RIGA GRADUATE SCHOOL OF LAW

“Sicherungsverwahrung” (preventive detention) in Germany under the scrutiny of the ECHR

MASTER’S THESIS

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DECLARATION OF HONOUR:
I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

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RIGA, 2020

ABSTRACT

The societal challenge how to deal with offenders deemed habitually dangerous, requires to balance needs for security of the general public with the human rights of the potential extreme dangerous offender. The prediction of future heavy crimes can never be precise. Hence, all measures infringing the rights of individuals deemed dangerous are very problematic from a human rights perspective.

Germany uses "Sicherungsverwahrung" (preventive detention) to handle this challenge. The concept basically meant that after their prison-sentence, offenders deemed dangerous were kept in prison like conditions until they were not deemed dangerous anymore. The European Court of Human Rights (ECtHR) interfered after such measures were prolonged and ordered retrospectively. The thesis shows that also the non-retrospective forms of preventive detention were problematic under the European Convention on Human Rights, because preventive detention did hardly differentiate from a penalty albeit classified as purely preventive in Germany. The ECtHR triggered reforms of preventive detention that started a development to more human rights conformity, but, as argued in the thesis, the ECtHR accepted new forms of preventive detention that still violate the Convention. Consequently, Germany still needs to solve the challenge of dealing with offenders deemed dangerous in accordance with human rights.

SUMMARY

"Sicherungsverwahrung" (preventive detention) is a measure in Germany to prevent allegedly dangerous offenders from committing heavy crimes by maintaining them in detention after their prison-sentence ends. In the German law tradition, it is seen as purely preventive, but it was executed very similar to prison-sentences. Preventive detention as a concept was developed at the end of the nineteenth century, introduced to law 1934 and reformed in the sixties and seventies of the twenties century. Since 1998, the possibilities to order it were expanded, including forms of preventive detention with retrospective effect. Such an effect had the form of preventive detention that could be retrospectively ordered at the end of a prison-sentence and the abolition of the former 10-years maximum duration for preventive detention that also included offenders who were already convicted, imprisoned or confined in preventive detention.

Starting with its leading judgement in *M. v. Germany* at the end of 2009, the European Court of Human Rights (ECtHR) ruled that the forms of preventive detention, that meant a retrospective worsening for the offenders concerned, infringed Art. 5 § 1 European Convention on Human Rights (ECHR) because none of the exceptions allowing a deprivation of liberty in Art. 5 § 1 cl. 2 ECHR applied to those forms of preventive detention. The ECtHR especially criticized that there was no causal connection between preventive detention and the offender's "conviction" in the terms of Art. 5 § 1 cl. 2. lit. a) ECHR, if the form of preventive detention was not foreseen by law at the time of the conviction. Additionally, the ECtHR ruled that preventive detention was executed in a way that it had to be qualified as penalty in the terms of Art. 7 § 1. ECHR. Consequently, the forms of preventive detention, that were not existent at the time of the offence that lead to their ordering, resulted in a violation of *nulla poena sine lege*.

These rulings by the ECtHR triggered a reform process in Germany that aimed at altering the execution of preventive detention to make its character also under the ECHR preventive, instead of punitive. Since these reforms the execution of preventive detention is not just confinement in prison conditions anymore, but a comprehensive legal framework tries to facilitate treatment and therapy during the detention with the aim to make offenders less dangerous and to reintegrate them into society as fast as possible. The legal framework also tries to make the burden of the confinement for the detainees as small as possible to emphasise the non-penal character of preventive detention. The new legal framework getting gradually implemented, can be seen as making the execution of preventive detention not in general violating the Convention anymore.

Most forms of preventive detention with retrospective effect were abolished for the future, but Germany also searched ways not to release offenders deemed as extremely dangerous, although the forms of preventive detention confining them violated the ECHR. The German legislator and the Constitutional Court tried to base the preventive detention for those extremely dangerous offenders on Art. 5 § 1 cl. 2 lit. e) ECHR, namely the detention "of persons of unsound mind". For this goal Germany implemented a new necessary statutory criterion for forms of preventive detention violating the prohibition of retrospective worsening. The ECtHR accepted these new forms of preventive detention in individual cases as deprivation of liberty justified under Art. 5 § 1 cl.2 lit. e) ECHR and ruled that the new

forms of preventive detention are not to be qualified as penalty in the terms of Art. 7 § 1 cl. 2 ECHR anymore.

