



Indefinite Sentencing in Criminal Law: A Human Rights Perspective

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Executive Summary

„In dubio pro securitate?” – a new concept evolving throughout the past decades indicates a shift in criminal law theory that seemed to be unshakeable for centuries. The demand for public safety and security has led to the suppressed interest of the individual and resulted in uncontrolled confinements of potential terrorists and in sanctions of an indefinite character.

The undesired dilemma of satisfying the interest of society to be protected from dangerous criminals or safeguarding the rights of the individual raises serious issues from human rights perspectives this thesis is examining with a special focus on the institution of preventive detention.

After presenting the law on the institutions, the study first discusses the human rights problems preventive detention induces from a general aspect which is followed by comparative chapters evolving alongside the case law. The thesis also reveals the position of human rights monitoring agencies to underpin the issues the researcher is concerned about also by the sphere of civil society.

The scrutinized jurisdictions (Germany, the U.K., ECtHR) provide a great basis to present and analyze different approaches towards the thesis’ problem, the research reveals their defects and offers valuable deductions even if from a negative point of view, which might warn and enable jurisdictions coming later to the center of reports and judgments to find more effective solutions.

Introduction

Criminal law has long been among the ‘popular’ subjects of human rights researchers since it has the capacity to impose the greatest impact on human lives and therefore provides a potential surface for attack if not built up and safeguarded in a way that accords with the increasing number of human rights standards.

Indefinite sentences, a special segment of criminal law this thesis will focus on, has been a stable element of many European countries’ criminal sanction system since the 1930s.¹ These criminal institutions are designed to deprive criminals from their liberty for an undetermined period of time, in some occasions on the basis of mere future predictions.

The emergence of human rights however started to raise serious doubts regarding these kinds of penalties from human rights perspectives. The increasing number of recent judicial decisions of both international and national courts² indicates the significance of the problem and justifies the attention dedicated to this issue by the academic community.³

Although a great literature has already emerged dealing with some aspects of this area, my intent is to disclose the human rights problems arising in connection with a particular punishment called preventive detention which has been given less attention so far.

¹ See Merkel, Grischa: *Incompatible Contrasts? – Preventive Detention in Germany and the European Convention on Human Rights*, 11 German Law Journal 1046-1066 (2010) at 1047.

² E.g. *M. v. Germany*, ECHR, Application no: 19359/04 (2009); *Schmitz v. Germany*, ECHR, Application no: 30493/04 (2011); *Mork v. Germany*, ECHR, Application no: 31047/04 (2011); *Haidn v. Germany*, ECHR, Application no: 6587/04 (2011); *James, Wells and Lee v. The U.K.*, ECHR, Application no: 25119/09 57715/09 57877/09 (2012); German Federal Constitutional Court (2 BvR 2029/01, 2 BvR 571/10) 2004, 2011; *Secretary of State for Justice (Respondent) v. James (FC) (Appellant) (formerly Walker and another) R (on the application of Lee) (FC) (Appellant)*, UK House of Lords, 6 May 2009.

³ E.g. Michael Pösl, Kirstin Drenkhahn, Christopher Michaelson, Ben Power, Christopher Rose, Grischa Merkel, Richard L. Lippke, Christopher New; Daniel Statman, Saul Smilansky et al.

Unlike most articles, this thesis' point of view will not only concentrate on the well-known ECtHR's decisions but will also investigate to what extent this special sanction, in general, can or cannot meet the human rights requirements.

The thesis will analyze the institution in the context of the German and U.K. jurisdictions and also from the viewpoint of the European Court of Human Rights (ECtHR). The reason for analyzing these jurisdictions is that Germany, which still has preventive detention in its sanction system, and the U.K., which already rescinded the institution, can be an interesting 'coupling' for illustrating the similarities and differences as concerns the possible approaches to the thesis' problem.

It is also inevitable to include the case law of the ECtHR due to its recent activity in the relevant field and due to the fact that the Court has a very influential role in setting up international standards and also has the competence to control and transform domestic legislations.

At the beginning, the thesis will introduce the institutions of preventive detention and imprisonment for public protection⁴ from the point of view of the German and the U.K.'s regulation respectively and will also reveal the relevant legal developments.

Following the presentation of the legal background the thesis will provide an overview which has the aim to present a detailed analysis about those human rights matters that are affected by penalties of an undetermined character.

The general part will be followed by comparative chapters evolving alongside the case law of the domestic jurisdictions and the ECtHR with feedbacks given continuously to the problems presented in the general part of the paper.

⁴ The institutions are substantially similar legal sanctions, however they have been introduced to the legal system of Germany and the U.K. under different legal terms/names.

Through the lens of the chosen instruments, the different legal frameworks and the case law, the researcher anticipates to see a wide horizon that will enable the thesis to make valuable deductions, identify the consequences of each system's approach and even to offer various solutions to the problem.

1. The law on preventive detention and imprisonment for public protection

The intent of this introductory chapter is to present and comment on the legal rulings covering indefinite sanctions of the scrutinized jurisdictions which is inevitable for the clear understanding of the human rights analysis provided in the following chapters both from a general perspective and also on the basis of the relevant case law.

Preventive detention (Germany) and imprisonment for public protection (UK) are substantially the same penal institutions that have been in existence for decades in different forms in various countries. Although they have the ambiguous character of depriving criminals of their liberty for an indeterminate period of time, their presence in several criminal systems is still justified today on the mere basis of their aim.

However, before turning to the specific regulations, it is important to highlight that these institutions are not to be confused with other kind of measures known also as preventive detention. Therefore deprivation of liberty in the sense where suspects are detained in the name of war on terror for an indefinite period of time without a judicial decision and without the opportunity to challenge the lawfulness of the measure does not constitute a part of the research. Those pre-trial detention cases where people are detained for preventive purposes but with a prospect to be heard before a tribunal are not covered either. The thesis' focus is limited to a third form of preventive detention when it is applied as a sanction by a judicial body after having conducted a trial and which is to be served after a definite term prison sentence.

1.1. Preventive detention or Sicherungsverwahrung – As in the German criminal law system

„In dubio pro securitate?”⁵ – a new concept evolving throughout the past decades indicates a shift in criminal law theory that seemed to be unshakeable for centuries. The reason behind this tendency, as Meaghan Kelly suggests, is the long-standing, enormous fear of society from “certain groups of people” manifested in the past in the segregation of Japanese Americans, the eugenic movement and laws in the North-American continent and in the Nazi Holocaust in Europe.⁶

Today, though not that radical, the appearance is still present. The demand for public safety and security has led to the suppressed interest of the individual and resulted in uncontrolled confinements of potential terrorists and in sanctions of an indefinite character.

Preventive detention had been introduced into the German legal system in 1933⁷ and had been amended multiple times from 1969 onwards. Although the number of detainees had been relatively low⁸ at the beginning, a change in the direction of criminal policy in the 1990s resulted in increasing prisoner rate.

Under the provisions of the German Criminal Code⁹ Sicherungsverwahrung is applicable in case of an intentional offence for which the perpetrator had been punished with an at least two-year long prison sentence. A further condition is that the delinquent had been sentenced two times

⁵ Braum, Stefan: *Nachträgliche Sicherungsverwahrung: In dubio pro securitate?*, 4 Zeitschrift für Rechtspolitik 105-108 (2004) at 105.

⁶ Kelly, Meaghan: *Lock them up -- and throw away the key: The preventive detention of sex offenders in the United States and Germany*, 39 Georgetown Journal of International Law 551 (2008) at 552-554.

⁷ Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Besserung und Sicherung

⁸ See Drenkhahn, Kirstin; Morganstern, Christine; van Zyl Smit, Dirk: *What is in a name? Preventive detention in Germany in the shadow of European human rights law*, 3 Criminal Law Review 167-187 (2012) at 168.

⁹ German Criminal Code, Section 66.

before, “at least to one year imprisonment in each case”¹⁰ for an intentional offence. Besides, the delinquent must have served an at least two year long prison sentence or detention “pursuant to a measure of correction and prevention”.¹¹ The most dubious factor however is hidden in the subjective test which requires, on the basis of the perpetrator’s propensity, that he “pose a danger to the general public”.¹² For judging this criterion the act gives special significance to those offences that have resulted in “serious emotional trauma or physical injury to the victim”, moreover “serious economic damage” can also serve as a basis for establishing the dangerousness of the perpetrator.¹³

According to the regulation the sanction is also applicable if there is no previous conviction or detention but the delinquent had committed three intentional offences punished with at least one year imprisonment each and the aggregate prison term imposed attains a minimum of three years.¹⁴

The subtle net of the law however does not end here. As indicated above the trend of criminal legislation has gone through significant changes. The first development appeared in a new form of the sanction called reserved/deferred preventive detention in 2002. It was novel in the sense that it enabled the courts to impose the punishment retrospectively provided that the original judgment indicated the potentiality of preventive detention and the sanction was ordered no later than six month before the first possible date of parole.¹⁵

A more drastic amendment to the German Penal Code came into force in 2004. The idea of the so-called retrospective/subsequent preventive detention was born at the level of the Länder. In

¹⁰ See: M. v. Germany 49-51. §.

¹¹ Ibid.

¹² German Criminal Code, Section 66. § (1).

¹³ Ibid.

¹⁴ German Criminal Code, Section 66. § (2).

¹⁵ German Criminal Code, Section 66a. §.

comparison to the previous form of the institution the new regulation allowed for the imposition of preventive detention even if it was not indicated in the original judgment. The preconditions included a limit in subject namely that only particular types of acts punishable with at least one year imprisonment could entail the sanction. Besides, the detention could only be imposed before the expiration of the original prison sentence provided that “evidence came to light which indicated that the convicted person presents a significant danger to the general public [...] and the other conditions listed in Article 66 of the Criminal Code had been met”.¹⁶

I am of the opinion that the enumerated forms of preventive detention constitute an increasing threat to the individual’s human rights. Obviously, the later a sanction is determined in the course of a criminal proceedings the more issues it can raise from human rights perspectives, which problems will be presented in details throughout the following chapters.

¹⁶ German Criminal Code, Section 66b. §.

1.2 Imprisonment for public protection (IPP) – The U.K. solution

As opposed to preventive detention the institution of imprisonment for public protection (IPP) is a relatively recent development in the U.K.'s criminal system, nevertheless its object and motive is somewhat similar: a response or reaction to increasing criminality leaving victims with psychological or physical damages behind.

IPP was introduced by the Criminal Justice Act 2003 and came into force in 2005. Albeit the institution emanates from the so-called Halliday Report,¹⁷ the act which had been passed eventually rolled away from this document ignoring important safeguards built in the report. This had led to the disregard of the original aim, namely to combat the most serious offenders and, by being overinclusive, it resulted in the enormous growth of prison population. This undesired effect was recognized by the legislation which tried to tackle the problem by amending the Act in 2008. Since the endeavor did not live up the expectations, the institution's abolishment had become inevitable.

Although both preventive detention and IPP have the controversial character of indefiniteness, the latter shares significant traits also with the institution of life imprisonment with the possibility of parole, mainly reflected in the mechanism of the imposition of penalties.

The similarities start with the statutory provision that proscribes the very same terms for the imposition of both sanctions except the requirement of dangerousness that has to be met so that the application of IPP become an option. Here the law provides that only specific acts attaining a

¹⁷J. Halliday *et al*: *The Halliday Report - 'Making Punishments Work: A Review of the Sentencing Framework for England & Wales'*. Available at:

<http://webarchive.nationalarchives.gov.uk/+/http://www.homeoffice.gov.uk/documents/halliday-report-sppu>

In: Rose, Christopher: *RIP the IPP: A Look Back at the Sentence of Imprisonment for Public Protection*, 76 Journal of Criminal Law 303-313 (2012) at 304.

serious level (punishable with life sentence or at least 10 years imprisonment) can entail IPP if “the court is of the opinion there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences”.¹⁸

Dangerousness could either be assessed by the trial judge or assumed by law provided that there is a prior conviction for particular acts; however the trial judge might still consider the sentence unreasonable and ignore its application. It is important to add that this legal assumption was subjected to heavy criticism which led to the elimination of the provision in 2008. According to the new terms what the decision-maker has to consider is either a contingent, previous conviction for offences enumerated in a new list or the potential period of the tariff that should be at least two-year long if IPP was imposed.

As concerns the imposition of the sanctions the following remarks have to be noted: In case of preventive detention there is a full prison sentence preceding the execution of preventive detention, which is determined and imposed on the basis of the guilty act committed by the perpetrator. So preventive detention is an additional, separate sanction which therefore has no strong relationship with the original, tried offence in the past but rather is connected to potential future acts. The past act in this interpretation is limited to the role of suggesting or helping predict the dangerousness of the delinquent.

In contrast, IPP, similarly to life imprisonment with parole, is not an auxiliary sanction which follows another imprisonment and is not built on different legal grounds (past act and future dangerousness) either. Although it is divided into two parts (a definite period of time called the tariff has to expire before allowing the prisoner to turn to the appellate body for release), it is still

¹⁸ Section 225 of the Criminal Justice Act 2003.

a single penalty which is the only and direct consequence of the past criminal activity of the offender.

Here it is important to forecast that the difference manifested in the remote and separate existence of the definite prison sentence from preventive detention in Germany and the united, single form of IPP in the U.K. will entail serious consequences also from the point of view of the human rights analysis presented later. One will see that some of the human rights principles cannot be the subjects of infringements in the context of IPP in comparison to its German pair.

