Developments

Incompatible Contrasts? – Preventive Detention in Germany and the European Convention on Human Rights

By Grischa Merkel[*]

Abstract

This article will give an overview of the idea and history of origins of preventive detention and the legal changes in the German Criminal Code that underlie the decision of the European Court of Human Rights (ECHR) (17 December 2009). It will attempt an outlook by considering the prospective outcome of future law suits against German legal statutes relating to preventive detention, and will also describe the present situation and current legal recommendations, including the much-discussed alternative of detention in psychiatric wards. The article will close with a brief comparative look at the related legal problems arising in countries with a criminal law which is based on the establishment of personal guilt of the offender while facing public pressure to detain persons for protective reasons.

A. Introduction

In Germany preventive detention is nowadays understood as an indeterminate, potentially life-long confinement, which extends the convicted offender's confinement beyond his or her regularly served prison sentence. The underlying argument here is the assumption, based on the severity of the committed crime, that the previous offender is likely to re-offend, once released. Mostly, this argument is applied to instances of violent or sexual crimes; however, nonviolent crime against property and legal estate may also lead to preventive detention in Germany. Such individuals will only receive parole if they can sufficiently demonstrate that they no longer pose a threat to the community – a demand very hard to meet, since these inmates are usually excluded from any efforts of social reintegration. Preventive detention has not at all times been an indeterminate confinement, but in recent years, in Germany considerable changes, aimed at a rather uncompromising policy of locking away presumably dangerous delinquents, have been made in the criminal law system, one of them being the abolishment of the restriction in time through a reform of the governing law in 1998.

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https://doi.org/10.1017/S2071832200020095 Published online by Cambridge University Press

In a seminal decision of 17 December 2009, the European Court of Human Rights (ECHR) in Strasbourg took issue with the German regulation and found that preventive detention as practiced in Germany "is to be qualified as a 'penalty'" and not simply as a measure of correction and prevention.[1] Hence, a basic principle of penal justice was breached by the new law of 1998 mandating the retroactive application of the rule of unlimited detention against presumably dangerous delinquents for reasons of public security. This pertains to the discharge of at least 80 prison inmates subject to preventive detention before 1998 when this measure had still been restricted to an ultimate duration of ten years. Since the appeal of Germany against this judgement was immediately refused by the court on 11 May 2010, the legal situation has become quite promising for preventive detention inmates – and a worry to legislators, police and the general public.

This article will give an overview of the idea and history of origins of preventive detention and the legal changes in the German Criminal Code that underlie the decision of the ECHR. It will attempt an outlook by considering the prospective outcome of future law suits against German legal statutes relating to preventive detention, and will also describe the present situation and current legal recommendations, including the much-discussed alternative of detention in psychiatric wards. The article will close with a brief comparative look at the related legal problems arising in countries with a criminal law which is based on the establishment of personal guilt of the offender while facing public pressure to detain persons for protective reasons.

B. The German Criminal Law – the judicial background of the ECHR decision

Preventive detention was introduced into the German legal system in 1933 as an indefinite detention subsequent to the penal time served by "habitual" offenders. Although coming into force under the Nazi-Regime, the idea of a criminal system pursuing preventive aims linked to an assessment of the 'dangerousness' of delinquents has no specific roots in Nazi ideology. Its roots go back to late 19th century criminal law doctrine developed by scholars like Franz von Liszt.[2] Its motivation was the development of an alternative to the traditional criminal system, which had been based on personal guilt and took shape during the German Enlightenment ("*Aufklärung*") in the 18th century and which was strongly influenced by Kantian moral philosophy. The challenge by von Liszt and others coincided with the flourishing of social-darwinistic thinking throughout Europe,[3] and eventually led to

[1] *M. v. Germany*, judgement of 17 December 2009. 5th Section, App. no. 19359/04, p. 27, *para.* 133.

[2] v. Liszt, *Der Zweckgedanke im Strafrecht*, 3 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT (ZStW) 1-47 (1883).

[3] Preventive detention came into force in Sweden in 1927, The Netherlands in 1929, Norway in 1929, former Yugoslavia in 1929, Italy in 1930, Denmark in 1930, Belgium in 1930, Poland in 1932 and Finland in 1932, see, *Bundestagsdrucksache* 13/2859, p. 3.

the indefinite confinement of thousands of people on grounds of their interference with various strands of the nationalistic ideology at that time.

This evolution of criminal law and the emergence of an alternative penal theory not grounded in the guilt principle are of crucial importance for an adequate assessment of the debate around preventive detention. The principle of guilt roots in the idea of self-determination and retaliation. It rests on the idea that the delinquent is charged for the crime he or she culpably committed, but is a free person thereafter, and thus will not be deprived of his freedom for the sake of public security or other interests. The fact that a crime was perpetrated under the influence of severe mental incapacity, however, leads to an exclusion of a verdict of guilt and therefore averts the judge from imposing a criminal sentence. So the principle of guilt does not apply in cases of mentally ill offenders who are detained on the grounds of their alleged dangerousness.

According to the doctrine of German Criminal Law even before the recent reform, the aim of preventive detention is not the retribution for past offences, but solely the protection of society from future harm. However, since preventive detention in Germany has always been reserved for culpable offenders only, this way of safekeeping beyond the served prison term collides with the guilt principle and its purpose of punishment aiming at retribution for guilt.[4] Despite their different aims the two models have coexisted in the so called "twin-tracked" system of the German Criminal Law since 1933: retaliatory penalty on the one hand, measures of correction and prevention oriented towards protective needs of society such as deterrence, security and betterment of offenders on the other.

After the Second World War preventive detention was abolished in the German Democratic Republic while it remained in force in the Federal Republic of Germany. However, the number of inmates in Western Germany fell below 1000 in the 1960s[5] due to a general reservation among the courts after the end of the Nazi-Era to impose preventive detention. In 1975, only 337 inmates were kept in preventive detention.[6] In order to lower the reservations of judges to imposing preventive detention, the legislature subsequently limited preventive detention when it was imposed for the first time to a maximum of ten years following a served prison term. Nevertheless, the number of inmates of preventive

[4] See, Köhler, *Die Aufhebung der Sicherungsmaßregeln durch die Strafgerechtigkeit*, in: FESTSCHRIFT FÜR GÜNTHER JAKOBS ZUM 70. GEBURTSTAG 281 (Pawlik/Zaczyk ed., 2007).

[5] KINZIG, DIE LEGALBEWÄHRUNG GEFÄHRLICHER RÜCKFALLTÄTER (2008), at 109.

[6] Federal Statistical Office (*Statistisches Bundesamt*) Fachserie 10 Reihe 4.1, 2010: https://www-ec.destatis.de/csp/shop/sfg/bpm.html.cms.cBroker.cls?CSPCHD=00500001000048auyhIA00000081paYbJYm_A7lLOqyNWZdg--&cmspath=struktur,vollanzeige.csp&ID=1025820, last accessed 22 September 2010.

https://doi.org/10.1017/S2071832200020095 Published online by Cambridge University Press

detention levelled at around 200 until the turn of the millennium.[7] The respective order had to be issued by the court as part of its verdict terminating its criminal proceedings. With a maximum of ten years of preventive detention 'added' to their prison term, convicts were thus informed of the ultimate date of their discharge.