Contrary to the ECtHR, the thesis argues that the new statutory criterion regarding the mental condition of the preventive detainees, that was intended to justify forms of preventive detention with retrospective effect, was not sufficient to change the assessment under the Convention. Not only is the new statutory criterion too loose to alter a measure from infringing basic human rights to being consistent with the ECHR, but also the entire German conduct to subsequently try to alter a measure to circumvent the Convention is not in line with a narrow interpretation of this Convention.

How human rights apply to the parts of society with the weakest public representation of interests, for example, offenders deemed as abnormal and dangerous, is a good indicator how civilised a society has become. Every society needs to meet the challenge how to deal with offenders deemed as extremely dangerous. The common European human rights minimum standards can allow that an answer to this question takes into account the legitimate security concerns of the general public. Such an answer might still include that offenders, who are predicted to commit the gravest offences if released, are kept in confinement even after their ordinary and guilt adequate prison-sentence ended.

But any confinement, that gets ordered independently from guilt, is very problematic from a human rights perspective. It can only be seen as not violating the ECHR if it is shaped in itself as human rights friendly as possible. Offenders who are to be confined independently of their guilt, need to be treated as good as the circumstances allow. From the beginning of their prison-sentence, they have to be treated optimally with the aim to reintegrate them into society as fast as possible. Only if a fast reintegration is facilitated with all modern methods, such a confinement really serves predominantly a preventive cause. If the offenders have a longer detainment than necessary because not everything was done to reintegrate them quickly, the confinement is not predominately preventive, but punitive. This is especially problematic when prevention is the only justification under national law or the ECHR. In addition to state-of-the-art efforts for fast releases, it is also important that the execution of the confinement coming after the guilt adequate punishment is as close to life in freedom as possible. This later confinement must be shaped as non-punitive as possible to honour that the offenders are forced to sacrifice their freedom for the security of the general public. A confinement fulfilling the criteria described above, could be an answer complying with European minimum human rights standards to the question how to handle allegedly extremely dangerous individuals.

Despite therapeutic treatment, good conditions and sophisticated theoretical justifications, for the offenders detained such a measure would still feel like a penalty. Hence, it is important not to retrospectively order or enhance it in order to avoid the impression of conflicting with the basic human right *nulla poena sine lege*, as protected by Art. 7 § 1 cl. 2 ECHR from which is no derogation permitted even in public emergency threatening the life of the nation.

The interactions between Germany and the ECtHR could have been instructive to envisage a possible modern answer to the societal challenge of dealing with extremely dangerous offenders, but this goal was not reached. It is very positive that the ECtHR triggered the development to a more modern, human rights orientated handling of assumed danger posed by individuals, but it is regrettable that the ECtHR stopped to push Germany to

a system of preventive detention that is fully in line with basic human rights as protected by the ECHR.

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LISTS ABBREVIATIONS

Abbreviation	Meaning
Art.	Article/Artikel
cl.	clause
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
lit.	littera/letter
StGB	Strafgesetzbuch (German Criminal Code)

All websites were latest accessed on the 30.5.2020 if not indicated differently.

"Sicherungsverwahrung" (preventive detention) in Germany under the scrutiny of the ECHR

1. INTRODUCTION

In Germany the term "Sicherungsverwahrung" (preventive detention) describes a measure according to which individuals having served their prison sentence are kept in custody with the goal to protect the general public.[1] In contrast to ordinary penalties, preventive detention is not limited by the offender's guilt.[2] It ends when it is found with sufficient certainty that the offender is not dangerous anymore, making its duration unforeseeable and potentially lifelong.[3] This makes preventive detention arguably the most severe measure in Germany.[4]

Preventive detention has normally been ordered in the same judgement in which an offender has been convicted and sentenced to a prison-term (preventive detention ordered in the judgement).[5] But since 1998 the possibilities to order it and to maintain offenders in preventive detention were gradually expanded.[6] Inter alia, Germany abolished the former 10-years maximum duration for offenders confined for the first time in preventive detention.[7] The abolition also explicitly affected offenders who had already been sentenced (retrospectively prolonged preventive detention).[8] Also, the possibility to order preventive detention shortly before the release from prison was introduced (retrospective preventive detention).[9]

This expansion of preventive detention was scrutinised by the European Court of Human Rights (ECtHR) and starting in 2009, with its leading judgement *M. v. Germany*[10], the Court declared the aforementioned forms of preventive detention with retrospective effects as incompatible with the European Convention on Human rights (ECHR)[11].[12] The compatibility of various forms of preventive detention with the Convention will be the subject of this thesis.