Having the reader familiarized with the basic characteristics of the institutions, the next chapter's aim is to present and analyze those human rights issues the penalties of the examined jurisdictions may arise from a theoretical, general perspective.

2. Indefinite sentencing vs. Human rights – A theoretical perspective

The aim of penalties in criminal law might vary according to the different criminal law theories, however ‘the ends justify the means’ saying should have its limits in any jurisdictions. The purpose of this chapter is to prove, that notwithstanding the existence of a legitimate aim, namely to protect society from dangerous criminals, preventive detention gives rise also to legitimate concerns from a lot of perspectives as a consequence of which it might be worth rethinking the role of the institution.

2.1. Preventive detention vs. Human rights

For a better understanding of the thesis’ idea a detailed analysis concerning the problematic relationship between indefinite sentencing and human rights with a special focus on preventive detention will be provided first, which part will be followed by presenting the differences in the context of IPP.

Right to liberty

About liberty almost everyone has a somewhat clear concept however what human rights documents cover under this requirement is not without concerns. The question might better be approached from a negative perspective and, as Richard Stone points out, inferences might be deducted from the exceptions enumerated in Art. 5 of the European Convention on Human Rights.¹⁹

Preventive detention usually comes under Art. 5. § (1) (a) of the Convention, since it is executed after a conviction and therefore its use is seemed to be justified under this specific exception.

¹⁹ Stone, Richard: *Deprivation of liberty: the scope of Article 5 of the European Convention on Human Rights*, 1 European Human Rights Law Review 46-57 (2012) at 47.

The question is not that simple though. As I referred to this earlier, the institution can have more variations depending on the time when it is imposed (normal, deferred and retrospective), and cases have also emerged after a change in the law as a result of which the sentence's maximum term had been extended retrospectively

Interestingly, the Strasbourg Court has no doubts from human rights perspectives about the nature of the penalty generally, but only has concerns when preventive detention is paired with other characteristics that go against principles such as the prohibition of retroactivity as in the cases of *M. v. Germany* or *Haidn v. Germany* presented in more details in the following chapters.

The Court's position, according to which preventive detention itself passes the test of Art. 5, is solely built upon the causal relationship reasoning in which the continuity between the conviction and the additional, indefinite imprisonment is investigated and is considered to be existing in the relevant cases.²⁰

Unlike the Strasbourg Court, I do not believe the causal relationship to be so strong, not in the basic form of preventive detention either, when the penalty is set in the original judgment. In my view, there certainly is a causal relationship in scenarios when someone is sentenced to imprisonment for a certain period of time on the basis of his guilty act in the past, nevertheless I cannot see any relationship between the conviction and an additional undetermined detention claimed on dangerousness. Or it might be more accurate to say that there is a relationship since preventive detention is a direct result of the conviction and in most of the cases the judgment indicates the penalty in advance, still I argue that this bond is only illusory. Illusory, because a

²⁰ *M. v. Germany*, ECHR, Application no: 19359/04 (2009); *Haidn v. Germany*, ECHR, Application no: 6587/04 (2011).

conviction that is built on future predictions and not on past happenings contradicts almost every criminal law principle and therefore its validity shall be questioned. If there is no valid conviction no valid relationship can exist either.

Prohibition of torture, inhuman, degrading treatment

Prohibition of torture is one of the most significant principles in international law since it is recorded among the *ius cogens* norms and from which no derogation is allowed.

The ECHR phrases this requirement under Art. 3 and has been invoked frequently by prisoners referring to a variety of reasons. Although the prohibition of inhuman, degrading treatment has arisen several times in front of the Court in the context of life imprisonment and it has become clear that the ECtHR does not consider life sentences without the possibility of parole inhuman or degrading despite the lack of hope for a future release,²¹ it is still an open question what would be the body's position as regards indefinite penalties.

Future suggestions might be made on the basis of the mere fact that the issue of sentencing falls within the scope of the Court only in very limited circumstances, since the relevant test requires the sentence to be “grossly disproportionate” and could only be met in “rare and unique occasions”.²²

So the present case law on the question forecasts a negative answer. Nevertheless it is likely that the Court will encounter an actual case in the near future, since the requirement of prohibition of torture, inhuman and degrading treatment indeed seems to be a justified claim in the context of indefinite punishments.

²¹ *Vinter and Others v. the United Kingdom*, ECHR, Application nos: 66069/09 and 130/10 and 3896/10 (2012).

²² *Ibid.* 89. §.

Human dignity

The concept of human dignity is present in many countries' constitution and also in international human rights documents. Although there is an ample literature developed on the notion, due to the limits of this thesis, only a few definitions will be highlighted here.

The German Constitutional Court has established its own interpretation in the Lüth case²³ in 1958, in which human dignity is explained not only as a right but also as a value which the entire part of the Basic Law dealing with fundamental rights centers upon.

The Hungarian Constitutional Court has also established its own definition claiming that “the right to human dignity means that there is a certain part of each individual’s autonomy and self-determination not subjected to other persons’ disposal, which is the reason why Man is able to remain a human being and will not turn into an object or any other means.”²⁴

The ECtHR refers to this principle as the “very essence of the Convention”²⁵ that might create a strong reference point for applications. In my view it must definitely be the case in complaints concerning indefinite sentences. I argue if autonomy or self-determination belong to the notion of dignity, the right of prisoners serving their preventive detention sentence must be strongly infringed. I would foster my reasoning with Weber’s position, who sees the concept of self-determination as something that rehabilitation and reintegration constitute a part of.²⁶ In this interpretation dignity also implies that sentencing shall focus on the aim of rehabilitation and

²³ German Federal Constitutional Court (BvG), Lüth decision, 1 BvR 400/51.

²⁴ Decision of the Hungarian Constitutional Court, 64/1991.

²⁵ *Pretty v. the United Kingdom*, ECHR, Application no: 2346/02 (2002).

²⁶ Weber, Harmut-Michael: *Life imprisonment and secure preventive detention: Problems and Pitfalls*, 8 Zeitschrift für Internationale Strafrechtsdogmatik 364-371 (2006) at 368.

reintegration which seems to be insulted by sanctions that instead of placing back detainees into the society continue depriving them of their liberty.

Moreover, the circumstances surrounding indefinite penalties are also problematic from the point of view of dignity. Unlike other prisoners, preventive detention detainees cannot live a “full” life within the prison’s walls, since due to the lack of knowledge of how long they are going to be part of the prison society they are unable to settle in and at the same time unable to prepare for a life outside the jail. This is so because they constantly have a faint hope for release and therefore they might have the feeling that it is unnecessary for them to plan for the long run inside, whereas a sudden permission to leave can also have a detrimental impact on the new start of the criminals’ outside life.

Rule of law

The rule of law principle is one of the three pillars of Council of Europe and also an extremely important doctrine of domestic constitutional laws. It serves as a basis for deriving further legal requirements, the observance of which is crucial in a democratic society. Some of them such as legitimate expectation and legal certainty might be contested in the context of undetermined sentencing. It is definitely the case as regards preventive detention imposed retrospectively and preventive detention with a retrospectively extended maximum period, however I would not agree that these concerns can only arise when retroactivity is also affected.

Legitimate expectation might also be infringed in the basic case of preventive detention since this principle not only requires the legislators not to alter the law in a way that people no longer can count on their expectations but, in my reading, also requires such circumstances that enable

citizens to develop expectations at all. Since these prisoners cannot expect freedom to be gained at a specific time, I claim that this demand is certainly not met in case of indefinite sanctions.

Even if preventive detention is a stable element of a criminal system which one can keep in mind when decides for leaving the path of lawfulness and therefore in this respect legal certainty is not jeopardized, this discipline might also be construed in a more simple way. According to this extended reading the need for legal certainty prohibits not only the uncertain application of a sanction but also means an obstacle for those punishments that in their substance, per se, lack the character of certainty. This interpretation indeed could challenge the institution of preventive detention.

Prohibition of multiple punishments

Preventive detention is special from the point of view that it is executed following another prison term. Albeit it is quite common in legal systems that one criminal act might entail more types of penalties and/or measures at the same time such as imprisonment coupled with punitive damages or driving disqualification, these sanctions shall be distinguished from those incidents when also preventive detention is imposed.

The reason behind the distinction is that whereas in the first case the legal basis for all of the sanctions is the very same act that happened in the past, in preventive detention cases the same criminal act is evaluated twice: once with reference to the past (behavior) and once with reference to the future (dangerousness) where each one entails a separate but still homogeneous sanction, namely imprisonments to be executed separately one after another.

Accordingly, the aforementioned method of sentencing definitely calls into question the prohibition of multiple punishments.

Responsibility for the delictum, for the delinquent; Ante delictual responsibility

According to Ferenc Nagy “modern criminal law in compliance with the rule of law doctrine is basically and necessarily delictum-criminal law.”²⁷ It means that a person’s responsibility can only be based on his past acts. The other side of the coin is the delinquent-criminal law which centers upon the propensity of the delinquent. An extreme view originating from this stream is the so-called ante delictual responsibility when someone who is expected to commit a crime is made liable even before the criminal act could have happened. As Nagy notes, this approach is unacceptable since no state should be allowed to create an unlimited power to interfere even against potential criminals.

Since the sanction of preventive detention is not based on the act of the offender but on the possible dangerous trait of the delinquent it is quite reasonable to say that the view of ante delictual responsibility is indeed living in democratic societies under the skin of indefinite institutions.

Culpa principle

Criminal law is like a pyramid. In order to send someone eventually into prison there are some previous, interrelating stairs that have to be climbed. The culpa principle is a manifestation of this route and therefore has relevance in the context of the thesis’ problem also. According to this doctrine, a sanction, which is a final stage in a criminal procedure, can only be imposed if preceded by a culpable act upon which the responsibility of the perpetrator can be established. If the culpa element is missing, which is true for preventive detention detainees, it entails that this

²⁷ Nagy, Ferenc: *A magyar büntetőjog általános része*, Budapest (2008) at 52-53.

special “way of safekeeping [...] collides with the guilt principle and its purpose of punishment aiming at retribution for guilt”.²⁸

Another pitfall of preventive detention in the context of the culpa principle, as Lippke rightly suggests, is the missing pre-condition of free will which otherwise must exist for the establishment of culpability.²⁹ In a traditional case when a criminal is punished for his past activity, he still has the opportunity to exculpate himself if he can prove the lack of free choice. In contrast, when someone is convicted on the basis of his future acts or dangerousness, he is deprived of such opportunity since these circumstances definitely cannot be taken into consideration in a future scenario.

Following this analysis it is also not an option for these “offenders” to change their mind and desist from committing the act which would be normally considered as a mitigating circumstance. Taking this chain of logic other mitigating circumstances are also excluded in this connection usually playing an important factor in criminal sentencing.

Nullum crimen/nulla poena sine lege

The principle of nullum crimen and nulla poena sine lege is a fundamental doctrine in criminal law theory from which more requirements can be derived.

As regards preventive detention and indefinite sentences in general, the most relevant sub-demand of this principle is nullum crimen/nulla poena sine lege certa, which expects the law to be defined accurately and poses a prohibition on indefinite criminal acts and legal sanctions.

²⁸ See: Köhler, *Die Aufhebung der Sicherungsmaßregeln durch die Strafgerechtigkeit*, in: *Festschrift für Günther Jakobs Zum 70. Geburtstag* 281 (Pawlik/Zaczyk ed., 2007).

In: Merkel, Grischa: *Incompatible Contrasts? – Preventive Detention in Germany and the European Convention on Human Rights*, 11 German Law Journal 1046-1066 (2010) at 1048.

²⁹ Lippke, Richard L.: *No easy way out: dangerous offenders and preventive detention*, 27 Law and Philosophy 383-414 (2008) at 386-387.

I argue that preventive detention cannot meet these criteria since even if the language of the law is clear and definite and one can envisage the consequences of his criminal behavior and therefore it is correct in a procedural sense, the substantial quality of the law might still raise doubts due to the indefinite character of the penalty itself. Not having knowledge about if and when one is going to be released definitely amounts to a violation of the law clamoring for unambiguity and certainty.

Proportionality

The debate surrounding preventive detention emanates from the fact that there are two basic conflicting interests hiding behind the institution that have to be respected. Since the prisoner who is considered to be dangerous poses a risk to the society, the criminal's individual interest to get released after serving his sentence and the public interest of being protected from dangerous offenders becomes interrelated and leads to an undesired dilemma of satisfying one interest and necessarily giving up on the other.

Since the infringement of one side's interest is inevitable, proportionality must serve as a safeguard in order to prevent abuses. It is especially an important requirement in the German legal system due to the so-called proportionality test³⁰ established by the Federal Constitutional Court.

So the basic idea behind these dubious institutions is the protection of the public, but can this aim indeed justify a penalty with no upper limits, with no safeguards against arbitrariness and of a character that contradicts most criminal and human rights principles?

³⁰ See e.g. BVerfGE 7, 377; BVerfGE 19, 342 and others in Tomoszek, Maxim: VIIIth Congress of the International Association of Constitutional Law, Workshop 9 – Proportionality as a constitutional principle. Available at: <http://www.juridicas.unam.mx/wcc/ponencias/9/175.pdf>

My answer is no, and my view is also supported by Meaghan Kelly, who is also of the opinion that today's emphasized security interests are undesirably dominant and lead to "skewed balancing" practices.³¹ The reason behind this trend might be the role of the media as its exaggerating broadcasting practices have taken over people and set up increasing demands for legislators to respond to dangerous criminals' atrocities, which necessarily results in unfair balancing.