C. Recent Changes with respect to preventive detention

The first dramatic change of this legal situation took place early in 1998, the year of the election of the new German Federal Parliament ("Bundestag") still under government of the Conservative Party with Chancellor Helmut Kohl, and a new law was conceived to fight sex offences and other severe criminality.[8] The 10-year cap on preventive detention was lifted in favour of a virtually unlimited duration. At the same time, the requirements for the imposition of preventive detention on physically aggressive and sexual offenders were lowered with respect to the number of requisite previous conviction(s) and to the severity of crimes committed.

Since the 1998 law's coming into force, the number of preventive detention inmates increased dramatically, pushing the total number of detainees to over five hundred in 2010.[9] However, the decision whether or not to subject an offender to preventive detention is still a matter of discretion since, in addition to the mentioned requirements, the trial judges must assess the future dangerousness of offenders, an assessment which is based on a problematic evaluation of their "disposedness" to commit severe crimes. There is much reason to believe that this adjudication takes place 'in the eyes of the public,' of sorts. As a result, it may therefore be less the change of the law, which directly impacts the courts in this or that direction, but rather a change in the public perception of criminality, especially of sexually motivated assaults. The sexual abuse and violent death of three girls aged 7 to 10 and of a young woman aged 18 became central topics of the press coverage between 1994 and 1997[10] and – presumably with respect to the upcoming election – a concern of politicians. Fuelled by tabloid publications and extensive media coverage, a picture of "sex-monsters" was painted, strangers in search of children in order to rape and kill them. Meanwhile, it has never been a secret that the vast majority of sexual and other

[7] For details of the quantity of preventive detention inmates see, the Federal Statistical Office of Germany (*supra,* note 6).

[8] *Gesetz zur Bekämpfung von Sexualdelikten und sonstigen gefährlichen Straftaten*, *Bundesgesetzblatt* 26 January 1998, part I no. 6, at 160: http://www.afane-jacquart.com/docs/2009/12/gesetz-zur-bekampfung-von-sexualdelikten-und-anderen-gefahrlichen-straftaten.pdf, last accessed 22 September 2010.

[9] See, the Federal Statistical Office of Germany (*supra,* note 6).

[10] Schüler-Springorum, *Rechtliche Konsequenzen bei gefährlichen Taetern?*, RECHT UND PSYCHIATRIE 25 (1998).

https://doi.org/10.1017/S2071832200020095 Published online by Cambridge University Press

violent crimes against children take place in the familiar surroundings of the victims, and that the number of children being murdered by sexual offenders is actually decreasing.[11]

These developments were followed by other profound and highly problematic amendments of the German Criminal Code, now under the government of the coalition of the Social Democrats and the Green Party under Chancellor Gerhard Schröder: in 2002 the statutory option was established for trial courts to impose prison sentences with a proviso or reservation of a subsequent imposition of preventive detention for adults (21 years upwards) after completion of prison terms (Art. 66a of the German Criminal Code), briefly put, reserved detention *("vorbehaltene Sicherungsverwahrung").* In such cases, the trial judge is asked to delay an eventual ordering of preventive detention until after the completion of two-thirds of the prison term, during which period it will have been possible to gather evidence in support of or against such a detention order. For the subsequent decision on discharge (or detention), the convicted's behavior in prison is the main focus of consideration.

Two years later, in 2004, the above mentioned law was extended to young adults (aged 18 to 21), and, even more importantly, an option for courts to subject adult prisoners to preventive detention with no prior notification in trial – the so-called subsequent preventive detention *("nachträgliche Sicherungsverwahrung"*) was established (Art. 66b of the German Penal Code). Under new government of the grand coalition of the Social Democrats and the Conservatives under Chancellor Angela Merkel this option was extended to offenders from 14 years upwards in 2008. It applies if new evidence becomes available during the prison term, which is seen to support an extension of the detention. Under this law, the prisoner, therefore, does not know whether or not preventive detention will be ordered until the end of the prison term. To clarify the difference: preventive detention in Germany is always subsequent in time to sentence terms served in prison, whereas the respective decree is either issued as an additional part of the conviction or reserved with the conviction or issued at the end of prison terms. So, in this context, the meaning of "subsequent" does not point to the beginning of the detention, but to the point in time when the respective verdict is issued.

However, the Federal Court of Justice *("Bundesgerichtshof", FCJ)* has interpreted this law narrowly: in order to be at all admissible as basis for a post-conviction order of preventive detention, the FCJ held that the facts on which the prognosis of the prisoner's alleged dangerousness would be based must not only have been factually unknown during the trial but *could* not even possibly have been known by the trial judges. This, in effect, has rendered the new law somewhat less effective in its applicatory scope. In effect, the FCJ

[11] See, p. 3 of the Statistic for Criminal Offences of the German Federal Office of Criminal Investigation (*Polizeiliche Kriminalstatistik*) 2009, ZEITREIHE 1987 BIS 2009, GRUNDTABELLE 01, *Bundeskriminalamt* Wiesbaden: http://www.bka.de/pks/zeitreihen/pdf/t01.pdf, last accessed 22 September 2010.

confirmed a mere 12 orders of subsequent preventive detention since the law came into force, while some 100 were rejected within the first four years.[12] It is hardly surprising that the new law was subject to extensive critique from criminal lawyers.[13]

D. The retroactive application of the new law and the decision of the ECHR

As mentioned above, preventive detention is not considered a penalty, thus principles of sentencing, such as the prohibition of retroactive effects and the inadmissibility of double jeopardy (ne bis in idem), do not apply.[14] The prohibition of retroactive effects, in short, provides for the trial judge to apply the law that was in force at the time the criminal act was committed. Amendments of the law which came into force after the time of the criminal action are therefore not to be taken into consideration by the criminal court. Art. 2 § 6 of the German Criminal Code, on the other hand, explicitly allows the retroactive application of a law intensifying the "measures of correction and prevention" which includes preventive detention. After the change of the law in 1998, the executive courts[15] *(Strafvollstreckungskammern)*, therefore, solely in charge of decisions on the release of inmates for lack of persistent dangerousness, extended the confinements of inmates in preventive detention beyond the 10-year restriction, even if they were convicted and directed to preventive detention before 1998 when the restriction was valid.

One of the concerned inmates, plaintiff "M", finally went to the ECHR and claimed for his constitutional right to freedom in Strasbourg after the Federal Constitutional Court of Germany *("Bundesverfassungsgericht")* in 2004[16] had confirmed the extension of M's confinement in preventive detention beyond the 10-year restriction that had been valid at

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[12] Ministry of Justice, press release of 9 June 2010: http://www.bmj.bund.de/enid/1d77f07859ce2551b7bee2c2d9d7f23d,2c9bda706d635f6964092d0936383939093a0979656172092d0932303130093a096d6f6e7468092d093036093a095f7472636964092d0936383939/Pressestelle/Pressemitteilungen_58.html, last accessed 22 September 2010.