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[1] Thomas Ullenbruch, Kirstin Drenkhahn and Christine Morgenstern, "§ 66 StGB" (Art. 66 Criminal Code) in Münchener Kommentar zum Strafgesetzbuch (Munich Commentary on the Criminal Code), 2th volume, 3th edition, ed. Wolfgang Joecks and Klaus Miebach (Munich: C.H. Beck, 2016), recital 4.
[2] *Ibid*., recital 3.
[3] *Ibid*.
[4] *Ibid*.
[5] Reichsregierung (Government of the Third Reich), Art. 1 nr. 1 §§ 20a and 40e Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Sicherung und Besserung (Act against dangerous habitual offenders and on measures of prevention and betterment) passed: 24.11.1933 (RGBl I (1933), p. 995. Available on: https://web.archive.org/web/20180120000042/http://www.servat.unibe.ch/dns/RGBl_1933_I_995_G_Gewohnheitsverbrecher.pdf [hereinafter: Habitual Offenders Act]. Preventive detention that was ordered after the convicting judgement was only possible for acts that were committed before 1.1.1934 according to a transitional provision (*Cf. Ibid*., Art. 5 nr. 1).
[6] Michael Alex, *Nachträgliche Sicherungsverwahrung ein rechtsstaatliches und kriminalpolitisches Debakel* (Retrospective preventive detention – a rule of law and criminal policy debacle), 2nd edition (Holzkirchen: Felix-Verlag, 2013), p. 9-20 [hereinafter: Alex, *Debacle*].
[7] BVerfGE 128, 326, § 8.
[8] *Ibid*., § 10.
[9] *Ibid*., § 15.
[10] *M. v. Germany* (Application nr. 19359/04, judgement of 17 December 2009).
[11] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR (last amended by Protocols nr. 11 and 14, published 4 November 1950). Available on: https://www.echr.coe.int/Documents/Convention_ENG.pdf.

The ECtHR's judgements triggered a general reform of the execution of preventive detention in Germany and changes in the prerequisites of particular forms of preventive detention. In this thesis, not only the new system of preventive detention will be assessed, but also old forms of preventive detention will be evaluated more rigorously than in the ECtHR's judgements. For this, the insights will help that became more apparent in the subsequent reform process.

This evaluation of preventive detention in Germany under the scrutiny of the ECHR tries also to be a small contribution to a question all societies face, namely how to deal with offenders deemed notoriously dangerous. Including the historic perspective in which individuals deemed dangerous, for instance, were deported or executed,[13] the approach a society chooses might be a good indicator how civilized it has become. The interactions between the ECtHR, on the on hand, and the German legislator and Constitutional Court, on the other hand show illustrative the struggle to implement a system of prevention that honours human rights as guaranteed by the ECHR. Whether such a system was finally established in Germany shall be partly answered in the following chapters.

The next chapter (2.) contains a description of the theoretical conception of preventive detention also with the aim to provide a knowledge base for argumentation in subsequent parts. Afterwards, in chapter 3., I will outline the developments of preventive detention prior to the ECtHR's leading judgement *M. v. Germany* in late 2009 and try to answer the first research question whether the different forms of preventive detention were compatible with the ECHR before 2010. Chapter 4. will briefly outline the reform process in Germany that was triggered by the ECtHR's judgements. These reforms took mainly effect on the 1.6.2013. Hence, Chapter 5. will evaluate the second research question, whether these reforms in Germany brought the system of preventive detention in line with the Convention after this date. This will also provide a basis to answer the underlying question whether the changes are an example for a successful cooperation between the ECtHR and a State Party to the Convention that improved the human rights situation in Germany or if the German legislator together with the Federal Constitutional Court searched a way to circumvent the requirements of the Convention. Lastly, the conclusions (chapter 6.) will attempt to set out what can be learned from the interaction between the ECtHR and the German constitutional institutions with regard to the question of how a society could deal with allegedly dangerous offenders in accordance with human rights

Due to the word limit of this master thesis, only the key dates of preventive detention for juveniles and young adults will be mentioned, but the specifics will not be discussed.