The problems concerning proportionality start with the fact that risk assessment, which should be a basic element in the process of sentencing, is certainly an impossible task in case of indefinite sanctions. Although these punishments are usually imposed on the basis of an expert opinion, as Kelly³² rightly explains, in most cases the same experts are assigned who they deem their assignments like a direct call for recording the dangerousness of the delinquent without giving any considerations. Besides, the correctness of the experts' opinion cannot be evaluated either, since we are unable to determine what would have happened if the prisoners had been released.

Moreover empirical studies suggest that preventive detention is basically executed under the same circumstances as normal prison sentences³³ which also contributes to disproportionateness and therefore strengthens my assertion that proportionality is interfered with in this context.

I further argue that prison environment is not capable of providing a basis for an opinion about the prisoner's future dangerousness. Albeit the imposition of the penalty itself or its prolongation is usually based on the behavior of the offender inside the prison's wall, I claim this to be a totally undue starting point for predicting what would happen outside the prison society.

³¹ Kelly, Meaghan: *Lock them up -- and throw away the key: The preventive detention of sex offenders in the United States and Germany*, 39 *Georgetown Journal of International Law* 551 (2008) at 562.

³² *Ibid* at 557-564.

³³ See *M. v. Germany* 41-44. §.

Furthermore, proportionality might also be attacked from another point of view which, instead of focusing on the interests of the individual and the public, analyzes the relationship between the first imprisonment's duration based on the guiltiness of the perpetrator and the duration of preventive detention. After studying some articles that indicate the prison terms in particular cases,³⁴ I realized that the number of years of definite imprisonment is strikingly low in cases where preventive detention is also employed in comparison to the severity of the committed crimes and to other decisions where preventive detention was not ordered.

In this way preventive detention can easily lead to double disproportionateness, which could be prevented if judges, whenever convinced that the offender deserves a more severe punishment, would indeed give a more serious one, but not by imposing an indefinite penalty but by increasing the definite number of years the criminal has to serve in jail. This way of sentencing would allow punishments to have a direct, causal relationship with the past and not with the future, which legal basis would accord more with the human rights principles and contribute to the prevention of abuses.

Beyond reasonable doubt, in dubio pro reo

The beyond reasonable doubt principle is related to the required standard of proof in criminal procedures regarding the guiltiness of the accused. According to this doctrine, the decision-maker has to be convinced beyond reasonable doubt that the delinquent did commit the crime he is being charged of.

However, if someone is deprived of the opportunity of having a fair trial because his guiltiness will be judged on the basis of his future acts, it is impossible to meet the requirement of this

³⁴ See e.g. Michaelsen, Christopher: 'From Strasbourg, with Love'—Preventive Detention before the German Federal Constitutional Court and the European Court of Human Right, 12:1 Human Rights Law Review 148-167 (2012) at 155-161.

widely acknowledged doctrine. Albeit the German legislation, being familiar with this problem, prescribed for an alternative standard of proof that might be satisfied even if only a “high probability of dangerousness”³⁵ can be established, the accepted standard is challengeable given the criminal nature of the cases and their legal consequences.

Another criminal law principle which has a great relevance in this context is the so-called “in dubio pro reo doctrine” obliging the trial judge in case of doubts to rule in favor of the defendant. Since acquitting a criminal does not demand full certainty but provides for a vague probability, the aforementioned principle becomes inapplicable since no court could ever be convinced about the delinquent’s future acts and his dangerousness and preventive detention could never be imposed. Therefore ignoring this basic principle in criminal cases is extremely problematic.

Fair trial rights

The right to a fair trial is acknowledged in many human rights documents and is among the most frequently invoked articles of the ECHR. The Convention phrases this right as belonging to everyone “in the determination [...] of any criminal charge against him”,³⁶ which constitutes the first impediment for preventive detention cases. As these detainees’ punishment is based on their dangerousness, albeit they are subjugated to criminal sanctions, still there are no specific charges pressed against them on which their indefinite penalty is directly built. So from this point of view it seems that this human rights guarantee does not apply to PD prisoners at all and consequently they are divested of a range of safeguards embedded in this provision.

Even if one accepts that the charges of the original criminal procedure can serve as charges also in the context of preventive detention, a close examination of Art. 6 reveals some dubious issues

³⁵ Criminal Code of Germany, Section 66. §.

³⁶ ECHR, Art. 6.

connected to defence rights. Since in preventive detention cases there is no crime committed in the past, at least the penalty is not connected to that, it is quite a troublesome mission for the criminal or the defence council to prove that the crime will not happen. Moreover, it is even harder to find witnesses for a future act or to disprove the dangerousness of the delinquent if he is being kept inside the prison walls. Furthermore, not only the interrogation of witnesses but the whole procedure of proving is undermined due to the nature of what is to be assessed, not to speak of those circumstances that can be taken into consideration in a normal case, such as the phases of a crime, intent, duress, the role of the victim itself and many other factors.

The most serious contradiction of the fair trial guarantees, however, is rooted in the presumption of innocence and in the requirement deriving from this principle. In a normal criminal procedure, the burden of proof lies with the prosecutor whereas in preventive detention cases the burden of proof is reversed.³⁷ Therefore, in these cases, the delinquent is assumed guilty as long as he cannot succeed to counter-prove his dangerousness and as a result the defendant can find himself in a very difficult situation since proving something that did not happen is a quite challenging task.

³⁷ Saas Claire: *Preventive Detention and Criminal Justice*, Ravenna, May 11 12 (2012), DRAFT – Exceptional Law in Europe with Emphasis on “Enemies”. Available at: <http://www.law.unc.edu/documents/faculty/adversaryconference/exceptionallawsineuropewithemphasisonenemiesapril2012.pdf>

2.2. IPP vs. Human rights

Having presented the impacts of indefinite sentencing on human rights in general for which the institution of preventive detention served as a basis, now I refer back to my position according to which in the context of IPP, as not being a collateral sanction in contrast to preventive detention, some of my arguments cannot be valid.

Most importantly, the ignorance of the culpa principle, which was proven in preventive detention cases, cannot stand its ground here, since the danger of committing a future crime is not the sole basis for imposing IPP. Although it does influence the judge in determining which sanction to impose, still the legal ground for its imposition is the past act and therefore satisfies the culpa principle.

Similarly, ante-delictual responsibility, which is built on the so-called “delinquent criminal law” rather than the “delictum-criminal law” theory, does not come alive as vividly as in the case of preventive detention. The reasoning is quite simple: as explained earlier, preventive detention is grounded solely on the propensity of the delinquent and the likeliness that he will commit a crime in the future whereas the culpable past conduct itself entails a different consequence namely a definite term imprisonment. To the contrary, IPP as a whole is the result of the committed offence plus the dangerousness. The crucial point here is to understand the different role of dangerousness in the context of the two sanctions and what impact they have on sentencing: whether it deserves a whole, separate sentence or only influences the type of the punishment.

Given the separate and remote existence of preventive detention from the imprisonment preceding it, the direct relationship with future dangerousness and the indirect connection with

the committed act, I claim the Strasbourg Court's argument about the causal relationship argument to be incorrect. In contrast, in case of the IPP I see a much stable relationship between the sanction and the conviction and therefore finding a non-violation of Art. 5 on the causal relationship ground would be more acceptable than in preventive detention cases.

I would further argue that the prohibition of multiple punishment is not contested either in the context of IPP prisoners. Although there is a determined part of the sentence also just like in case of preventive detention, the past act is not evaluated twice and does not entail separate sanctions.

Moving to other principles, since dangerousness is only a factor here that together with the committed act serve as a basis for imposing the adequate punishment, in contrast to preventive detention where the whole penalty is based only on future predictions and where the perpetrator's real act is assessed and punished in total isolation, the need for and the lack of the fair trials guarantees or the principles of beyond reasonable doubt and in dubio pro reo cannot be detected either among the concerns circling around IPP.

Nevertheless, the lack of clashes concerning these human rights requirements does not mean that other issues cannot emerge which are serious enough to challenge the lawfulness of IPP.

Actually the challenge has already happened, apparently entailing a way faster reaction from the legislation of the U.K. than from Germany. The criticism both from the academic community and the ECtHR resulted in the repeal of the provisions governing IPP and eventually led to the death of the institution. However it also must be noted that despite this promising development, the legislators decided to turn back to the IPP's predecessor called automatic life sentence. As Christopher Rose notes, this institution also "shares the prescriptive nature of the original IPP

provisions”³⁸ meaning that it leaves no choice for the sentencing judge if the statutory criteria are met and therefore cannot be regarded as a perfect solution for the dilemma surrounding potentially dangerous perpetrators.

³⁸ Rose, Christopher: *RIP the IPP: A Look Back at the Sentence of Imprisonment for Public Protection*, 76 *Journal of Criminal Law* (2012) 303 at 312.

3. Courts in dialogue

The problems induced by indefinite sentencing appear not only at the level of dogmatics but also in legal practicing. Due to a number of decisions delivered in the last couple of years by the domestic courts and the ECtHR, a more practical dimension has also developed concerning the legality of preventive detention and the IPP.³⁹

Given the importance of the domestic judgments preceding the route to Strasbourg, this chapter is going to disclose and assess the national case history of the institutions born before and as a result of the ECtHR's relevant verdicts.

3.1. The legal roller-coaster of preventive detention in the German system

The evolution of the case law on preventive detention goes back to 2001, when an individual referred to as M filed a constitutional complaint with the German Bundesverfassungsgericht (BvG). Since then a number of cases have reached the German Constitutional Court and some of them have also made their way up to the top of the human rights judiciary resulting in judgments delivered by the ECtHR.

This chapter is going to present the legal roller-coaster the institution had been riding primarily at the domestic level and the exceptional dialogue developed between Karlsruhe and Strasbourg.

³⁹ See M. v. Germany, ECHR, Application no: 19359/04 (2009); Grosskopf v. Germany, ECHR, Application no: 24478/03 (2010); Schmitz v. Germany, ECHR, Application no: 30493/04 (2011); Mork v. Germany, ECHR, Application no: 31047/04 (2011); Haidn v. Germany, ECHR, Application no: 6587/04 (2011); James, Wells and Lee v. The United Kingdom, ECHR, Application no: 25119/09, 57715/09, 57877/09 (2012); See also domestic judgments e.g. the decision of the German Constitutional Court (2 BvR 2029/01) 5 February 2004.

3.1.1. The past behind the well-known M. decision at the domestic level

The constitutional complaint filed by the applicant known as M. was based on the 1998 Amendment of the German Criminal Code⁴⁰ that abolished the former 10-year maximum limit of preventive detention and allowed for the extension of the sentence retroactively even in cases decided before the new law came into force.

This practice, according to the complaint, contradicted the prohibition of retroactive punishment and legislation, the rule of law doctrine, the principle of proportionality and the right to liberty, all articulated in the Grundgesetz.⁴¹

The BvG however rejected the claims⁴² by reasoning that even though the body acknowledges the increased interest to right to liberty after the expiry of the 10 years period, the continued detention still remains justifiable due to the safeguards built in the new law such as the required “higher standard with regard to the legal interest under threat [...] and the proof of the applicant’s dangerousness.”⁴³

As concerns the prohibition on retroactivity, the German Court simply excluded its application by invoking the twin track system of sanctions which makes a distinction between measures and penalties. As a result, the purely preventive aim and the lack of intent to punish guilt rendered the institution a measure and led to the lawful ignorance of Art. 103. § (2) of the Basic Law.

⁴⁰ Sixth Criminal-Law Reform Act of 1998, See also: Krehl Christoph: *Reforms of the German Criminal Code - Stock-taking and Perspectives - also from a Constitutional Point of View*, 4 German Law Journal 421-431 (2003). Available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=267>

⁴¹ Art. 2. § (2) sentence 2 in conjunction with Art 104.1; Art. 2. § (2) sentence 2 in conjunction with Art. 20. § (3); Art. 103. § (2) of the German Basic Law

⁴² BvG, 2 BvR 2029/01, 5 February 2004.

⁴³ Michaelsen, Christopher: ‘From Strasbourg, with Love’—Preventive Detention before the German Federal Constitutional Court and the European Court of Human Right, 12:1 Human Rights Law Review 148-167 (2012) at 154.

The BvG also added that the interest of the public outweighs the prisoners' expectation of being released after 10 years and therefore found the principle of proportionality intact.

The above mentioned decision was not the only one of the Bundesverfassungsgericht dealing with the institution of preventive detention in 2004.⁴⁴ The Bavarian Dangerous Offenders' Placement Act,⁴⁵ allowing for the retrospective imposition of the sanction, also came under the scrutiny of the Court which decision, instead of deciding on the substance of the issue, only examined the jurisdictional aspect and left the substantial question to be ruled on by the Bundestag. The constitutional body, though declaring the unconstitutionality of the act, did not deal with the human rights aspects of the issue but grounded its decision solely on problems concerning the competence of the Länder and the federal legislature. Moreover, it did not call for the nullification of the unlawful provisions but ordered the prisoners to be remained in preventive detention without any valid legal basis. Although the intent of the Court was in this respect to give the opportunity for the federal legislation to rule on the issue, this practice contradicts basic fundamental rights ironically infringed by a body that is indeed responsible for the protection of these norms.