[13] BÖLLINGER/POLLÄHNE, NOMOS KOMMENTAR STRAFGESETZBUCH (3. ed., 2010), § 66b para. 3.

[14] Critically: HASSEMER/KARGL, NOMOS KOMMENTAR STRAFGESETZBUCH (*supra,* note 13), § 2 para. 60.

[15] In contrast to the Parole Board of England and Wales the executive courts of Germany are special chambers of the judiciary body and consist of judges only.

[16] BVerfGE 109, 133 – 2 BvR 2029/01, Decision of 5 February 2004: http://www.bundesverfassungsgericht.de/entscheidungen/rs20040205_2bvr202901.html, last accessed 22 September 2010. For further information see, Dünkel/van Zyl Smit, *Preventive Detention of Dangerous Offenders Re-examined: A Comment on two decisions of the German Federal Constitutional Court (BVerfG – 2 BvR 2029/01 of 5 February 2004 and BVerfG – 2 BvR 834/02 – 2 BvR 1588/02 of 10 February 2004) and the Federal Draft Bill on Preventive Detention of 9 March 2004*, 5 GERMAN LAW JOURNAL 619 (2004): http://www.germanlawjournal.com/pdfs/Vol05No06/PDF_Vol_05_No_06_619-637_Public_Duenkel_van_Zyl_Smit.pdf.

https://doi.org/10.1017/S2071832200020095 Published online by Cambridge University Press

the time of his conviction in 1986. The biography of M is rather typical for inmates of preventive detention: Since he had turned 14 and thus acquired the aptitude of being held responsible for criminal deeds, M has spent no more than a few weeks in freedom. His record shows a manifest inability to lead a normal life, starting with thefts and ending with attempted murder. After he had shown brutal aggressiveness during his prison time he was sent to a psychiatric ward because of a severe mental illness. But ten months later he used a guarded walk outside the clinic for an escape after attempting to kill his guard and stealing her purse. Only a few days later M was caught when he was about to make an attempt to rob another woman. Remarkably, the court refused an insanity defence, ruling that M was not mentally ill anymore, and sent him to prison with the direction to preventive detention thereafter.[17] So there is little doubt about M having been extremely dangerous before his last conviction in 1986[18] and that his criminal record could be seen to make the prospect of him being released and going free as unsettling.

The ECHR, however, did not concur with the practice of the executive court extending M's confinement: The concept of "conviction" as used in Art. 5 § 1 (a) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "Convention")[19] is to be understood as "a court's finding that the person concerned is guilty of an offence" (para. 96). The ECHR held, that since executive courts are not competent to decide on the question of guilt, they can by consequence not be competent to rescale the sentence imposed on the detainee by the trial court. Hence, although the trial judges did not determine a certain definite time for M's preventive detention, its ultimate point was not to be stretched beyond the 10-year time limit set by the law on which the original decision was based in 1986 (para. 99 et seq.). The ECHR also awarded M 50.000 EUR of compensation for his non-pecuniary damage of having been detained in breach of the Convention since 2001 (para. 141).

Furthermore, as regards the actual living conditions of preventive detention inmates in Germany, the ECHR could not find anything that would justify the profound normative distinction between penalty and an order of preventive detention for reasons of public security: The Court observed in this regard that "(...) it is striking that persons subject to preventive detention are detained in ordinary prisons, albeit in separate wings. Minor alterations to the detention regime compared to that of an ordinary prisoner serving his sentence, including privileges such as detainees' right to wear their own clothes and to further equip their more comfortable prison cells, cannot mask the fact that there is no

[17] BVerfGE 109, 133 (*supra,* note 16).

[18] For further information see, Dünkel/van Zyl Smit (*supra,* note 16), at 622.

[19] Reading as follows: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: the lawful detention of a person after conviction by a competent court (...)." Http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf, last accessed 22 September 2010.

substantial difference between the execution of a prison sentence and that of a preventive detention order" (para. 127). In addition to the breach of the right to liberty and security, the ECHR therefore found a violation of the prohibition of retroactivity (Art. 7 § 1 of the Convention) which applies in any case of retroactive punishment (para. 137).[20]

E. The Reaction of the German Courts

Immediately after this legal success M demanded to be discharged from jail. However, after a first cursory overview, the Federal Constitutional Court of Germany decided that the state's interest in public security outweighed M's right to liberty, and that, therefore, M had to be kept confined until the court had had sufficient time to dig deeper into the details and had reached a conclusion of its own as to the legal merits of the ECHR's decision.[21] According to Art. 46 of the Convention, Germany is obliged to follow the ECHR's decisions once they have obtained legally binding force. For this reason, the German Code of Penal Procedure provides for an option to retrial if the ECHR has found a breach of the Convention and the conviction relies on this breach (Art. 359 no. 6). However, in a civil law decision ("Görgülü") of 2004 the Federal Constitutional Court found that judgements of the ECHR have no constitutional force, but rather the status of a federal law.[22] This constellation raises the fundamental question of how to implement a decision of the ECHR which contradicts the interpretation of the law by the Constitutional Court.[23] As a result there is a problematic uncertainty at the moment concerning the reaction of the Higher Regional Courts (*Oberlandesgerichte*) in Germany dealing with appeals of inmates of preventive detention who invoke their right of liberty with reference to the ECHR's decision.

Some inmates who were deemed dangerous and subjected to a retroactive imposition or extension of preventive detention, were already successful in applying to the Higher Regional Courts[24] and the FCJ[25]. In other cases, however, the Higher Regional Courts simply

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[20] ECHR (*supra,* note 1).

[21] Decision of 22 December 2009 – 2 BvR 2365/09: http://www.bundesverfassungsgericht.de/entscheidungen/rk20091222_2bvr236509.html, last accessed 22 September 2010.

[22] *Bundesverfassungsgericht*, decision of 14 October 2004 – 2 BvR 1481/04 = BVerfGE 111, 307: http://www.servat.unibe.ch/dfr/bv111307.html, last accessed 22 September 2010.

[23] For further information see, Grabenwarter, *Wirkungen eines Urteils des Europäischen Gerichtshofs für Menschenrechte – am Beispiel des Falls M. gegen Deutschland*, JURISTEN ZEITUNG 857 (2010).

[24] *Oberlandesgericht* Frankfurt, decision of 24 June 2010 – 3 Ws 485/10: http://openjur.de/u/52680.html, last accessed 22 September 2010; OLG Karlsruhe, decision of 15 July 2010 – 2 Ws 458/09: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht

refused to accept the decision of the ECHR altogether by referring to the "will" of the German Legislator and the 2004 decision of the Constitutional Court, in which the change of the law has been deemed to accord with the German Constitution.[26] This decision was also confirmed by the FCJ in March 2010, when the Court ruled on the ground that the diverging decision of the ECHR was not yet legally binding.[27] In the respective decision the Court dealt with the case of a juvenile offender sentenced to the maximum (for juvenile criminals) of 10 years imprisonment in 1998. Only a couple of days before the end of his prison term, the new law, extending subsequent preventive detention to juvenile offenders, came into force and averted his release.

