), pp. 63–82.

Burkhardt, S.U., 2021. Lockerungen zur Erreichung des Vollzugsziels. *In:* J. Feest, W. Lesting and M. Lindemann, eds., *Strafvollzugsgesetze*. 8th ed. Cologne: Carl Heymanns, II § 42 LandesR.

Cernko, D., 2014. *Die Umsetzung der CPT-Empfehlungen im deutschen Strafvollzug*. Berlin: Duncker & Humblot.

Crewe, B., 2011. Depth, weight tightness – Revisiting the pains of imprisonment. *Punishment & Society*, 13(5), pp. 509–529.

Dragsted, A., and Schiøler, J., 2017. *Straffuldbyrdelsesloven med kommentarer*. 2nd ed. Copenhagen: Jurist og Økonomforbundets Forlag, pp. 539–570.

Durnescu, I., and Poledna, S., 2020. Prison Leave in Romania and the Power of Street Level Bureaucrats. *European Journal on Criminal Policy and Research,* 26, pp. 231–246.

Engbo, H.J., 2005. *Straffuldbyrdelsesret*. 2nd ed. Copenhagen: Jurist og Økonomforbundets Forlag.

Eupretrialrights, 2019. *Bringing justice into prison: for a common European approach: White Paper on access to justice for pre-trial detainees* [online]. Available at: http://www.prisonlitigation.org/wp-content/uploads/2021/04/WHITE-PAPER-final-ENG.pdf

Feest, J. and Murayama, M. 2021. Protecting the Innocent Through Criminal Justice. *In:* J. Feest, ed., *Definitionsmacht, Renitenz und Abolitionismus*. Wiesbaden: Springer, pp. 47–75.

Feest, J., Lesting, W., and Selling, P., 1997. *Totale Institution und Rechtsschutz: Eine Untersuchung zum Rechtsschutz im Strafvollzug.* Opladen: Westdeutscher.

Galli, T., 2011. *Lockerungsbegutachtungen im Strafvollzug. Kritik aus kriminologischer Sicht.* Wiesbaden: Springer.

Goerdeler, J., 2021. Aufsichtsbehörde. *In:* J. Feest, W. Lesting and M. Lindemann, eds., *Strafvollzugsgesetze*. 8th ed. Cologne: Carl Heymanns, II, § 101.

Graebsch, C., 2014. Kontrolle des Strafvollzugs durch unabhängiges Monitoring und die Prävention von Folter und unmenschlicher oder erniedrigender Behandlung oder Strafe. *Forum Strafvollzug*, 6, pp. 390–396.

Graebsch, C., 2017a. Precrime und Strafvollzug. Resozialisierungsanspruch und Situation von Gefangenen bei prognoseabhängiger Entlassung. *Kritische Justiz* 50(2), pp. 166–175.

Graebsch, C., 2017b. Resozialisierungsauftrag bei Nichtdeutschen. *In:* H. Cornel, G. Kawamura-Reindl and B.R. Sonnen, eds., *Handbuch Resozialisierung*, 4th ed. Baden-Baden: Nomos, pp. 433–448.

Graebsch, C., 2021. Ausländische Gefangene. *In:* J. Feest, W. Lesting and M. Lindemann, eds., *Strafvollzugsgesetze*. 8th ed. Cologne: Carl Heymanns, II § 42 LandesR, V II, chapter 3.

Graebsch, C., forthcoming. Access to the judge but still not to justice? *In:* H. de Suremain, C. Graebsch and A. Le Huérou, eds., *Prison without violence? Human rights put to the test by prison policies (Ukraine, Russia, Germany, France).* Wiesbaden: Springer.

Johnsen, J.T., 2018. Nordic Legal Aid and Access to Justice. *In:* O.H. Rønning and O. Hammerslev, eds., *Outsourcing Legal Aid in the Nordic Welfare States* [online]. Cham: Palgrave Macmillan, pp. 227–267. Available at:

https://library.oapen.org/bitstream/id/454f25b2-9708-4d4b-979c-b2b35f8915a0/1002118.pdf#doi%3A10.1007/978-3-319-46684-2_10