3.1.2. The dilemma generated by a contradicting decision: The implementation of the M. judgment

The legal debate came into light again in December 2009, when the ECtHR delivered a condemning decision against Germany in the M. case.⁴⁶ The judgment brought about severe challenges primarily for the judiciary that had to face the dilemma of contradicting decisions coming from the highest judicial organs protecting fundamental rights.

⁴⁴ BvG, 2 BvR 834/02, 10 February 2004.

⁴⁵ The Bavarian Dangerous Offenders' Placement Act of 1 January, 2002.

⁴⁶ M. v. Germany, ECHR, Application no: 19359/04 (2009).

Although the German system allows the retrial of those cases failed in Strasbourg under the Criminal Procedure Code,⁴⁷ the precedent judgment known as *Gürgülü v. Germany*⁴⁸ on the relationship between the two courts rendered the picture somewhat confusing. On one hand, the decision requires “interpretative” and benevolent approach towards the ECHR but at the same time ranks the judgments coming from Strasbourg as federal law which constitutional constellation entailed severe problems in the context of implementation due to the subjugated position of the “European” decisions.⁴⁹

Consequently, the requirement of legitimate expectation or clear and foreseeable laws enshrined in the rule of law principle had been jeopardized by the domestic courts that in some cases followed and in some refused to follow the ECtHR’s decision.

The uncertainty generated by the German courts was aimed to be eliminated by a new law in 2010 establishing jurisdiction for the German Supreme Court (FCJ) in cases the Higher Regional Courts intend to decline the release of preventive detention prisoners on the basis of their dangerousness. However, instead of bringing some kind of relief, the fourth and fifth Senate of the FCJ reached different conclusions and left the issue of predictability unresolved or even more chaotic.

As a result of the legal chaos caused by the apparently incompatible contrast of the decisions issued by the ECtHR and the BvG, the German legislation made a new attempt manifested in two Acts entered into force in January, 2011.⁵⁰ One of them limited the scope of preventive

⁴⁷ German Criminal Procedure Code Art. 359. § (6).

⁴⁸ BvG, 2 BvR 1481/04, October 14 2004.; *Gürgülü v. Germany*, ECHR, Application no: 74969/01 (2004).

⁴⁹ See Peters Birgit: *Germany’s Dialogue with Strasbourg: Extrapolating the Bundesverfassungsgericht’s Relationship with the European Court of Human Rights in the Preventive Detention Decision*, 13 German Law Journal 757-772 (2012). Available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1438>

⁵⁰ Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung und zu begleitenden Regelungen of 22 Dezember 2010.

detention to “crimes against life, physical integrity, personal freedom or sexual self-determination” of a person and also outlawed the retrospective imposition of the sentence unless the convictions date back before 2011 or if they concern prisoners whose mental illness has been cured but still pose a threat to the public.⁵¹

The Therapy Placement Act went even further and ruled that ex-preventive detention prisoners can be examined by a psychiatrist after having been released and in case a mental illness is diagnosed they can be confined in accommodations under supervision provided that they pose a threat to the public. The newly created placement procedure of a civil nature includes some procedural safeguards such as that the order “must be issued by a regional civil court”, the person concerned must be heard and represented by a lawyer, two expert opinions are required, the decision can be challenged on appeal and the “placement is limited to renewable periods of 18 months”.⁵² The proposed solution of the Bundestag, however, is at least as problematic as its retrospective predecessor, if not worse.

Preventive detention detainees are legally competent people who were held responsible for their acts at the time of their conviction. Declaring these people to be of an unsound mind would change the basis of their detention and therefore goes against the principle of guilt. The application of this rule would definitely open channels for abuse, since basically no prisoner could rely on a release date anymore as a result of a potential future retrospective diagnosis.⁵³

⁵¹ Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 November to 7 December 2010 (22, February 2012).

⁵² Gesetz zur Therapierung und Unterbringung psychisch gestörter Gewalttäter (Therapienunterbringungsgesetz – ThUG) Art. 5 of Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung und zu begleitenden Regelungen of 22 Dezember 2010.

⁵³ Merkel, Grischa: *Incompatible Contrasts? – Preventive Detention in Germany and the European Convention on Human Rights*, 11 German Law Journal 1046-1066 (2010) at 1057.

Besides, the new Act is also discriminative in the sense that it only targets preventive detention prisoners despite the fact that subsequent mental problems can arise in case of any prisoners due to the mere circumstances of the detention as such.

Moreover, the Therapy Placement Act is also over-inclusive on criminals suffering from mental illness as a distinction is made in the German legal system between the placement of dangerous offenders in prison for preventive purposes (preventive detention) and the placement of mentally ill persons in psychiatric hospitals (mental hospital order). Therefore it seems that the new Act is overlapping with the scope of another area covered by separate laws⁵⁴ and has the ambiguous target to keep persons in detention who should otherwise be freed from preventive detention in compliance with the decisions of the ECtHR. Even if one supposes that this newly established basis of detention could come under Art. 5. § (1) (e) of the ECHR, I am of the opinion that the new law should certainly fail to meet the threshold of Strasbourg due to its arbitrary character.

While Germany was struggling with the implementation of the European judgment both at the level of the judiciary and the legislation, the ECtHR reaffirmed its position articulated in the M. decision and released three more condemning judgments in January, 2011.⁵⁵

⁵⁴ German Criminal Code 63. §.

⁵⁵ Kallweit v. Germany, ECHR, Application no: 17792/07; Mautes v. Germany, ECHR, Application no: 20008/07; and Schummer v. Germany, Application nos: 27360/04 and 42225/07.

3.1.3. Judgment overruled: The dialogue between Karlsruhe and Strasbourg

When it seemed that the problem of implementation will outgrow the German judiciary and legislation, the BvG stepped in and handed down its second judgment⁵⁶ on the institution overruling its previous decision. The judgment of May 2011 was a response to four constitutional complaints, two of them concerning the continued detention of prisoners beyond the 10-year limit, whereas the remaining two covered cases on retrospectively imposed preventive detention without indicating its potential application in the original judgment.

The new decision reflected on the M. judgment of the ECtHR, which was considered “equivalent to legally relevant changes” according to the constitutional body. The “Völkerrechtsfreundlich” approach required the BvG to deem the Strasbourg decisions as aids for the interpretation of the Basic Law and led to the beginning of a dialogue between Karlsruhe and Strasbourg.

Nevertheless, the German body did not follow the European instructions blindly. While both institutions found that due to the divergent objectives and grounds of a general prison sentence and preventive detention the latter should “keep a marked distance” from the former in terms of execution (Abstandsgebot), they deducted convergent consequences.

Whereas the ECtHR qualified preventive detention as a penalty and therefore invited the principle of prohibition of retroactive punishments into play, the BvG insisted on the traditional twin-track perception of the German sanction system and consequently excluded the operation of the prohibition of retroactivity (Art. 103.§).⁵⁷ Instead, it developed seven “constitutionally derived principles”⁵⁸ aiming a therapeutic orientation with a view to minimize the risk these detained people pose to the public and therefore decrease the duration of their sentences. Since

⁵⁶ BvG, 2 BvR 2365/09, 4 May 2011.

⁵⁷ Drenkhahn, Kirstin; Morganstern, Christine; van Zyl Smit, Dirk: *What is in a name? Preventive detention in Germany in the shadow of European human rights law*, 3 Criminal Law Review 167-187 (2012) at 173-176.

⁵⁸ Ibid. at 175.

these requirements (manifested in the ultima ratio principle, individualized treatment, separation from general imprisonment, the need for legal protection and regular supervision) had not been met, the BvG ruled that preventive detention does not comply with Art. 2. § sentence 2 (freedom of person) in conjunction with Art. 104. § (1) (legal guarantees of detention) of the Basic Law. Furthermore, the non-satisfaction of the distance requirement also entailed the demand for the absolute protection of the detainees' legitimate expectations⁵⁹ which was not respected by the complained institution either.

From the angle of the issue of implementation there seems to be a harmony between the two courts: So far so good. However, in spite of the fact that the German body found the balance to be disproportionate between the interest of the public of being protected from dangerous offenders and the individuals' right to liberty, it left a channel open to rectify the balance even if preventive detention is ordered or prolonged retrospectively. The preconditions include the observance of the distance requirement, a high danger of committing the most serious sex and violent crimes and the detection of mental disorder. As one can see the exceptions clearly comply with and therefore encourage the application of the ambiguous Therapy Placement Act mentioned above and suppose the lawfulness of such detention under Art. 5. § (1) (e) of the ECHR without giving deeper consideration to the European jurisprudence.

Consequently, I argue that the new model of the institution not only threatens a number of democratic principles but also poses an expensive burden on the state to set up new institutions for the offenders "on the second preventive detention track".⁶⁰

⁵⁹ Basic Law: Art. 2. § sentence 2 in conjunction with Art. 20. § (3).

⁶⁰ Drenkhahn, Kirstin; Morganstern, Christine; van Zyl Smit, Dirk: *What is in a name? Preventive detention in Germany in the shadow of European human rights law* at 179.

In light of the above facts and considerations one should see that despite the existence of a clear dialogue between the courts⁶¹ it might remain uncertain whether they indeed speak the same language. Although there is some agreement to a certain extent between the bodies, I am of the opinion that, due to the channels left unsown by the German Constitutional Court, a true reconciliation between the viewpoints of the courts must still wait to happen and it is only a matter of facts and time until the new model will also be challenged before the ECtHR.

⁶¹ The Strasbourg Court welcomed the German Constitutional Court's decision in *Schmitz v. Germany*, ECHR, Application no: 30493/04 (2011); and *Mork v. Germany*, ECHR, Application no: 31047/04 (2011).

3.2. The domestic case history of imprisonment for public protection

Similarly to preventive detention, imprisonment for public protection does also have an adventurous legal history hiding contradictory decisions delivered by the domestic courts. The following part of the paper reveals the precedent judgment on the issue and phrases significant critiques to the reasoning of the decisions.

3.2.1. The beginning: Divergent conclusions on the leading case of IPP

The institution of IPP had been challenged in 2007 by three prisoners who had no access to any rehabilitative courses during their fixed term detention called the tariff. As a result the listed hearing before the Parole Board, the competent body for reaching a decision on the dangerousness of the individual, had been adjourned claiming that there is not enough evidence upon which the Parole Board could base its decision whether to release the detainees or not.

Although the Divisional Court ruled at first instance that a detention exceeding the tariff period is unlawful “unless [the] continuation [is] justified by a current and effective assessment”⁶² as to the dangerousness of the applicant, the Court of Appeal rejected this position. The Appeal Court only agreed with the finding of the Divisional Court in establishing the failure of the Secretary of State “in his public law duty” since he did not provide an effective mechanism in which the statutory system could have worked.⁶³ However, the Court added that the error relating to the Secretary of State does not render the detention unlawful.

⁶² R (Wells) v. Parole Board [2008] 1 AER 138 – the decision of the Divisional Court (Laws LJ and Mitting J) on 31 July 2007. In: Secretary of State for Justice (Respondent) v. James (FC) (Appellant) (formerly Walker and another) R (on the application of Lee) (FC) (Appellant), UK House of Lords, 6 May 2009. Available at: <http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090506/james.pdf>

⁶³ R (Walker) v. Secretary of State for Justice [2008] 1 WLR 1988 – the decision of the Court of Appeal (Lord Phillips of Worth Matravers CJ, Dyson and Toulson LJ) on 1 February 2008. In: Secretary of State for Justice (Respondent) v. James (FC) (Appellant) (formerly Walker and another) R (on the application of Lee) (FC) (Appellant), UK House of Lords, 6 May 2009.

3.2.2. House of Lords brings no relief for prisoners serving IPP

The case reached also the House of Lords in front of which the petitioners claimed that the detention becomes unlawful once the tariff expires provided that no proof has been shown as to the dangerousness of the prisoners. Furthermore, due to the direct applicability of the ECHR before the U.K. Courts,⁶⁴ the detainees argued that the causal relationship between their detention and the original judgment is broken and they also invoked the prohibition of arbitrariness. They also asserted that the Parole Board could not effectively make a decision due to the shortcomings of the system which clearly violated their right under Art. 5. § (4) of the Convention.

The decision of the House of Lords, however, did not bring success to the prisoners.⁶⁵ The body upheld the Court of Appeals' finding as concerns the lawfulness of the detention asserting that the failure of the Secretary of State is independent from the decision reached by the Parole Board. The judges reasoned that no release can be ordered until an affirmative decision has been made and no decision can be reached until the Parole Board is convinced that the "detention is no longer necessary". This is the statutory mechanism which cannot be revised by judicial decisions, apparently even if the law allows for serious encroachments upon the right to liberty.

On the basis of the Court's reasoning it seems that the default position is that a prisoner poses a threat to the public save if there is a decision to the contrary. This new perception however runs

⁶⁴ See Human Rights Act 1998.

⁶⁵ Secretary of State for Justice (Respondent) v. James (FC) (Appellant) (formerly Walker and another) R (on the application of Lee) (FC) (Appellant), U.K. House of Lords, 6 May 2009.

counter to the previous position and reverses the presumption that perceived dangerousness only as a possibility that could not be predicted by the sentencing judge in advance.⁶⁶

To corroborate the finding, the judges elaborated on the arguments taken by the ECtHR in right to liberty cases and argued that Art. 5. § (1) (a) remained intact since the detention had been a result of a conviction of a competent court. They invoked the relevant judgments⁶⁷ and even though acknowledged that the causal relationship might be broken if the grounds on which the new decision is based to re-detain or not to release are inconsistent with the sentencing court's judgment, they rejected the rupture of the causal connection by referring to the statutory mechanism again. The judges went on saying that a decision not to free an IPP detainee on the ground that the Parole Board is not convinced about the "safety for release" cannot be said to be "inconsistent with the [original] objectives", particularly because the objectives, that only embrace the protection of the public without the aim of rehabilitation, remained the same. This approach however totally ignores the question "why" the Parole Board cannot be convinced about the safety for release and constitutes a clear example for an arbitrary application of the law.