F. The Reaction of the German Legislature

In order to end this absence of binding legal forces and hence the unpredictability of the law itself caused by an apparent loophole in its texture, a new bill was quickly passed: In any further case of a Higher Regional Court not wanting to release an inmate of preventive detention for reasons of their dangerousness, it has to submit the case to the FCJ in order to attain a guiding precedent binding upon all regional courts.[28] This new law makes it clear enough that legislators are not willing to regulate the situation themselves but rather leave

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=bw&nr=13198, last accessed 22 September 2010; OLG Hamm, decision of 6 July 2010 – 4 Ws 157/10: http://openjur.de/u/52682.html, last accessed 22 September 2010, and decision of 22 July 2010 – 4 decision of Ws 180/10, III-4 Ws 180/10: http://www.strafrecht-online.de/inhalte/strafrechtliche-entscheidungen/aktuelle-urteile/olg-hamm-beschl-v-22072010-4-ws-18010/, last accessed 22 September 2010.

[25] *Bundesgerichtshof*, decision of 12 May 2010 – 4 StR 577/09: http://www.hrr-strafrecht.de/hrr/4/09/4-577-09.php, last accessed 22 September 2010.

[26] *Oberlandesgericht* Celle, decision of 25 May 2010 – 2 Ws 169/10: http://openjur.de/u/52683.html, last accessed 22 September 2010; OLG Stuttgart, decision of 1 June 2010 – 1 Ws 57/10: http://openjur.de/u/52862.html, last accessed 22 September 2010; OLG Koblenz, decision of 7 June 2010 – 1 Ws 108/10: http://www3.justiz.rlp.de/rechtspr/DisplayUrteil.asp?rowguid=%7b3AEF7EEB-456D-44C4-B1CE-932C65272C49%7d, last accessed 22 September 2010; OLG Nürnberg, decision of 24 June 2010 – 1 Ws 315/10: http://openjur.de/u/
52275.html, last accessed 22 September 2010, and 7 July 2010 – 1 Ws 342/10: http://openjur.de/u/54707.html, last accessed 22 September 2010; OLG Köln, decision of 14 July 2010 – 2 WS 428/10: http://www.strafrecht-online.de/inhalte/strafrechtliche-entscheidungen/aktuelle-urteile/olg-koeln-beschl-v-14072010-2-ws-42810/, last accessed 22 September 2010. See, also *Bundesverfassungsgericht* (*supra*, note 16).

[27] *Bundesgerichtshof*, judgement of 9 March 2010 – 1 StR 554/09: http://www.hrr-strafrecht.de/hrr/1/09/1-554-09.php, last accessed 22 September 2010.

[28] § 121 Abs. 1 Nr. 2, Abs. 2 Nr. 3 of the Judicature Act (*Gerichtsverfassungsgesetz*) as amended on 24 July 2010 (BGBl. I S. 976).

https://doi.org/10.1017/S2071832200020095 Published online by Cambridge University Press

it to the courts.[29] The obligation to submit has recently been taken by the Higher Regional Court of Nürnberg on 4 August 2010,[30] so a binding precedent is forthcoming.

Having found some solution to this problem, the question of how to deal with "highly dangerous subjects" that are to be released in accordance with the ECHR ruling remains unresolved. Roughly, the prospect thus opened by an inappropriate failure to act on the part of the legislature is this: men, more often than not, way beyond their sixties, whose lives and experiences had been confined by prison walls and, to a high degree, defined by their guards suddenly going free, albeit under a regime of day-and-night observation by the police – an observation that incidentally has no footing in the law. And neither do penalty-like restrictions imposed upon ex-prisoners. Some "experts" of the conservative parties (CDU and CSU) and the head of the police trade union are going so far as to propose to pillory a number of the released by posting their names, addresses and photographs on easily accessible websites of the internet. Falling right into the silly season, this sensitive topic was gratefully taken up and grossly inflated, not to say, distorted by various regional or national media.[31]

Under the new government of a coalition of the Conservatives and the Liberals the German Federal Minister of Justice, Sabine Leutheusser-Schnarrenberger, a member of the liberal party (FDP), has been trying - rather desperately - to put forth a new law that would allow for the use of electronic tags in order to enable security institutions to control the whereabouts of potentially dangerous subjects while, at the same time, granting them freedom of movement. Guido Westerwelle, State Secretary and Vice-Chancellor, is supporting the legislative proposal. The Minister of the Interior, Thomas de Maizière, however, a member of the conservative party (CDU), responsible for domestic security, after incipiently agreeing to this proposal has recently, turned on his previous position in order to now pursue the option of prolonged detention, labelled "preventive housing".[32]

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[29] See, *Oberlandesgericht* Hamm, decision of 22 July 2010 – 4 Ws 180/10, III-4 Ws 180/10: http://openjur.de/u/54155.html, last accessed 22 September 2010.

[30] *Oberlandesgericht* Nürnberg, decision of 4 August 2010 – 1 Ws 404/10: http://openjur.de/u/55218.html, last accessed 22 September 2010.

[31] http://www.BILD.de of 9 August 2010: http://www.bild.de/BILD/politik/2010/08/09/internet-pranger-fuer-sex-verbrecher/unions-politiker-machen-vorstoss.html, last accessed 22 September 2010; FRANKFURTER ALLGEMEINE FAZ.NET of 9 August 2010: http://www.faz.net/s/Rub594835B672714A1DB1A121534F010EE1/Doc~EF4E0CC2D126C4D77A3AA0D991D6B83FA~ATpl~Ecommon~Scontent.html, last accessed 22 September 2010.

[32] FRANKFURTER ALLGEMEINE FAZ.NET of 15 August 2010: http://www.faz.net/s/Rub594835B672714A1DB1A121534F010EE1/Doc~E5F3147CFE8664BE2B82D4426749B73AA~ATpl~Ecommon~Scontent.html, last accessed 22 September 2010; FRANKFURTER ALLGEMEINE ZEITUNG of 7 August 2010, 1-2.; SUEDDEUTSCHE.DE of 30 July 2010: http://www.sueddeutsche.de/politik/sicherungsverwahrung-unionslaender-rebellieren-gegen-leutheusser-schnarrenberger-1.982129, last accessed 22 September 2010; see, also German Federal Government press conference of 4 August 2010:

https://doi.org/10.1017/S2071832200020095 Published online by Cambridge University Press

On the other hand, ministers of the federal states who are in charge of, and run, the respective local prisons, meanwhile try to find agreements on how to cope with those still detained since their penitentiary-like situation must be brought to an end.[33] As long as the execution of preventive detention is not in any significant way different from punishment, the perpetuation of subsequent preventive detention necessarily interferes with the inadmissibility of double jeopardy. Thus hundreds of inmates may claim a breach of the principle "*nulla poena sine culpa*".