Jordan, B., 2016. *Begutachtungsmedizin in Deutschland am Beispiel Bayern. Eine Befragung unter 548 medizinischen und psychologischen Sachverständigen in Bayern* [online]. Dissertation. Medizinische Fakultät der Universität München. Available at: https://edoc.ub.uni-muenchen.de/19622/1/Jordan_Benedikt.pdf

Kirs, E., 2021. *Complaint procedures and the right to information in prison: A handbook for national preventive mechanisms* [online]. Vienna: Institute of Fundamental and Human Rights, in cooperation with the Hungarian Helsinki Committee, the Bulgarian Helsinki Committee and the Associazione Antigone. Available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2021/04/handbook_complaint_procedures_and_the_right_to_information_hhc.pdf

Knauer, F., 2021. Überwachung des Schriftwechsels. *In:* J. Feest, W. Lesting and M. Lindemann, eds., *Strafvollzugsgesetze*. 8th ed. Cologne: Carl Heymanns, LandesR, II § 34.

Kristiansen, B.L., 2018. Legal Aid in Denmark. *In:* O.H. Rønning and O. Hammerslev, eds., *Outsourcing Legal Aid in the Nordic Welfare States* [online]. Cham: Palgrave Macmillan, pp. 99–124. Available at: https://library.oapen.org/bitstream/id/454f25b2-9708-4d4b-979c-b2b35f8915a0/1002118.pdf#doi%3A10.1007/978-3-319-46684-2_5

Larrauri, E., 2020. Reducing Discretion in the Administration of Prison Leave: In Search of Legitimacy. *European Journal on Criminal Policy and Research* [online], 26, pp. 141–156. https://doi.org/10.1007/s10610-019-09424-4

Leitch, J.A., 2013. Looking for quality: the empirical debate in access to justice research. *Windsor Yearbook of Access to Justice* [online], 31(2), pp. 229–255. Available at: https://doi.org/10.22329/wyaj.v31i2.4421

Liebling, A., 2000. Prison officers, policing and the use of discretion. *Theoretical Criminology*, 4(3), pp. 333–357.

Liebling, A., and Price, D., 2011. Prison officers and the use of discretion. In: L. Gelsthorpe and N. Padfield, eds., *Exercising discretion: Decision-making in the criminal justice system and beyond.* London/New York: Routledge.

Michaels, R., 2006. The Functional Method of Comparative Law. *In:* M. Reimann and R. Zimmermann, eds., *The Oxford Handbook of Comparative Law*. Oxford University Press, pp. 340–382.

Morgenstern, C., and Dünkel, F., 2018. Monitoring prisons in Germany: The role of the European Court of Human Rights. *In:* G. Cliquennois and H. de Suremain, eds., *Monitoring Penal Policy in Europe*. London: Routledge, pp. 17–35.

Nelken, D., 2010. *Comparative Criminal Justice.* London: Sage.

Nelken, D., and Feest, J., 2001. *Adapting Legal Cultures.* Oxford: Hart.

Rhode, D.L., 2013. Access to Justice: An Agenda for Legal Education and Research. *Journal of Legal Education*, 62, pp. 531–50.

Robert, L., and Larrauri, E., 2020. Prison Leave Across Europe: Some Reasons to Think About it. *Kriminologie – Das Online/Criminology – The Online Journal* [online], 2(2), pp. 251–263. Available at: https://doi.org/10.18716/ojs/krimoj/2020.2.9

Schoultz, I., 2018. Legal Aid in Sweden. *In:* O.H. Rønning and O. Hammerslev, eds., *Outsourcing Legal Aid in the Nordic Welfare States* [online]. Cham: Palgrave Macmillan, pp. 43–76. Available at: https://library.oapen.org/bitstream/id/454f25b2-9708-4d4b-979c-b2b35f8915a0/1002118.pdf#doi%3A10.1007/978-3-319-46684-2_3

Spader, D.J., 1984. Rule of law v. rule of man: The search for the golden zigzag between conflicting fundamental values. *In: Journal of Criminal Justice,* 12, 4, 1984, pp. 379–394.

Storgaard, A., 2020. Prison Leave in Denmark: How a Tradition of Combining Rehabilitation with Discipline Developed into Putting Access to Justice at Risk. *European Journal on Criminal Policy and Research*, 26(2), pp. 213–229.

Zweigert, K., and Kötz, H., 1998. *Introduction to comparative law.* Trans.: T. Weir. 3rd ed. Oxford University Press.