3.2.3. Obeying the letter of the law vs. Ensuring rights effectively

In my view the crucial problem regarding these arguments roots in the fact that the Court does not pay any regard to the context. It satisfies itself by the mere obedience of the letters of the law and does not offer effective/substantial protection, which aim has been declared multiple times even by the ECtHR.

⁶⁶ Duffy, Jim: When indefinite becomes arbitrary: James, Wells and Lee v UK. Available at: <http://ukhumanrightsblog.com/2012/09/24/when-indefinite-becomes-arbitrary-james-wells-and-lee-v-uk/>

⁶⁷ Weeks v the UK, ECHR, Application no: 9787/82 (1987); Stafford v. the UK, ECHR, Application no: 46295/99 (2002); Van Droogenbroeck v. Belgium, ECHR, Application no: 7906/77 (1982).

The whole reasoning centering upon the insistence on what the law says only partially satisfies the requirement of lawfulness under Art. 5. The Strasbourg Court had already made it clear that, despite the margin of appreciation granted to member states, the control of preventing arbitrariness is still to be exercised by the Human Rights Court. Consequently, the House of Lords' narrow interpretation, ignoring the effective protection of rights, cannot comply with the Convention in this regard.

Moreover I am of the opinion that the House of Lords also erred in applying the Weeks judgment analogously in their decision when they claimed that it is inherent in the judgment of life sentences that the liberty of the convicted will be at the discretion of the executive for life. Accordingly, the sentencing court should have known and therefore should have wanted this to happen and as a result the appropriateness of the sentence itself cannot be scrutinized under Art. 5 - the judges added. What I think is just the opposite. In my view, as the sentencing court could not foresee the malfunction of the system, it could not foresee the substantial prolongation of the detention resulting from this error either. This is particularly the reason why I criticize the Strasbourg Court itself for not finding the causal relationship to be broken when scrutinizing Art. 5. § (1) (a) in *M. v Germany*, notwithstanding the fact that the European Court rectified its error by establishing a violation on a different basis.⁶⁸

As concerns the complaint on Art. 5. § (4), the Lords argued what this provision requires is a procedural demand (review by a court-like body, power to order release, not advisory jurisdiction) but does not secure a meaningful, effective review in a substantive sense.

⁶⁸ James, Wells and Lee v. The U.K., ECHR, Application no: 25119/09 57715/09 57877/09 (2012).

In my view this position is striking again with due regard to the European case law obviously holding that the rights articulated in the Convention have to be ensured also in the practical sense whereas blank declarations are clearly not satisfying.⁶⁹

The judges envisaged only one extreme situation when arbitrariness could actually be established, namely if the Parole Board would no more be able to function at all and therefore there would be no way to end the detention in a manner the original sentence contemplated. This argument can also be challenged since even if a full break down does not eventuate, a malfunction can still substantially lengthen the detention which the original sentence did not aim either. Consequently, a mere delay can also result in the rupture of the causal connection after the tariff period has elapsed.

In order to underpin its findings the House of Lords invoked the Noorkoiv case,⁷⁰ in which the Court already took the view that the delay by the Secretary of State in referring cases to the Parole Board can only result in a violation of Art. 5. § (4) but not in Art. 5. § (1) (a). The Lords argued if the Parole Boards' delay itself does not break the causal connection, it is less likely to be breached by a delay in treatments, which has a more remote relationship with the decision and does not constitute a single basis for the Parole Board's finding either.

I am of the opinion that the Court here also followed a flawed logic as it ignored some crucial differences. In the present case the Parole Board itself is the one being ineffective, the decision of which would serve as a basis for the prolongation of the detention, which is clearly a substantive issue and therefore must have an impact on the causal relationship. Whereas in Noorkoiv, the delay, emanating from the failure of the Secretary of State, did not prevent the

⁶⁹ See ECHR Preamble; Art. 13; Art. 34.

⁷⁰ R (Noorkoiv) v. Secretary of State for the Home Department [2002] 1 WLR 3284. In: Secretary of State for Justice (Respondent) v. James (FC) (Appellant) (formerly Walker and another) R (on the application of Lee) (FC) (Appellant), UK House of Lords, 6 May 2009.

Parole Board from making an effective decision once the case has been referred to it and in this respect the delay here is indeed a procedural one having no connection with Art. 5. § (1) (a).

The House of Lords also invoked the Cawser case⁷¹ in which the judges previously held that the lack of opportunity to take part in rehabilitative courses cannot lead to the disjunction of the causal connection. However the Court failed to give any reasons why it should/could not depart from its former position.

At the end of the James judgment Lord Judge puts an emphasis on the realities. He claims that realities imply on one hand that prisoners are dependent on the prison regime which is “dependent on the structures [built] by the Secretary of State”. He further adds that the Parole Board is dependent on its assessment which is “dependent [again] on the structure provided by the Secretary of State”. Albeit I could not agree more with Lord Judge on what he said, I cannot see the reason why he abandoned his own realization and simply returned to the formal law argument used an excuse for not ruling in favor of the detainees.

On the basis of the reasoning above what I see as a basis for the continued confinement is neither a conviction nor a consistent objective, but rather the failure of the Secretary of State. It is so because a mainly procedural issue i.e. the lack of resources could have an enormous impact on the length of detention by not providing the applicants with the opportunity to “demonstrate [that] they no longer [pose a threat] to the public”.⁷² However an error can clearly not serve as a basis for any detention waiting for justification.

⁷¹ R (Cawser) v. Secretary of State for the Home Department [2004] UKHRR 101. In: Secretary of State for Justice (Respondent) v. James (FC) (Appellant) (formerly Walker and another) R (on the application of Lee) (FC) (Appellant), UK House of Lords, 6 May 2009.

⁷² Secretary of State for Justice (Respondent) v. James (FC) (Appellant)

In my view the real and most important policy hiding in the House of Lords' reasoning is directed by the Court's aim to restrict its own power. What is behind the position of the body that insists rigorously on the statutory mechanism articulated by the law is built on a purely procedural, jurisdictional consideration that does not wish to vest the judiciary with the power to overrule or amend the law and therefore is only willing, by declaring the failure of the Secretary of State, to grant declaratory relief and rejects to order the release from a definitely arbitrary detention.

Still, I am of the opinion that deciding for the applicants in no way could lead to the expenditure of the Court's jurisdiction. It would only ensure the effective application of the law and exclude arbitrariness which is exactly what the rule of law principle requires instead of a rigorous, literal interpretation.

4. The analysis and critique of the case law of the European Court of Human Rights

Considering the importance of delivering a full picture about the thesis' problem, the intent of this chapter is to bring closer the examined institutions through the relevant European case law and subject the decisive parts of the Strasbourg Court's reasoning, centering upon the so-called causal relationship argument, to a detailed scrutiny. This part will reveal how the Court operates with its influential doctrine, how it behaves under different factual and legal circumstances and whether it should be subjected to criticism.

4.1. M. v. Germany: The leading judgment concerning preventive detention from the European perspective

As mentioned before, M. v. Germany is the leading case of the European Court of Human Rights decided on the issue of preventive detention. Having the reader familiarized with the domestic aspect of the case in the precious chapter, this part of the paper will disclose the case as before the ECtHR. As already explained, the case concerned a prisoner who had been sentenced to imprisonment for a specific period of time along with preventive detention of an indefinite character though having a ten year upper limit. Meanwhile, the maximum limit had been abolished and consequently the prisoner had to remain in prison even after being detained for ten years. Although at first glance it seems that the Court delivered a judgment on preventive detention per se and rejected the institution by finding a violation, the facts reveal that the case has an additional and very special element embodied in the retroactive applicability of the law which plays a decisive factor in the outcome of the case. The special importance of this factor can be underpinned by the Court's case law⁷³ disclosing just the opposite position of the body in

⁷³ See Grosskopf v. Germany, ECHR, Application no: 24478/03 (2010); Schmitz v. Germany, ECHR, Application no: 30493/04 (2011); Mork v. Germany, ECHR, Application no: 31047/04 (2011);

cases where the issue of retroactivity is not concerned by the facts. In those cases the Strasbourg Court affirmed the compatibility of the indefinite sanction with the Convention.

Notwithstanding the fact that the M. judgment is not exclusively about preventive detention but touches upon further issues having an influential role in the decision, it still includes some valuable arguments that worth considering and being subjected to criticism.

4.1.1. The causal relationship argument: When the extension of the maximum period is involved

The reasoning of the Court in the M. judgment is centering upon the causal relationship argument, a test created by the precedents in right to liberty cases under Art 5. § (1) (a). According to this provision a detention can be considered lawful if it is “after conviction by a competent court.” In the Guzzardi case⁷⁴ the Court had created a guide for the application of this provision by explaining how the word “conviction” shall be construed. Accordingly, the term “conviction” does not exist unless there is “both a finding of guilt after it has been established in accordance with the law that there has been an offence and the imposition of a penalty or other measure involving deprivation of liberty”.⁷⁵

The crucial part from the point of view of the causal relationship argument appears under the interpretation of the word “after”. This doctrine indeed not only requires a chronological order in the context of the conviction and the detention but also prescribes that the “detention must result from, follow and depend upon or occur by virtue of the conviction.”⁷⁶ This causal connection

⁷⁴ Guzzardi v Italy, ECHR, Application no: 7367/76 (1980), 100. §.

⁷⁵ Stafford v. the United Kingdom, ECHR, Application no: 46295/99 (2002) 64. §. See: Office of The High Commissioner for Human Rights in cooperation with the International Bar Association: Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers 159-172 (2003) at 172. Available at: <http://www.justiciaviva.org.pe/jurispu/relator/cap5.pdf>

⁷⁶ M. v. Germany 105. §; Weeks v. the United Kingdom 42. §; Stafford v. the United Kingdom 64. §.

however might become weaker by the passage of time and it even can be broken if the objectives of the initial conviction are no longer “consistent” with the grounds on which a subsequent “decision to release or re-detain [are] based”.⁷⁷

The Court also noted that the decision of those courts that are only competent in making decisions about the execution of judgments cannot be regarded as convictions. Since in the M. case the order to remain detained was issued by a similar court having only executing competence, it would have been essential to find a valid connection still in existence between the sentencing court’s decision and the detention. However, at the time the sentencing court decided for the imposition of preventive detention there was an upper limit for the penalty from which the legitimate expectation of the sentencing court stemmed of having the convicted be released in ten years maximum. Consequently, the chain “between the original conviction and the [continued] detention [must have] broken” when this period expired which could not have been resurrected due to the lack of competence of the executive court.

Establishing a violation of Art. 5. § (1) (a) and the argument underpinning it seems to be reasonable in the context of the M. decision, however it is of crucial importance that the only factor why the Court did not regard the test as being satisfied is the amendment of the law that did not allow the sentencing court to foresee the chance that the applicant might serve more than ten years in prison.

In my view, the real problem does arise when the Court takes the opposite position and finds the test to be satisfied in those preventive detention cases where the extension of the maximum period is not involved which finding has led to the acceptance of the institution of preventive detention as such at the European level.

⁷⁷ M v. Germany 105. §

Contrary to the Court I am of the opinion that the causal relationship can also be damaged even if the extension of the maximum period is not involved.

4.1.2. The causal relationship argument: When the extension of the maximum period is NOT involved

In the following section I am going to present the Court's position in those preventive detention cases where no special circumstances are involved and therefore only the mere institution as such is scrutinized.

Preventive detention vs. life imprisonment: An examination under Art. 5. § (1) (a)

The Strasbourg Court has held in numerous decisions, such as *Schmitz v. Germany*, *Grosskopf v. Germany* or *Mork v. Germany*, that preventive detention is justifiable under Art. 5. § (1) (a), since the causal relationship test, contrary to the *M.* case, is met. It reasoned its position by claiming that on one hand the detention was based on a conviction and on the other hand both the sentencing court's order and the executive court's decision not to release the applicant had the same objectives of preventing future crimes and therefore the causal connection between the conviction and the detention was not infringed.

In my view, however, the Court did not pay due attention to the special, preventive character of the institution. Had the Court examined more carefully its own definition about conviction with due regard to the character of preventive detention, it would/should have realized that this sanction does not meet the test of conviction and therefore the causal connection could not exist either.

In order to corroborate my position I recall the *Weeks v. the United Kingdom* case,⁷⁸ which did also lean on the causal relationship argument, however the facts did not concern preventive detention but life imprisonment.

This distinction is crucial from the point of view of satisfying the Court's test which requires a "finding of guilt" and the establishment of an offence. The Court is of the opinion that both sanctions are able to meet this standard. In my view, as concerns the *Weeks* judgment, the one about life imprisonment, the Court's position cannot be challenged: the applicant was charged with burglary he had been found guilty of and punished with one single sentence which was life imprisonment.