2. THEORETICAL CONCEPTION OF PREVENTIVE DETENTION

The societal challenge, how to handle offenders deemed dangerous, was answered partly with preventive detention as part of the twin-track system in Germany.[14] This twin-track system in

[12] Axel Dessecker, "§ 66 StGB" (Art. 66 criminal code), in *Strafgesetzbuch* (criminal code), 1st volume, 5th edition, ed. by Urs Kindhäuser, Ulfired Neumann and Hans-Ulrich Pfaeffgen, (Baden-Baden: Nomos, 2017) recital 6.
[13] BVerfGE 109, 133, § 2.
[14] *Ibid*., §§ 2 f.

the German Criminal Code (Strafgesetzbuch [hereinafter: StGB])[15] distinguishes between *Strafen* (penalties)[16] and *Maßregeln der Besserung und Sicherung* (measures of betterment and prevention)[17].[18] Penalties can only be imposed in connection with guilt which is the basis for the sentencing.[19] Contrary to that, the dangerousness of the offender is the basis for the measures of betterment and prevention, whereas the guilt or absence thereof is not a condition.[20] Their goal is to protect the general public.[21] Correction of the offender's behaviour and hindering him to damage the general public are the means to reach this goal. The betterment of the offender in itself is not the purpose of the measures of betterment and prevention, as it is not allowed to impose the measures against an individual who is unlikely to commit further offences.[22] On the other hand, it is possible to detain an offender, who is not capable of betterment, to secure the general public.[23] Precondition for all measures of betterment and prevention are *Anlasstat* (triggering offence), danger of future crimes and proportionality.[24] Preventive detention additionally in its concept requires a guilty verdict.[25] That means that preventive detention only gets ordered if the offender was convicted and sentenced to a prison-term by a court. Such a conviction requires that the offender is fully or diminished criminally liable.[26]

The background of the twin-track system was significantly shaped by Franz von Liszt's penal theory of the idea of purpose (to prevent future crimes) in criminal law (*punitur ne peccetur*), as expounded in his inaugural speech 1882, called "*Marburger Programm*".[27]

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[15] Strafgesetzbuch, StGB (Criminal Code), (last amended by Article 62 of the Act of 20.11.2019 [BGBl. I (2019), p. 1626]), in the version of the publication of 13.11.1998. Available on: https://www.gesetze-im-internet.de/stgb/BJNR001270871.html.

[16] Penalties in the German Criminal Code are prison sentence (Art. 38 StGB), fines (Art. 40 StGB) and subordinated the driving ban for a maximum duration of six months (Art. 44 StGB).

[17] The measures of betterment and prevention are enlisted in Art. 61 StGB: (1.) placement in a psychiatric hospital, (2.) placement in an addiction treatment facility, (3.) placement in preventive detention, (4.) supervision of conduct, (5.) disqualification from driving, (6.) disqualification from exercising a profession.

[18] Gerhard van Gemmern, "§ 61 StGB" (Art. 61 criminal code) in *Münchener Kommentar zum Strafgesetzbuch* (Munich Commentary on the Criminal Code), 2nd volume, 3th edition, ed. Wolfgang Joecks and Klaus Miebach (Munich: C.H. Beck, 2016), recital 1.

[19] *See* Art. 46 StGB, stating that guilt is the base on which the penalty is fixed; BVerfGE, 91, 1, § 78; Van Gemmern, "§ 61 StGB", *supra* note 18.

[20] BVerfGE 109, 133, § 149; Van Gemmern, "§ 61 StGB", *supra* note 18; Dominik Brodowski, "Diskussionsbeiträge der 36. Tagung der deutschsprachigen Strafrechtslehrerinnen und Strafrechtslehrer 2015 in Augsburg" (Contributions to the discussion at the 36th Conference of German-speaking Criminal Law Teachers 2015 in Augsburg), *ZSTW* (issue 127[3], 2015): 691 (722) [hereinafter: Brodowski, "Criminal Law Conference 2015"], citing Stuckenberg.