However, in light of concerns that keeping those currently and those to-be released under permanent observation would eventually become far too expensive, both the Federal Minister of Justice and the Minister of the Interior have expressed their will to keep at least those inmates who are not released so far confined in "preventive housing" with psychiatric care if psychiatric expertises attest to their mental illness.[34] But again, this alternative raises problems with respect to the principle of guilt as will be discussed further in the following section.

G. Psychiatric housing as a legal alternative?

Detention because of a mental disorder or, as Art. 5 § 1 (e) of the Convention puts it, because of "unsound mind" is lawful if the person poses a danger to others.[35] The International Classification of Diseases[36] as well as the Diagnostic and Statistical Manual of Mental Disorders[37] list antisocial, respectively dissocial, personality disorders (ICD-10 F60.2, DSM-IV 301.7), that are characterized by an inability to lead a norm-orientated social life. To declare the inmates of preventive detention mentally ill, therefore, may not

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http://www.bundesregierung.de/nn_774/Content/DE/Mitschrift/Pressekonferenzen/2010/08/2010-08-04-regpk.html, last accessed 22 September 2010.

[33] SÜDDEUTSCHE ZEITUNG of 9 August 2010, at 2; FRANKFURTER ALLGEMEINE FAZ.NET of 6 August 2010: http://www.faz.net/s/Rub5785324EF29440359B02AF69CB1BB8CC/Doc~EAF4E94F726E949309534124DDF286C36~ATpl~Ecommon~Scontent.html, last accessed 22 September 2010.

[34] SUEDDEUTSCHE.DE of 29 August 2010: http://www.sueddeutsche.de/politik/reform-der-sicherungsverwahrung-stein-der-weisen-hohle-nuss-1.993591, last accessed 22 September 2010.

[35] According to the Germany law, detention is also possible if a mentally ill person poses danger only to herself. However, this is of no relevance in the present context.

[36] World Heath Organization, International Statistical Classification of Diseases and Health Related Problems, 10th Revision, Second Edition, 2005: http://apps.who.int/classifications/apps/icd/icd10online/, last accessed 22 September 2010.

[37] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, Washington, D.C., American Psychiatric Association, 2000.

be a problem of medical diagnosis in the first place. Furthermore, according to evaluations made for scientific research, about three-fourth of the inmates show psychological abnormalities, most of them with antisocial characteristics.[38] But this also points to the fact that such personality traits are usually not regarded as severe mental disorders by the courts.[39] As mentioned above, the inmates of preventive detention are former prisoners who were found guilty and hence responsible of more than one severe crime. Thus, in their respective cases, the insanity defence did not obtain. The inmates were, and are, regarded legally competent with regard to the ability to control their actions and to avoid future criminal deeds. On the other hand, declaring someone to be of "unsound mind" indicates just the opposite, namely, that they are constrained in controlling their actions to an extent which requires professional help. Therefore a random exchange of the opposed reasons for detention would affect the aim of the guilt principle to restrict penalty in a severe way: Basically no prisoner, sentenced to a certain amount of time spent in prison on the grounds of his guilt, could be confident of the date of his release anymore, since, in principle, the conscription to psychiatric housing could be issued at any time.

Yet, the attempt of the Federal Ministers brings to light that it has always been highly arbitrary whether offenders are directed to psychiatric hospitals or to preventive detention. As mentioned above, a significant "disposedness" to the perpetratation of severe crimes is an essential requirement for the imposition of preventive detention (Art. 66 § 1 no. 3 of the German Criminal Code); it may, however, also indicate a severe personality disorder according to the ICD-10 and DSM-IV. The starting point of a so-called "criminal career" in early adolescence as well as the average prison time exceeding 12 years[40] demonstrate a dramatic disturbance of social orientation caused by various factors, usually not within the influence of the person concerned, such as maltreatment or abuse during childhood.[41] Such phenomena are therefore neither caused by a mere "weakness of the character" nor do they fall within the "normal spectrum" of criminal behaviour, as is often emphasized by the courts.[42]

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[38] Habermeyer et al., *Kriminologische und diagnostische Merkmale von Häftlingen mit angeordneter Sicherungsverwahrung*, MONATSSCHRIFT FÜR KRIMINOLOGIE 317 (2007), at 324; Kinzig, *Die Gutachtenpraxis bei der Anordnung von Sicherungsverwahrung*, RECHT PSYCHIATRIE 9 (1997); see also Puhlmann/Habermeyer, *Die Sachverständigenexpertise im Spannungsfeld zwischen Justiz und Psychiatrie am Beispiel des Hangbegriffs des § 66 StGB (Sicherungsverwahrung)*, FORENSISCHE PSYCHIATRIE, PSYCHOLOGIE, KRIMINOLOGIE 46 (2010).

[39] See, for instance, *Bundesgerichtshof*, decision of 23 October 2007 – 4 StR 358/07: http://www.hrr-strafrecht.de/hrr/4/07/4-358-07.php, last accessed 22 September 2010.

[40] Habermeyer et al. (*supra,* note 38).

[41] See, Habermeyer et al. (*supra,* note 38); Brewer-Smyth et al., *Physical and sexual abuse, salivary cortisol, and neurologic correlates of violent criminal behavior of female prison inmates*, 55 BIOLOGICAL PSYCHIATRY 21 (2004). Among the factors that can be seen to negatively impact a person's ability to adequate social behaviour, is nutrition, see Liu et. al, *Malnutrition at Age 3 Years and Externalizing Behavior Problems at Ages 8, 11, and 17 Years*, AM J PSYCHIATRY 161 (2004).

[42] See, *Bundesgerichtshof* (*supra*, note 39).

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The dramatic impact of maltreatment during childhood has recently been examined by Caspi et al. His team underlined the relevance of three factors: first a genetic vulnerability caused by a specific gene, called MAO-A, that influences serotonin levels and thus is relevant to the ability to handle stress; secondly maltreatment during early childhood; and thirdly a disposition to antisocial behaviour thereafter. The scientists found that the genetic vulnerability is highly significant with respect to conduct disorder and the disposition towards violence but *only* in cases of early maltreatment. No distinctive features were found in persons without the genetic vulnerability when the tested persons experienced no maltreatment, and in any case maltreatment led to an increase of antisocial tendencies.[43]

Other causes, however, may as well lead to antisocial behaviour. E.g. epileptic strokes[44] or a bite of an infected tick[45] can cause changes in the brain that generate sudden violent behaviour. The impact of the brain's functions correlated with (antisocial-)behaviour was impressively demonstrated in the rather famous case of a 40-year old American high school teacher who suddenly began to show interest in paedosexual movies and other sorts of pornography, to attempt to date children and to visit prostitutes. A large tumour was found in his forehead and surgically excised. Afterwards he did not exhibit any more problems of such kind – at least for some time. But then the odd sexual desires returned, and he started to collect pornographic material again. A newly performed brain scan revealed that the tumour had grown again.[46] Thus it was quite obvious that his odd paedosexual interest was caused by a "malfunction" of his brain which in turn was caused by the tumour. In cases such as this, German courts would, in all probability, apply the insanity defence.