In contrast, the imposition of preventive detention is more complex. The fact that it follows another, fixed term imprisonment makes it ambiguous whether the criteria of a finding of guilt and the establishment of an offence can be satisfied without doubts. This is so because although guiltiness and the past offence are indeed connected to a sanction but this sanction is the fixed term imprisonment proportionate to the crime, whereas their connection to preventive detention is much weaker. Albeit preventive detention has some kind of formal relationship with the past act since it is the one that induces the criminal procedure, this relationship seems to be broken when the past offence entails another but still homogenous sanction (imprisonment for a specific period of time). Since it would not make sense to impose a substantially similar penalty twice for the same past act and it would also contradict the *ne bis in idem* principle, the rationale must be that one of the imprisonments does have a different basis. Consequently, what preventive

⁷⁸ *Weeks v. the United Kingdom*, ECHR, Application no: 9787/82 (1987).

detention has a real connection with is not the past act but the future dangerousness the offender poses to the public.⁷⁹

However, future dangerousness is not considered by the Court as a valid basis for a conviction, moreover neither can it entail a finding of guilt due to the fact that it simply did not happen. As a result a conviction that is based on future acts without the possibility of finding of guilt is only illusory and a thorough examination of the definition reveals that in reality it cannot satisfy the term “conviction” for the purposes of Art. 5. § (1) (a) leading to the consequence that no causal relationship can exist either.

In life imprisonment cases, however, the (only) punishment is obviously based on the past act and even if there are some concerns as to the dangerousness of the offender it can only influence the type of the sanction along with the past offence but cannot constitute an independent basis for a separate but still identical, homogenous measure which would break the connection between the past act and the detention.

Preventive detention: An examination under point (a) in conjunction with point (c) and

Art. 5. § (4)

According to the Court’s jurisprudence the provisions of the Convention, and therefore those under Article 5, shall be read in conjunction, which position sheds light to another challenge in the context of preventive detention cases. The challenge is in the contradiction created by the case law of the Court. Accordingly, preventive detention cannot be justified under Art. 5. § (1) (c) regardless of the fact whether it is used as a preventive measure⁸⁰ like in *Guzzardi* or as a

⁷⁹ This position was expressly affirmed by the German Constitutional Court in a decision concerning preventive detention: „While a prison sentence serves the retribution of culpably committed offences, the deprivation of liberty of a detainee under preventive detention solely pursues preventive objectives, namely the prevention of criminal offence in the future.” 2 BvR 2333/08, 2 BvR 1152/10, 2 BvR 571/10.

⁸⁰ *Guzzardi v Italy*, ECHR, Application no: 7367/76 (1980) 102. §.

sanction⁸¹ like in *M. v. Germany*, due to the lack of concreteness and to the fact that these detainees “are not be brought promptly before a judge and tried for future offences” as it would be required by Art. 5. § (3). Interestingly, the Court reached different conclusions under Art. 5. § (1) (a) depending on the difference if preventive detention is employed as a measure or as a criminal sanction/penalty. The Court claims in *Guzzardi* that as a measure, preventive detention cannot be justified under Art. 5. § (1) (a) either, since a preventive measure “does not constitute detention after conviction by a competent court”,⁸² whereas as a criminal sanction it might be covered by the same provision. In my view, however, the factors invoked by Court for rejecting the applicability of point (a) in case of the institution as a measure should prevent the applicability of the provision in case of the institution as a sanction also. First because the institution as a penalty has the same preventive character in substance as the measure has, and second because, as I elaborated on this earlier, preventive detention used as a sanction has no real connection with the conviction but with future dangerousness and therefore it “did not constitute detention after conviction by a competent court” either.

Furthermore, the application of Art. 5. § (1) (a) is also problematic from the point of view of the “doctrine of incorporation” according to which when “a decision is made by a court at the close of judicial proceedings [...] the supervision articulated by Art. 5. § (4) is incorporated in the decision”.⁸³ Following the practice of the Court and subsuming preventive detention under 5. § (1) (a) on the basis that preventive detention is a result of a conviction, would call for the observance of the Court’s well founded principle. This approach however is challengeable since the very nature of the ground for preventive detention is such that it is expected to change in the

⁸¹ *M. v. Germany* 102. §.

⁸² *Guzzardi v. Italy* 100. §.

⁸³ S. Trechsel: *Liberty and Security of Person*. In R. St. Macdonald et al. (eds.), *The European System for the protection of Human Rights*, Dordrecht, M. Nijhoff (1993) 277-344 at 320.

future therefore habeas corpus should be inevitable in preventive detention cases. So justifying preventive detention under point (a) either forces the Court to ignore habeas corpus or, by securing habeas corpus, to ignore its self-established doctrine of incorporation and increase the number of the already existing exceptions to the principle (life imprisonment, mental hospital order) by accepting a new one on preventive detention.⁸⁴

The problem surrounding the doctrine of incorporation might be approached also from another angle for which the case called *Silva Rocha v Portugal*⁸⁵ can serve as an illustration.

The case is special from the perspective that it does not regard the issue when habeas corpus should be provided but when habeas corpus can be ignored. The facts concern the detention in a psychiatric hospital for a minimum period of three years of a person found not to be criminally liable for the charges on account of his mental illness.

The Court ruled that the case is covered mutually by Art. 5. § (1) (a) and (e) and therefore the lack of review in the first three years of the detention complained by the applicant does not violate Art. 5. § (4) since it was incorporated in the decision which imposed the detention.

Following the logic of the judgment against Portugal one might argue that the lack of habeas corpus in the first years of detention can also be acceptable in preventive detention cases.

Nevertheless I am on the opinion that not even the *Silva Rocha* decision can provide a basis for such an approach. I argue that the “Portugal” decision in itself is a highly challengeable judgment. By subsuming the case also under Art. 5. § (1) (a) the Court contradicted its own definition on “conviction”, which is a precondition for the application of the said paragraph. I claim that due to the fact that the applicant was not criminally responsible, his detention could

⁸⁴ See De Wilde, Ooms and Versyp, ECHR, Application no: 2832/66; 2835/66; 2899/66 (1971) 76. §; *Winterwerp v. the Netherlands*, ECHR, Application no. 6301/73 (1979) 55. §.

⁸⁵ *Silva Rocha v. Portugal*, ECHR, Application no: 18165/91 (1996).

not be the consequence of a conviction requiring a “finding of guilt after it has been established in accordance with the law that there has been an offence.”⁸⁶

Besides, it is clearly established in the Court’s case law that in mental illness cases Art. 5. § (4) can only be satisfied if a regular review is carried out.

Furthermore I assert that such a judgment can only be agreed with if one accepts that the mental hospital sanction does have a punitive element.

As regards preventive detention, I claim that the decision imposing the sanction cannot be considered as conviction similarly to the Silva Rocha case on the grounds elaborated above. Moreover, preventive detention is not a punitive, retributive institution but it is imposed on the basis of future dangerousness, which is expected to change, solely for preventive purposes. As a consequence it would be unacceptable to exclude the possibility of review for any years as it happened in the cited case.

4.1.3. A follow-up: The cases corroborating the findings of the M. judgment

In order to present a full picture about the Strasburg Court’s position in preventive detention cases two more decisions named as *S. v. Germany*⁸⁷ and *Haidn v. Germany*⁸⁸ shall also be mentioned here. Both cases concerned preventive detention to be served after the completion of the applicants’ fixed term prison sentence imposed by the court “responsible for the execution of sentences” shortly before the prisoners should have been released. The extra imprisonment was ordered in each case under a new amendment of the Criminal Code allowing for the retroactive imposition of preventive detention (*nachträgliche/retrospective Sicherungsverwahrung*).⁸⁹

⁸⁶ *Stafford v. the United Kingdom*, ECHR, Application no: 46295/99 (2002) 64. §.

⁸⁷ *S. v. Germany*, ECHR, Application no: 3300/10 (2012).

⁸⁸ *Haidn v. Germany*, ECHR, Application no: 6587/04 (2011).

⁸⁹ German Criminal Code, Section 66b.

Although the Court found a violation in both cases due to the lack of the causal relationship, it does not mean that the body has reversed its decisions elaborated above. To the contrary, the Court remains to be consistent and similarly to the M. case where the extension of the 10 year period solely served as a basis for finding a violation under Article 5 due to the lack of the causal connection, these cases also implied a special circumstance, namely the retrospective application of preventive detention, that led to judgments declaring the detentions to be unlawful. So the Court seems to insist on its view that preventive detention is only incompatible with the Convention when it is coupled with other unlawful circumstances, whereas the institution on its very own is still considered to be in compliance with the requirements of Strasbourg.

4.2. Application of the argument outside the scope of preventive detention with a special focus on IPP

In the previous part of this chapter I already touched upon an institution other than preventive detention to show how the Court operates with the causal relationship argument under different factual and legal circumstances. In the following section of the paper I continue to analyze the Court's argument in cases concerning other sanctions than preventive detention.

4.2.1. Expired authorization for detention: Eriksen v. Norway

Another example for how the Court misuses its own argument can be found in the Eriksen v. Norway case. The case is special from the point of view that it concerned a security measure on the ground of mental reasons with a maximum period, although the term had elapsed before an authorization for prolongation was given. This uncovered period was claimed by the applicant not being consistent with the Convention. Interestingly, the Court, without giving any specific

reasons, found the causal relationship test to be satisfied. I am of the opinion that the Court erred in this respect and I agree with the concurring opinion of Judge Repik, who realized the mistake and argued that although a connection indeed existed but not between the conviction and the detention but the offence and the detention. Due to the expiry of the original conviction, the causal link ceased to exist with the conviction since the „detention did not result from, follow or depend upon or occur by virtue of it”.⁹⁰ In my view, the majority also perceived the weakness of their argument which must be the reason why they decided to move further and examine the claim also under Art. 5. § (1) (c), which unorthodox step could indeed reveal a valid justification for the detention.

4.2.2. A positive example: Van Droogenbroeck v. Belgium

The Van Droogenbroeck decision,⁹¹ not establishing the violation of Art. 5, is a positive example for the adequate application of the causal relationship argument. At first glance I might seem to be in self-contradiction since I subjected the German preventive detention judgments⁹² to harsh criticism for not finding a violation in cases touching upon the punishment per se. However the detailed analysis of the cases reveals that the Belgian institution of “placing an individual at the disposal of the Government” and its execution differs from its German pair to such an extent that allows divergent conclusions even if it regards similar institutions. First, the Belgian sanction did not necessarily entail detention but had different forms depending on the ground for imposition and the aim to be achieved by the measure. Second, the Belgian institution did not only have the aim to protect the public which often results in skewed balancing against the individual’s rights⁹³

⁹⁰ Eriksen v. Norway, ECHR, Application no: 17391/90 (1997), Concurring Opinion of Judge Repik.

⁹¹ Van Droogenbroeck v. Belgium, ECHR, Application no: 7906/77 (1982).

⁹² Schmitz v. Germany, Grosskopf v. Germany and Mork v. Germany

⁹³ Kelly, Meaghan: *Lock them up -- and throw away the key: The preventive detention of sex offenders in the United States and Germany*, 39 Georgetown Journal of International Law 551 (2008) at 562.

but also articulated the goal to reform the offenders. Third, the Belgian authorities made attempts to release the applicant who committed crimes over and over again, so in this sense the detention was not solely based on mere future predictions but on real acts that were capable of affirming the “causal link between the original conviction and the [...] detention”. Consequently it was the specific characteristics of the measure and the execution of the sentence i.e. “the patience and trust” showed by the authorities which functioned as safeguards and prevented the Court from finding a violation. In contrast, the German cases lacked those safeguarding circumstances as a consequence of which I cannot agree with the Court on reaching the same conclusion in the Belgian and German cases.

4.2.3. Imprisonment for public protection: James, Wells and Lee v. the U.K.

The most recent judgment of the ECtHR on indefinite sentences is the case of James, Wells and Lee that concerned the U.K. institution of IPP. As we could see in the German cases the Court did not find a violation unless preventive detention was coupled with the issue of retroactivity. Although the U.K. case also implied an additional issue namely the lack of access to rehabilitative measures, the Court did not find it problematic under the causal relationship argument but applied a different reasoning for establishing a violation. As concerns the causal relationship doctrine, following the logic of the M. judgment despite the fact that it concerned a different issue, I still claim that the causal link ceased to exist on similar grounds in the U.K. case also. In the German judgment Strasbourg held that the sentencing court could not foresee at the time of the conviction that the offender could be locked up for more than ten years in prison. Analogously, I assert that the sentencing court faced similar circumstances in the U.K. case, since even if it was not about retroactivity, still the court could not foresee that due to the lack of

resources the applicants will not be provided with the opportunity to take part in the rehabilitative courses which would prevent them from demonstrating in front of the Panel Board that they no longer pose a danger to the public and it would substantially postpone their release. I find this circumstance significant enough for being capable of breaking the causal connection between the original conviction and the detention beyond the tariff period.

Although the Court did not find a violation under Art. 5. § (1) (a), it declared the detention arbitrary which led to the violation of Art. 5. § (1) in general. The Court claimed in this respect that there has to be a “relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention”.⁹⁴ Since IPP prisoners are not only detained because they threaten the public but also for rehabilitative purposes, the circumstances of the detention shall be in accordance with that particular aim. Albeit this requirement is not an absolute one, still a fair balance must be struck between the conditions required ideally and what is provided. Since the circumstances led to the substantial prolongation of the applicants’ incarceration, the Court found the detention arbitrary which goes against Art. 5. § (1).

I am of the opinion that, although the Court should not have gone that far for finding a violation had it used the causal relationship test properly, the argument regarding arbitrariness makes sense. What is striking, however, that the Court used this very same argument also in the M. judgment⁹⁵ but not under the scrutiny of Art. 5 but under Art. 7 and therefore reached different deductions. Accordingly, the missing relationship between the ground of deprivation of liberty and the place and condition of detention in the M. case did not lead the Court to establishing arbitrariness but to qualify the institution as penalty, as a consequence of which the principle of prohibition of retroactivity should have been observed and resulted in the violation of Art 7.

⁹⁴ Ashingdane v. the U.K, ECHR, Application no: 8225/78 (1985).

⁹⁵ M. v. Germany 128. §.

Up to the very recent decisions coming from the European Court of Human Rights, jurisdictions applying indefinite sentencing managed to uphold their system on the basis of a single reasoning embodied in the causal relationship requirement. This chapter demonstrated the way the Court employs the test and was an attempt to raise attention to, by presenting and analyzing the positive and negative examples of the case law, what impact the misuse of the test has in “pure” preventive detention cases where the Court seems to allow state parties to create an unlimited power of interference against potential criminals.

5. Civil Judgments: The position of human rights monitoring agencies on indefinite sentencing

Due to the issues the scrutinized institutions raise, human rights monitoring bodies have also paid attention to the appearance of indefinite sanctions. Many of these reports, given their importance, have been cited even in the relevant judgments delivered by the national courts and the European Court of Human Rights.

This chapter's aim is to provide a detailed discussion on the reports, which is inevitable for presenting how the institutions are judged by the international community and to underpin the thesis' problem manifested in the critique of the scrutinized sentences.

5.1. Reports on the institution of preventive detention

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has expressed its concerns regarding preventive detention in its last two reports based on the visits to Germany carried out in 2005 and 2010.

The first report published in 2007⁹⁶ was grounded on the experiences of the CPT delegation in the Berlin-Tegel Prison's Special Unit accommodating preventive detention prisoners. Although the report starts talking about the good material conditions in the monitored area (single rooms, natural light, kitchen, area for washing, drying and ironing) it goes on to emphasize that the additional activities in comparison to ordinary prisoners are not made use of by this special group of detainees due to the fact that most of them are suffering from multiple personality

⁹⁶ Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 November to 2 December 2005. (18, April 2007). Available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=topic&tocid=4565c2252&toid=459d2f5b2&publisher=&type=COUNTRYREP&coi=&docid=4631ece62&skip=0>

disorders and feeling demotivated. Those interviewed have also shared their fear of never being released. The report added that albeit the number of restrictions was significantly lower than in the ordinary unit, the lack of limitations was coupled with lack of care and a staff being unaware of how to handle this particular group of inmates.

The report also sheds light on the counter-productive effect of preventive detention prisoners being in total isolation from ordinary prisoners and requires an answer for whether rehabilitation programs are available during the fixed term prison sentence to enable prisoners to avoid to the extent possible the subsequent implementation of Sicherungsverwahrung.

Unfortunately, the response⁹⁷ was disappointing and has only reaffirmed the concerns regarding the institution. The German authorities admitted that there are no special programs for prisoners, waiting to serve preventive detention, aiming to eliminate or to reduce the period of the additional preventive imprisonment. It also confirmed the dilemma of accommodating special and ordinary prisoners together or separately by arguing that common housing on one hand would allow for more contacts and more therapeutic programs, but at the same time it sets up a great obstacle for ensuring better conditions for preventive detention prisoners. The response also complains about the requirement of separation in the sense that it deprives the prison staff of an effective means of controlling preventive detention prisoners, namely the opportunity of transfer to another unit as a reaction to breach of the prison rules, which provides a surface for abuses. Nevertheless it must be noted that the principle of separation can easily be rescinded by the Länder which have jurisdiction on the matter with the sole restrictions embodied in the presented Federal Constitutional Court's decisions.

⁹⁷ Response of the German Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Germany from 20 November to 2 December 2005. (18, April 2007). Available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=471efeba2>

The 2012 report⁹⁸ of the CPT was born after the birth of a number of significant decisions delivered by the FCC and the ECtHR, therefore the new report primarily requires “information on the measures taken by the authorities in the light of the [relevant] judgments”. As a result, the CPT required Germany to comply with the decision of *M. v Germany* declaring the “retrospective extension of the applicant’s preventive detention” beyond the 10 years limit to be in violation with the Convention and to comply with the decision of *Grosskopf v. Germany* also condemning the retrospective imposition of the institution. In accordance with these judgments, the CPT report demands Germany to deal with the insufficient differentiation between ordinary and preventive detention prisoners and to provide for special measures to support the special needs of these detainees with a view to release as a real option.

The report makes reference to the FCC decision delivered in 2011 as well, which obliges the German authorities to comply with the transitional arrangements applied until the entry into force of the new legislation with the deadline being 31, May 2013. Accordingly, in the so-called old cases (cases declared to be unconstitutional in compliance with the Strasbourg judgments) individual assessments must be carried out whether the person concerned meets the condition of the newly accepted Therapy Placement Act and if not whether they have been released. In other cases the FCC proscribed the strict adherence to the proportionality principle, the implementation of which the monitoring body was also concerned about.

⁹⁸ Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 November to 7 December 2010. (22, February 2012). Available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=type&type=COUNTRYREP&publisher=&coi=&docid=4f50d3b12&skip=0>

The German response⁹⁹ proves that the Länder have made significant attempts to comply with the notion of the Abstandsgebot (distance requirement) and also gives details about the conditions people are being held under the new Therapy Placement Act. According to the document some Länder sustain separate buildings for this purpose (Hessen, North-West Westphalia), some use psychiatric hospitals to house detainees (Bavaria) and some have taken no arrangements so far claiming that no person has been detained under the new Act (Berlin, Mecklenburg-Western Pomerania, Saxony and Thuringia).

The report of the Council of Europe Human Rights Commissioner¹⁰⁰ was also cited by the Strasbourg Court in its M. judgment against Germany. The document raises new aspects as to the problems induced by preventive detention, namely the undue burden of expectation which judges and experts are exposed to when predicting if a prisoner will reoffend in the future. It repeats the CPT's concern about the loss of future perspectives and calls for treatment to target this situation.

The UN Working Group on Arbitrary Detention¹⁰¹ was also negative on the institution since it expressed its concerns about the finding that preventive detention is frequently used in cases of social disorder contrary to the statutory and FCC's requirements and named the German law problematic also from the point of view of the principle of prohibition on retroactivity. It stressed that the German system does not follow the international human rights law notion on punishment, which concept wrongly induced the FCC to invoke the principle of legitimate

⁹⁹ Response of the German Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Germany) from 25 November to 7 December 2010. (22, February 2012). Available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4f50d8749>

¹⁰⁰ Report by Thomas Hammerberg on his visit to Germany (Comm. DH (2007) 14 of 11 July 2007) Available at: <https://wcd.coe.int/ViewDoc.jsp?id=1162763>

¹⁰¹ UN Working Group on Arbitrary Detention Statement upon conclusion of its mission to Germany (26 Sept – 5 Oct 2011). Available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11470&LangID=E>

expectation for finding a violation in its 2011 decision instead of turning to the constitutional ban on retrospective application of punishments. As a result, the Working Group is rightly on the opinion that the German law gives less effective remedies under the German Basic Law than it is supposed to give under international human rights law in case the ban of retroactive penalties is violated.

5.2. Reports on the institution of imprisonment for public protection

It was not only Germany who could not get away with its infamous indefinite sentence. Imprisonment for public protection, the U.K. alter ego of preventive detention, was also given special attention by human rights monitoring bodies and governmental organizations the report of which will be revealed in the present part of this chapter.

First I would like to highlight the most significant remarks on the institution made by the CPT published in 2009.¹⁰² The most astonishing part of the report points to IPP prisoners' complaints about being treated as "lifers" with documents recording their imprisonment as "99 years" without indicating any release date. This treatment was coupled with the practice that no sentence plan had been prepared until the tariff period of the prisoners almost expired.

The report also deals with the problem that constituted the basis for the U.K. and the Strasbourg judgments analyzed in the previous chapters, namely the lack of enough places on courses IPP prisoners are obliged to take. As a result, substantial delays happened in the detainees' release date.

¹⁰² Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008 (9 December 2009). Available at: <http://www.cpt.coe.int/documents/gbr/2009-30-inf-eng.htm>

Moreover, the document also notes that those who appealed their IPP sentence are not allowed to enroll in any programs.

The 2008 thematic review of IPP¹⁰³ points out that the prison network was already overcrowded by the time the first inmates under the IPP system have arrived to serve their sentences. This resulted in accommodating them in prisons not capable of providing them with the necessary programs and led to delays. Although the report stipulates that actions have been taken to redress the problems, still thousands of prisoners must face the consequences of the past system's shortcomings.

The second thematic review came to light in 2010 as a result of the Joint Inspection by HMI Probation and HMI Prisons. The document contains new critics as to the probation service and challenges the intense contribution of the prison staff in the context of implementing IPPs by putting an emphasis on the disproportionate responsibilities given the lack of their resources. As a consequence, the report considers the system as not sustainable.

Another report¹⁰⁴ containing important findings dates back to 2008 in which the Justice Committee warns about two major problems: the “flawed” structure of sentences and the assertion that the system of implementation was not given enough thought and resources. According to the report the extremely short tariff periods on one hand do not allow prisoners to complete programs in time for their risk assessment carried out by the Parole Board and on the other hand constitute a paradox given the default presumption that IPP prisoners represent a long term threat to the public.

¹⁰³ Thematic review of Imprisonment for Public Protection led by HMI Prisons and supported by HMI Probation (September, 2008).

¹⁰⁴ House of Commons Justice Committee: Towards effective sentencing, Fifth Report of Session 2007-2008. Available at: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/184/184.pdf>

The paper is concerned about the detainees' condition as well given the frustration resulting from the fact that they are not given the opportunity to attend the rehabilitative programs which can also lead to tense between the prisoners and the staff.

The government in its response¹⁰⁵ emphasizes the steps taken to reform the system, namely the increase of the minimum tariff period for imposing IPP and the wider discretion given to the courts. The government also informs about the establishment of the so-called NOMS IPP database covering more detailed information relating to IPP prisoners.

The Prison Reform Trust¹⁰⁶ has also carried out a research which not only points to the practical problems rooted in the lack of resources but also questions a more fundamental issue, namely the ability of risk assessment and therefore raises doubts as to the rationale for the whole system.

In another briefing the Prison Reform Trust continues to elaborate on this issue and phrases concerns about the presumption saying that prisons are capable of making people less dangerous. It cites the Joint Committee on Human Rights 2004 Report that considers prison environment dangerous to the health and well-being of people with a history of mental health problems and talks about the difficulties minors and people with learning difficulties and disabilities have to face. It also makes references to the Halliday report to underpin its assertion that prison works against successful re-socialization not only as concerns these special "types" of detainees but in all cases. The report also affirms the Prison Reform Trust's learning about suicide cases however it was refused to be given exact figures by the government.

¹⁰⁵ Government response to the Justice Select Committee's Report: Towards Effective Sentencing (Oct. 2008). Available at: <http://www.official-documents.gov.uk/document/cm74/7476/7476.pdf>

¹⁰⁶ Jessica Jacobson, Mike Hough: Unjust deserts: Imprisonment for Public Protection (2010). Available at: <http://www.prisonreformtrust.org.uk/Portals/0/Documents/unjustdeserts.pdf>

As one can see from the reports discussed, preventive detention and IPP raise serious concerns not only from the point of view of legal dogmatics as it appears in the judgments analyzed in the previous chapters but entail severe problems in the practical sense especially as concerns the implementation of the institutions.

6. A follow up

The examined institutions have faced a number of challenges during their existence primarily coming from judicial bodies and also from human rights monitoring agencies. As a result, the law-maker has built up new arrangements in the scrutinized countries, many of which have already been presented in the previous chapters. This part of the paper offers a follow up on the institutions to reveal the fate of the sanctions and to see if any reconciliation could be achieved on the issues raised by the thesis.

6.1. The ambiguous solution developed by Germany

The FCC had set 31 May 2013 as a deadline for the legislation to adopt the new law that conforms to the distance requirement specified in seven demands in the earlier mentioned constitutional decision.¹⁰⁷

As a result the Bundestag adopted the Federal Act of Implementation of the Distance Requirement in the Law of Preventive Detention¹⁰⁸ at the very end of 2012 which entered into force on 1 of June 2013. The new law amended the Criminal Code¹⁰⁹ by inserting a new section to Art. 66 on preventive detention, basically reiterating some of the seven FCC requirements:

As a safeguard the Code¹¹⁰ entitles the Strafvollreckungskammern to terminate preventive detention if the declared principles are not respected for a significant period of time and it proscribes mandatory defence in such proceedings if certain conditions are met. The new law

¹⁰⁷ German Federal Constitutional Court (2 BvR 571/10) 2011.

¹⁰⁸ Gesetz zur Bundeseinheitlichen Umsetzung des Abstandgebotes im Recht der Sicherungsverwahrung (Adopted 11 December 2012).

¹⁰⁹ See German Criminal Code Section 66c §.

¹¹⁰ See German Criminal Code Section 67c §. 1. and 67d §. 2.

also articulates that – generally – reviews shall be carried out on a yearly basis, and every nine month if ten years from the prison term has already been served.

So at first blink it might seem that the arrangements are finally in conformity with the Basic Law, however a closer look can disclose significant concerns with respect to the successfulness of the legislation.