This defence also applies, if people partly loose their control of action due to a physiological reduction of synaptic functions when they suffer from dementia and show violent and sexual abusive behaviour. However, if a brain damage does not *alter* an already existing personality but is involved in the malfunctioning of a *developing* personality at its earliest stages, it does not appear to strike judges as constituting a case of diminished

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[43] Caspi et al., *Role of Genotype in the Cycle of Violence in Maltreated Children*, 297 SCIENCE 851 (2002). For further information with respect to juridical aspects see, Merkel/Roth, *Langzeitverwahrung von Gewalttätern*, HUMBOLDT FORUM RECHT, *forthcoming*, October 2010: http://www.humboldt-forum-recht.de, last accessed 22 September 2010; Merkel/Roth, *Bestrafung oder Therapie? – Möglichkeiten und Grenzen staatlicher Sanktion unter Berücksichtigung der Hirnforschung,* in: HIRNFORSCHUNG – CHANCEN UND RISIKEN FÜR DAS RECHT, 21 (Rechtswissenschaftliche Fakultät der Universität Zürich ed., 2008).

[44] BGH, decision of 14 January 2009 – 2 StR 565/08 = NStZ-RR 2009.

[45] BADISCHE ZEITUNG of 21 January 2010.

[46] Burns/Swedlow, *Right orbitofrontal tumor with pedophilia symptom and constructional apraxia sign*, 60 ARCH NEUROL 437 (2003); see also Walter et. al, *Pedophilia is Linked to Reduced Activation in Hypothalamus and Lateral Prefrontal Cortex During Visual Erotic Stimulation*, 62 BIOLOGICAL PSYCHIATRY 698 (2007).

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responsibility, although the clinical aspects may be similar enough to pertain to the principle in dubio pro reo (the benefit of the doubt) in both types of cases. This ignorance, however, is not due to a "fault" of the judges, since these damages are, so far, usually not noticeable. They can already occur during birth or yet before or in the first years of life, so they may not lead to a perceivable change in the behaviour.[47] But even in cases when behavioural abnormalities are perceived, their causes often remain unknown. Still, the impact of brain functioning on social behaviour should not be underestimated, as the following case also demonstrates.

Anderson et al. have followed the development of two kids, call them Peter and Betty. Both showed an inability to follow rules or learn from punishment when they were little, they lacked of empathy towards others and of motivation and initiative, showed emotional instability, inability to develop friendships, and no expression of guilt or remorse; they lied chronically, stole, and fought physically. As young adults they were both not able to hold down a job, manage money, or make plans and goals for the future. Therefore Peter and Betty depended completely on their families for financial support. Their intellectual abilities, however, were normal. Therefore, apart from the otherwise ordinary family background their life story, so far, is comparable to the one of many preventive detention inmates. The researchers had however been following the development of these two children since they were babies because of a special occurrence when they were little: Betty had been run over by a vehicle at the age of 15 months, but seemed to recover fully within days. No behavioural abnormalities were observed until the age of three years, when she began to act deviant. And Peter had undergone surgery of a right frontal tumour at three months. According to the scientists, he had excellent recovery with no signs of recurrence, and only 'mild' behavioural abnormalities were observed until the age of nine.[48]

Since indicators accumulate, that people with severe antisocial behaviour are not capable of changing their behaviour by themselves and have not "chosen" to become delinquents, the question of guilt needs to be raised in any relevant case and help needs to be offered instead of detaining the concerned penal-like in preventive detention. However, since there are manifold causes of severe antisocial behaviour, the kind of assistance these people are in need of may as well be very diverse. Furthermore, effective support might not always be available, which may partly be due to the circumstance that their behaviour had in the past not been considered a pathological suffering.

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[47] An exception, however, needs to be made to cases of outstanding brutal aggressiveness or killing, like the case of Jürgen Bartsch, a young man who, during the years 1962–1966, killed four boys aged 8 to 12 in a beastly manner, trying to cut them apart while they were still alive and seeking sexual satisfaction while doing so. Here, the FCJ directed the Regional Court to deal with the question of guilt, see BGHSt 23, 176, 184.

[48] Anderson et al., *Impairment of social and moral behavior related to early damage in human prefrontal cortex*, NATURE NEUROSCIENCE 1032 (1999).

As mentioned above, severe mental incapacity excludes or diminishes the guilt of the offender, independent from the chance of its healing. An attested 'low' chance of leading a normal life after a therapy can be an indicator for the intenseness of the deficit, but it would break the law to punish one even harder on the ground of his inaccessibleness to (ineffective) therapeutic approach. Nevertheless, it has been suspected by psychiatrists that recidivists after staying at a psychiatric ward have a higher chance to end up in preventive detention[49] – not because they were successfully cured (which is obviously not true in most of the pertinent cases), but because of pragmatic and financial reasons. For the same reasons another problematic yet not questioned tendency can be noticed: To exclude assumed "incorrigible" patients even further in separated houses with less personal care.[50]

Any attempt of understanding severe antisocial behaviour as a mental illness is therefore prospective with respect to the offer of psychiatric, social and medical help instead of prison-like detention and would make the sanction more adequate and more reasonable. However, since the risk of excluding assumed "incorrigible" people from society is potentially high, there needs to be in general the same limitation in time of detention in psychiatric housing as there is for time spent in prison – defined by the legal wrong and not by psychiatric evaluations.

With respect to the approximately 80 inmates of preventive detention condemned before 1998, and most of them still pleading for their releases, it is yet hard to see how a mental illness could be indicated. They have been undergoing psychological tests every two years, and so far, according to the decision to uphold their confinement in preventive detention and not directing them into psychiatric ward, no mental illness causing their dangerousness exists.[51]

H. Consequences for the "reserved" and "subsequent" preventive detention

The focus of the ECHR on the requirement of detention following "conviction" does not only effect the retroactive abolishment of the 10-year-restriction in 1998 but also has an impact on legal questions concerning the reserved and subsequent preventive detention – not only with respect to their retroactive effect. In contrast to members of the

[49] Habermeyer et al., (*supra,* note 38), at 327.

[50] E.g. in Nordrhein-Westfalen, Berlin und Hessen, see, *Landtags-Drucksache* Mecklenburg-Vorpommern 4/1282 of 18 August 2004, at 5.

[51] See, German Federal Parliament (*Deutscher Bundestag*), press release of 26 June 2010: http://www.bundestag.de/presse/hib/2010_06/2010_218/04.html; also see, SUEDDEUTSCHE.DE of 29 August 2010: last accessed 22 September 2010 (supra note 34).

https://doi.org/10.1017/S2071832200020095 Published online by Cambridge University Press

conservative party, the German Minister of Justice has declared her firm intention to abolish the legal option of subsequent preventive detention.[52] This does not pertain to preventive detention issued by trial courts together with the verdict or to reserved preventive detention but only to such orders issued subsequent to the time spent in prison. For this type of preventive detention, extending its reach way beyond the appropriate punishment in reaction to the criminal offence is not regarded as a genuine response of the criminal law proper but rather as a police measure attached, for various reasons, to the criminal law. However, the question arises as to whether this character, as an imported attachment to the criminal law, provides sufficient justification for subsequent preventive detention with regard to Art. 5 § 1 (a) of the Convention.