First, as Kirstin Drenkhahn¹¹¹ phrases the question, is the distinction between preventive detention and imprisonment as a penalty, which is the major problem of the FCC, feasible in reality? The law professor builds her doubts on the fact that the seven demands that are to characterize the implementation of preventive detention have already been present in the Federal Prison Law and consequently had to be observed also in respect of imprisonment as a punishment. So if these guidelines have to be respected in the context of both sanctions how can the desired distinction be achieved in reality?

Furthermore, I could not agree more with Till Zimmermann, the law professor of the University of Passau, that some of the new provisions regarding the different types of preventive detention might also be challenged in the future either before the German Constitutional Court or the ECtHR:¹¹²

The basic type of the institution remains intact by the new provisions and albeit Art. 66 was declared unconstitutional as a whole, due to its compliance with the distance requirement, the provision can no longer be criticized by the FCC. Besides, it also satisfies the Strasbourg Court

¹¹¹ Drenkhahn, Kirstin: *Secure Preventive Detention in Germany: Incapacitation or Treatment Intervention?* 31 Behav. Sci. Law 312–327 (2013) at 320-321.

¹¹² Zimmermann, Till: *Das neue Recht der Sicherungsverwahrung* In: *HöchstRichterliche Rechtsprechung im Strafrecht* 164-178 (2013) at 170-175. Available at: <http://www.hrr-strafrecht.de/hrr/archiv/13-05/index.php?sz=8>

under Art. 5. § (1) (a) as the human rights body has already made it clear that the pure form of preventive detention does not violate the Convention.

Despite the promising beginning, the second form of the institution, the so-called reserved preventive detention might seem more problematic since in this case the imposition of the sentence is deferred to a later stage, though the possibility of ordering it is promulgated in the original judgment. Although the FCC has recently affirmed¹¹³ the conformity of the institution with the Basic Law, it remains disputed whether the sanction could also satisfy the causal relationship test of the ECtHR.

The most controversial form of the institution is the subsequent type of preventive detention imposed retrospectively at the end of the determined prison term. This practice had been criticized by both Karlsruhe and Strasbourg as a result of which serious changes were adopted in Germany, in 2011. As referred to this earlier, these modifications, not affected by the new Act, differentiate between old and new cases as I have referred to this in an earlier chapter. Accordingly, in cases postdating 2011, preventive detention can only be applied if someone, who was originally granted mental hospital order recovers mentally, but at the same time he remains to pose a risk to the public. Nevertheless I am of the opinion that this kind of transformation of mental hospital order into preventive detention should not stand the Strasbourg threshold since mental hospital orders do not require criminal responsibility and therefore those prisoners transferred into preventive detention would never have a conviction including a finding of guilt which is essential for making Art. 5. § (1) (a) come into play.

¹¹³ See Esser, Robert: *Criminal Sanctions under Human Rights' Pressure "Reserved" Preventive Detention and Aspects of Discrimination*. Available at: <http://www.theartofcrime.gr/eng/?pgtp=1&aid=1365190870#3>

In old cases a new condition, the state of “mental disorder” came forward, with the help of which the German legislation’s aim was to lawfully withhold those prisoners under Art. 5. § (1) (e) who should be otherwise freed under the new laws.

As these rules remained the same even after June 2013, some argue that Strasbourg should and will intervene again since point (e) only applies if criminal responsibility was excluded at the time of the judgment, which is certainly not the case in the context of preventive detention. Preventive detention does not require the exclusion of criminal responsibility, if this would be the scenario, not preventive detention but mental hospital order should be imposed and therefore, contrary to the legislators’ will, preventive detention could never come under point (e).

In contrast, as scholars refer to this,¹¹⁴ some might respond that the fact that Strasbourg does not consider a detention lawful simply because the person’s behavior deviates from the norms prevailing within a society does not mean that the required state of mind should necessarily amount to mental illness and therefore the German proposal can work at the European level. However it is also important that even if a less severe problem could set point (e) in action, the general condition of lawfulness would still require that the cause of detention correspond to the circumstances of the imprisonment and therefore the place of the execution, preferably a hospital instead of a prison unit, might be decisive as concerns the outcome of a potential case.

Besides, mental disorder, despite the FCC’s attempt to clarify the notion, remained unclear. The constitutional judges’ definition proscribing “continuous abnormally aggressive and seriously irresponsible behavior”, as Kirstin Drenkhahn puts it, comes close to qualify “criminal behavior in itself as pathological”.¹¹⁵

¹¹⁴ Heger, Martin and Pohlreich, Erol: *The European Court of Human Rights and German provisions on preventive detention*. Available at: <http://www.theartofcrime.gr/eng/?pgtp=1&aid=1365190870#3>

¹¹⁵ Drenkhahn, Kirstin: *Secure Preventive Detention in Germany: Incapacitation or Treatment Intervention?* At 323.

Consequently, the new arrangements are far not as perfect as they seem to be on the surface. Moreover, even if they pass the tests they only create a framework at the federal level, whereas the practical implementation remains to be regulated and carried out by the Länder due to jurisdictional issues, which will create new dimensions for the system to bleed from.

6.2. Saying Good bye to IPP?

The indeterminate sentence of imprisonment for public protection had been present in the criminal sanction system of the U.K. for seven years in respect of offences committed between 4 April 2005 and 3 December 2012. The roller coaster of the institution was stopped by the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) last year eventually abolishing the notorious sanction.

The community of academic and practicing lawyers has phrased many critics from the very beginning as concerns the punishment and particularly its implementation. As Ken Clarke, the then Secretary of State noted, the sentence was “unfair between prisoner and prisoner”¹¹⁶ due to its unexpectedly broad application. Others pointed out that the system put an unmanageable burden on the prison and parole system, contributed to overcrowding and created uncertainty in the legal system for both prisoners and practitioners which can have no place in a country governed by the rule of law principle.

As a result the system has gone through many changes however the problems remained unsolved. The first signs of the final solution arrived on 21 June 2011, when the bill of LASPO was introduced to the House of Commons, at the press conference of which the Prime Minister

¹¹⁶ Strickland, Pat: *The abolition of sentences of Imprisonment for Public Protection - Commons Library Standard Note*, at 12. Last updated: 26 April 2013. Available at: <http://www.parliament.uk/briefing-papers/Sn06086>

called the existing system “unclear, inconsistent and uncertain”.¹¹⁷ He added that a review of the sentence was planned to commence in order to find an alternative for managing dangerous offenders.

After the parliamentary debate on the Government’s proposal to abolish IPP, the Ministry of Justice has announced the completion of the review and the Legal Aid, Sentencing and Punishment of Offenders Act was given Royal Assent on 1 May 2012.

The new provisions¹¹⁸ repeal the IPP and replace it with a new life sentence applicable in cases of “second serious offences” and also created the institution of the so-called extended determinate sentence (EDS).

The criteria of the novel life sentence¹¹⁹ include a conviction for a specific offence, enlisted in the schedule to the Act, which is considered to be serious enough to justify an at least 10- year-long incarceration. The second condition refers to a previous conviction also for a listed offence for which the offender had been previously sentenced to life or to a period of at least 10 years.

Albeit courts are given a minimal discretion as they can reject the punishment if particular circumstances would make it unjust, the margin of balancing is so narrow that the new law is basically a return to the predecessor of the IPP, namely to the automatic life sentence, which can hardly be regarded as a step forward in the history of the sentencing policy of the U.K.¹²⁰

The extended determinate sentence (EDS) is not a novelty in the system either as a very similar sentence has existed before, however the amendments inserted new sections into the 2003 Criminal Justice Act. Accordingly, the punishment which is applicable for sexual or violent

¹¹⁷ Ibid. at 10.

¹¹⁸ Relevant changes of LASPO: Chapter 5 of Part 3, sections 122 to 128, and in schedule 18, with transitional provisions in schedule 19. In: Strickland, Pat: *The abolition of sentences of Imprisonment for Public Protection*, at 13.

¹¹⁹ LASPO, Chapter 5 of Part 2, Section 122 and Schedule 15B.

¹²⁰ See: Rose, Christopher: *RIP the IPP: A Look Back at the Sentence of Imprisonment for Public Protection*. Vol. 76, No. 4 The Journal of Criminal Law, 303-313 (2012) at 311.

offences can only be imposed if “the offender presents a substantial risk of causing serious harm through re-offending”.¹²¹ Another term is that either the offence committed would deserve an at least four-year-long determinate sentence or at the time of the commission the offender had been convicted for a particular crime specified in the schedule. If these conditions are met the court is vested with the discretionary power to subject the criminal to an extended license of up to 5 years for a violent and up to 8 years for a sexual offence.

What is important that unlike the IPP, the EDS guarantees an upper limit for the period of the detention. Accordingly, if the custodial period is less than ten years, after having served the 2/3 of his sentence, the prisoner must be let out without referring his case to the Parole Board. The body retains its power to decide on the release date of prisoners only, if the custodial term is ten years or more, however even in these cases all convicts must be freed at the conclusion of the custodial period.

Although I truly welcome the arrangements of the new law, it is still to be regret that it does not have retrospective effect. Therefore, IPP and the old scheme of extended sentences still apply in cases of convictions preceding the entry into force of the amendments (3 December 2012) and also where the sentences have not been imposed, though the offender already had been convicted.

In this regard I have to confront the reasoning given by Lord McNally who said that “it is not right/appropriate to alter sentences retrospectively that were lawfully imposed by the court simply because a policy decision has now been taken to repeal the sentence.”¹²²

¹²¹ LASPO, Chapter 5 of Part 2, Section 125 and Schedule 15B.

¹²² Strickland, Pat: *The abolition of sentences of Imprisonment for Public Protection*, at 15.

In my view, as Philip Rule notes, the adopted solution creates unjustness between prisoners given the fact that there will be many of the old system's detainees who no longer would qualify for an IPP if they were treated under the new scheme but who would not be able to convince the Parole Board about their release in compliance with the old process.¹²³

¹²³ Rule, Philip: *Caught in the system: the effect of abolishing IPP*, Vol. 157 No. 07 Solicitors Journal (2013).

Conclusion

Indefinite sentencing is a major concern of national jurisdictions' criminal policy today. The increasing tendency of criminalism, especially crimes of a violent character demand for effective answers, the undesired side-effect of which is the expanding power of the state affecting individuals.

Indefinite penalties raise particularly sensitive issues since they connect to subjective factors such as dangerousness, the propensity of the delinquent and future scenarios and therefore cannot function on the ground of the widely accepted criminal and human rights law principles. In connection to that the thesis presented a wide horizon on the general matters indefinite sentencing entails, many of which have also appeared at the practical level manifested in the case law of domestic courts and the ECtHR. Although it has been emphasized that IPP seems less threatening to human rights principles due its traits concerning the mechanism of imposition, the European judgments might prove that the thesis critique has a valid standing also regarding this institution and not only preventive detention.

Albeit the ECtHR delivered condemning decisions on the scrutinized sanctions, the research also shed light to significant problems as to the reasoning of the decisions. What is more, despite the Strasbourg Court's benevolent approach which led to violations only in very complex cases, the study reveals that both Germany and the U.K. failed to achieve a true reconciliation.

Albeit to a certain extent a dialogue developed following the warnings and the countries found new arrangements, they differentiated between old cases and new cases and therefore limited the scope of the newly-born solutions leaving hundreds of cases behind without managing the problems. Moreover, the new laws clearly show that, regardless of the fact whether they

abolished the institution as it happened in the U.K. or sustained it partially as it happened in Germany, they did not target to get rid of their indefinite sentencing policy. The resurrection of life sentence applicable in cases of “second serious offences” and the institution of the so-called extended determinate sentence (EDS) in the U.K. on one hand can hardly be regarded as detachedness from undetermined penalties and cannot solve the problem of lack of resources either, which is the major obstacle for implementing such sentences in accordance with human rights standards. The German solution, by introducing the notion of “mental disorder” and supporting the arrangements of the Therapy Placement Act also continues to contradict important fundamental principles.

Having deducted the consequences I propose that as long as a state does not have the appropriate resources to provide for substantial safeguards, (manifested primarily in the isolation of prisoners, offering therapies, following up on the prisoners’ condition) these institutions should not constitute a part of any sanction system. If the circumstances are met, confinement is only acceptable if it is incorporated into the definite term sentence similarly to IPP and life imprisonment with the possibility of parole. Moreover the imprisonment shall be restricted only to extreme cases, when the risk of balancing future scenarios is surely counterbalanced by the interest of protecting the society from future crimes. To affectively assess these circumstances the individual should be granted a parole time outside the prison system after serving his definite prison term to provide him with the opportunity to counter prove his dangerousness¹²⁴ and at the same time he should be warned about the consequences if such indefinite sentence should be imposed. If the act committed in the past is so grave that the criminal cannot be a part of society again even after serving his definite prison sentence, I claim that instead of predicting and

¹²⁴ See Van Droogenbroeck v. Belgium

imposing indefinite sentences, his fix term sentence should be so highly determined that it correspond to the grave breach of the law.

As a summary, I am of the opinion that the scrutinized jurisdictions of the thesis were great examples for presenting the human rights concerns in the context of indefinite sentencing. Although they could not set a role model for tackling these issues as it was anticipated at the beginning of the thesis, they provided a great basis to present and analyze different approaches and to make valuable deductions, even if from a negative point of view, how the problem should be managed, which might warn later jurisdictions coming to the center of reports and judgments to find more effective solutions.

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