Since "conviction" requires the finding of personal guilt,[53] the imposition of any type of preventative measure appears to be an unlawful intervention into the liberty of a person under Art. 5 § 1 (a). The ECHR, however, expressed no doubt that preventive detention can be legally ordered if it satisfies the requirement of being issued "after conviction" and thus related to the verdict in a specific way. Unfortunately, the ECHR gave only rough indications as to when a "detention of a person" satisfies the "after-conviction" criterion: In *X v. United Kingdom,* a case decided in 1981, the ECHR argued that "the word 'after' does not simply mean that the 'detention' must follow the 'conviction' in point of time: in addition, the 'detention' must result from, 'follow and depend upon' or occur 'by virtue of' the 'conviction'."[54] In the Belgian case *Van Droogenbroeck,* decided in 1982, the court was satisfied with the judgement sentencing the person concerned to imprisonment and the imposition of preventive detention appearing to be "an inseparable whole."[55]

According to *X v. United Kingdom*, the conviction must indeed be considered a *condicio sine qua non.* But this does not demand more of a conviction than it being an (additional) formal requirement for a preventive detention without in itself being already sufficient. On the other hand, to determine a *mandatory* order of preventive detention as an adjunct to the conviction would interfere with the legislator's right to leave the discretion concerning the duration of penalties to trial judges. The crucial question remains whether or not the latest changes in German Criminal Law with respect to preventive detention satisfy the preconditions for a *post-hoc* imposition of detention after conviction, and the answer lies somewhere in between these rather unspecific bench marks.

In order for preventive detention to be justified, the criminal behaviour and the "overall evaluation of the offender" must, as is stated in Art. 66 of the German Criminal Code,

[52] See, Ministry of Justice (*supra,* no. 12).

[53] See, *Guzzardi v. Italy*, judgement of 6 November 1980, App. no. 7367/76, p. 23, para. 100.

[54] See, *X v. the United Kingdom*, judgement of 5 November 1981. Series A no. 46, p. 17, para. 39.

[55] *Van Droogenbroeck*, judgement of 24 June 1982. Series A no. 50, p. 16, para. 39.

sufficiently demonstrate that he or she would pose a severe threat to the community. Since, for this criterion to be fulfilled, more than one severe crime must have been committed, one single perpetrated crime will, on its own, be but one, albeit manifest, signal for the dangerousness of the respective person. However, at the same time it may serve as completion of a picture which, as a whole, provides sufficient certainty about the potential dangerousness and would therefore be essential for both the guilty verdict on the respective single crime and the imposition of preventive detention for being potentially dangerous as demonstrated by the repeated perpetration of (still other) criminal acts. The emphasis, though, is on the fact that the accumulation of criminal behaviour becomes a *sufficient* cause for the extended detention. This necessitates the judge to make up his mind in one or the other way. Thus, the decision whether or not the offender is subject to preventive detention becomes an inherent part of the conviction; the imposition of preventive detention, therefore, follows the verdict of guilty.

In contrast, imposing *subsequent* detention requires "new facts" about the former perpetrator's future dangerousness (not a further crime and no additional guilty verdict) that were not cognizable at the time of the conviction. Hence, the conviction is no more than a *condicio sine qua non.* It does not satisfy the requirement of the detention's being dependent on a conviction in the mentioned sense since the former guilty verdict does not materially complete the requirements for preventive detention.[56] According to its formal criteria, it is purely a security measure that implies the precondition of a guilty verdict only in the sense that some anteceding conviction is necessary without its contributing to the prognosis of future dangers in the least.

From this it follows that the proposition of the Federal Minister of the Interior to subsequently commit inmates of preventive detention into "preventive housing" as a security measure independent from a finding of guilt in the above mentioned sense, may very well be rejected by the ECHR as well. However, it will probably also be rejected by the German Courts since the factors that suggest future dangerousness must not even be new facts. Besides, with respect to Art. 5 § 1 (a), it makes no substantial difference whether the location of the detention is penalty-like or rather similar to fenced housing. Claims concerning subsequent preventive detention are already pending with the ECHR. So, the court needs to decide on those cases where subsequent preventive detention was ordered in accordance with the new German law.

Since the German Minister of Justice has taken first steps to abolish the alternative "preventive housing" proposal of her colleague in cabinet, at least some of the mentioned legal problems may be resolved or avoided in the future. Unfortunately, however, the said

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[56] See, with different arguments, also Laue, *Die Sicherungsverwahrung auf dem europäischen Prüfstand*, JURISTISCHE RUNDSCHAU 203 (2010); Müller, *Die Sicherungsverwahrung, das Grundgesetz und die Europäische Menschenrechtskonvention*, STRAFVERTEIDIGER 211 (2010).

https://doi.org/10.1017/S2071832200020095 Published online by Cambridge University Press

abolishment of subsequent detention is supposed to be compensated by strengthening the alternative of the proviso of detention attached to the initial conviction. This is to be set forth by lowering the level of certainty trial judges have to achieve about the future dangerousness of the offender so they can give the proviso to preventive detention without a previous conviction. According to the intention of the Minister this will not apply in any case of criminal behaviour, nevertheless only few criminal acts like minor acts of theft and falsification of documents will be excluded.[57] Besides, the final decision regarding an inmate's fate after completing the prison term will not be issued until after two-thirds of the time spent in prison, but only at the end of prison term. The decision is not always taken by the court that initially adjudicated on the guilty verdict. This again makes it hard to argue that the detention is an inherent part of the conviction. And again, the determination of dangerousness is not exclusively linked to the criminal behaviour that induced the initial guilty verdict but also to (usually non-criminal!) behaviour thereafter, which makes the conviction not a sufficient condition for detention.[58]

It appears, therefore, that the perpetrated crime and the subsequent conviction are not sufficient in fulfilling the requirements of detention in either alternative, i.e. reserved detention or subsequent detention.

I. Is all of this a specific German Problem?

Much of the unceasing dispute around this legislative and policy development results from the fact that the core of the problem lies in the legitimization of punishment on the one hand and of detaining people for reasons of public safety on the other. The idea of punishment and guilt restricts the extent to which an offender can be detained to a measure proportionate to the severity of the committed crime. Necessarily, the idea of a lifelong *detention for safety reasons* only thus collides with the principle of guilt. Hence there is a friction between both the aims of punishment and of public security, regardless of which legal conception or system they are grounded in. And the inherent problems are evidently not answered by connecting the imposition of preventive detention to the finding of guilt in the suggested sense. The reverse is true: future dangerousness always stays hypothetical, and even more so the longer the person convicted is sentenced before they are committed to subsequent detention. Yet interfering with the liberty of an offender only for "safety" reasons seems justified only with respect to the actual status,

[57] See, Ministry of Justice (*supra,* note 12).

[58] See, with different arguments, also Rzepka, *Sicherheits- statt Rechtsstaat – Überblick und Anmerkungen zu bundes- und landesrechtlichen Konzepten einer nachträglichen Sicherungsverwahrung – Teil 2*, RECHT & PSYCHIATRIE 208 (2003). But see, Pieroth, *Gesetzgebungskompetenz- und Grundrechtsfragen der nachträglichen Sicherungsverwahrung*, JURISTEN ZEITUNG 927 (2002); Kinzig, *Das Gesetz zur Einführung der vorbehaltenen Sicherungsverwahrung*, NEUE JURISTISCHE WOCHENSCHRIFT 3207 (2002); Renzikowski, *Die nachträgliche Sicherungsverwahrung und die EMRK*, JURISTISCHE RUNDSCHAU 273 (2004).

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while it offers no guidance for the still distant future, that is, for the time after completion of the prison sentence. Otherwise, the already considerable uncertainty at the expense of the individual in determining his dangerousness will amount to a breach of the principle "in dubio pro reo" as expressed in Art. 6 § 2 of the Convention.

Secondly, although in cases of repeated commission of severe crimes the offender has arguably demonstrated his past dangerousness, he is considered to 'still' pose an *abstract*, not a concrete, danger to others. According to basic principles of constitutional law, however, such an abstract risk of being dangerous can hardly justify the imposition of the loss of freedom on persons. This follows from the right to liberty and is, *inter alia*, expressed in Art. 5 § 1 (c) of the Convention as shown by an *argumentum e contrario*: since detention in order to prevent one from committing a crime is lawful, the detention of a person with *no* imminent concrete crime to be prevented must be illegal. Thus, this respective impending crime must be predictable with a high degree of certitude as to its temporal occurrence and execution. This is why being deprived of one's freedom without posing a concrete and imminent threat or danger has always been regarded as a forced "special sacrifice" on the part of the individual for an overall feeling of safety on the part of society, and hence has been considered to lack sufficient justification. Such an unequal distribution of benefits and burdens in the management of social risks thus interferes with the principle of liberty.

J. Conclusion

Confinement needs to be restricted by the severity of the committed legal wrong to be in accord with the principle of liberty. However, since the danger of relapse is not acceptable in any case, further detention can not be generally excluded. Before and while extended detention may be executed, though, all efforts need to be provided to (re-)socialize the offender. Also, any detention going beyond penal time needs to be as close to normal living as possible.[59] This is to distribute the burden going nowadays beyond the responsibility of the offender back to society and therefore to legitimize the grave interference with the principle of liberty. For the same reason a retroactive application of a law downgrading the legal positions of prisoners or detention inmates is not in accord with their constitutional rights. In case of retroactive apply of reserved or subsequent detention this also results from the violation of Art. 5 § 1 (a) of the Convention on Human Rights since the requirement of detention after conviction is not fulfilled.

Regarding the announced adjustments in the German Criminal Code after the ECHR's judgement, it will, after all, solely be the marginal restriction of preventive detention with respect to the severity of the committed criminal act and the proposed abolishment of

[59] Same applies for prisons as well, since the penalty lies in the reduction of liberty of action only.

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subsequent preventive detention that strengthen the rights of the prisoners, the latter change, inconsistently, with no retroactive effect. However, the number of preventive detention inmates may continue to increase since the reduction of requirements necessary to give direction to reserved preventive detention will presumably compensate the gain of individual rights. At any rate, the ECHR's judgement forces the federal states to offer psychiatric and social help in the future. But it will require careful evaluation by independent commissions whether these rights are respected seriously, which will also include the observation of the prohibition of compulsory therapy. Hopefully, this will be provided before any further suffer happens inside the prison walls[60] and to the extent necessary.

Part of the continuing problem with released detention inmates is certainly home-made: In the past decade, the media have enforced strong tendencies to polarize between the allegedly 'virtuous' citizen on the one hand and the dangerous 'sex-monster' on the other, thereby creating an antagonism that has been aptly exploited and further accentuated by politicians, too rarely working at stemming such tides of populist belief.[61] This situation now evokes and projects the bizarre picture of a shocked and fearful society even though there has not been a single case of a released preventive detention inmate presenting the media with a noteworthy relapse. Furthermore, other aspects of the problem, of course, can be attributed to a laissez-faire attitude towards the administration of an accountable criminal sentencing system, grounded in the principles of constitutional rights and human dignity.

However, the introduction of laws lengthening life imprisonment sentences can be recognised in many other western countries as well, [62] since criminal law has often been seen as a useful instrument in the public display of political agency on the part of government, especially in times of crisis, general apathy or heightened popular discontent with the state. As has become visible in past years, such 'wars' bring with them problematic interferences with individual and collective rights of those not deemed to properly belong to the society. The misnamed 'war against terror' in one place finds its correlative in the 'war against sex-monsters' in another. As in the war against terror, such

[60] After the death of Skander Vogt, a 30 year old prisoner, chained and isolated 23 hours a day in the penal institution Bochuz VD, Switzerland has established a commission to observe the conditions of mentally ill prisoners in jail: http://bazonline.ch/schweiz/standard/Neues-Strafrecht-erfuellt-Erwartungen-nicht/story/11713381, last accessed 22 September 2010.

[61] The former chancellor of Germany, Gerhard Schroeder, quoted with respect to child abusers: "Wegschließen" – "und zwar für immer" (*Shut away – and that for all times*), see, FOCUS MAGAZIN of 18 February 2002: http://www.focus.de/politik/deutschland/justiz-wegschliessen-fuer-immer_aid_207649.html, last accessed 22 September 2010.

[62] *E.g.* the US with the Washington's Sexually Violent Predator laws from 1990 and 1991, and Great Britain with the imprisonment for public protection under Section 225 and 226 of the Criminal Justice Act 2003.

forms of hastened law-making fare ill for democracies. In our case, every law that allows unlimited detention for the purpose of an unspecified "security" of society bears a high risk of arbitrary imprisonment. This risk becomes clearly unjustifiable when the prohibition leading to lifelong detention addresses an attitude instead of a concrete violation of an object of legal protection. A democratic nation therefore has to withstand the temptation of fighting a symbolic war against alleged "monsters," "parasites" or "terrorists."

Finally, the current discussions around preventive detention seem to underscore the pressing need to, finally, direct serious attention to the context and circumstances under which crimes take place and originate. Such a contextual approach would likely lead to a better understanding of the social problems that shape criminal behaviour. This would allow for an alternative look at individual guilt, 'dangerousness' or 'disposedness.' "Criminal careers" starting in early youth and ongoing beyond adolescence are often a sign of the state's failure to protect the most vulnerable members of society, the children. This is the place where more effort is needed, by helping families, guarding the development of children, and by offering chances for a satisfying life in which everyone can participate.