[21] Van Gemmern, "§ 61 StGB", *supra* note 18.

[22] *Ibid*.; Gerhard, van Gemmern, "§ 63 StGB" (Art. 63 criminal code) in *Münchener Kommentar zum Strafgesetzbuch* (Munich Commentary on the Criminal Code), 2nd volume, 3th edition, ed. Wolfgang Joecks and Klaus Miebach (Munich: C.H. Beck, 2016), recital 1; Gerhard, van Gemmern, "§ 64 StGB" (Art. 64 criminal code) in *Münchener Kommentar zum Strafgesetzbuch* (Munich Commentary on the Criminal Code), 2nd volume, 3th edition, ed. Wolfgang Joecks and Klaus Miebach (Munich: C.H. Beck, 2016), recital 1.

[23] Van Gemmern, "§ 61 StGB", *supra* note 18.

[24] Art. 62-66b, 68, 69, 70 StGB; Van Gemmern, "§ 61 StGB", *supra* note 18, recital 3.

[25] Art. 66 § 1 nr. 1, Art. 66a § 1 nr. 1 StGB. An exception is regulated in Art. 66b § 1 (former § 3) StGB (*see infra* chapters 3.2.3.2. and 5.3.2.).

[26] Art. 20 f. StGB; Georg Freund, "Vorbemerkung zu § 13" (Preliminary remark on Art. 13), in *Münchener Kommentar zum Strafgesetzbuch* (Munich Commentary on the Criminal Code), 1st Volume, 3th edition, edited by Wolfgang Joecks and Klaus Miebach (Munich: C.H. Beck, 2017), recitals 237 f.

[27] *Cf.* for von Liszt's theory in written form: Franz von Liszt, "Der Zweckgedanke im Strafrecht." (The purpose-idea in criminal law.) *ZSTW, Zeitschrift für die gesamte Strafrechtswissenschaft* (1883): pp. 1-47 [hereinafter: von Liszt, "purpose-idea"]; Kristin Drenkhahn and Christine Morgenstern, "Dabei soll es auf den Namen nicht ankommen – der Streit um die Sicherungsverwahrung" (It should not depend on the name - the dispute over

His theory was a counter-draft to the then predominant idea of retribution as main reason for punishment (*punitur quia peccatum est*).[28] According to Liszt's theory, the reason for a penal system should be purpose-directed special prevention.[29] Punishment should serve deterrence, rehabilitation and societal protection.[30] Therefore, "occasional offenders" should receive a suspended sentence as warning, "reformable offenders" should receive (longish) custodial sentences, which should be accompanied by measures of resocialisation, and "incorrigible offenders" should be given very long custodial sentences (or with indefinite duration) to protect the general public.[31] To achieve actual reform that also implements the last mentioned very long custodial sentences for incorrigible offenders, von Liszt saw its naming as a compromise-tool to win over the legal scientists who wanted the amount of guilt to form the punishment's limit.[32] Hence, in 1893 he suggested to call the very long custodial measures for incorrigible offenders "*Sicherheitsmaßregeln*" (measures of prevention/securing-measures), instead of naming them punishments.[33] Von Liszt even mocked his opponents in this dispute over schools of thought with declaring:

> It should not depend on the name one wants to give the child. This is the loveable side... of our opponents, that they are satisfied if the time-honoured labels [meant is the punishing because of retribution] are spared.[34]

In the same article he also called the idea to combine a short penalty with a long and severe subsequent custody, but to name it differently than penalty, a "ridiculous absurdity"[35].

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preventive detention*), ZSTW*, (issue 124 [1], 2012): 132 (133 f., 201) [hereinafter: Drenkhahn and Morgenstern, "It should not depend on the name"].

A reform-movement carried by von Liszt's "*Marburger Programm*" and Gustav Radbruch leaded to the introduction of the twin-track system in draft reforms for the German criminal code. The reform-movement was based in turn on the Italian school of positive criminology by Enrico Ferri and Raffaele Garofalo as well as Carl Stooss's idea of securing the society against criminals. (*Cf.* Helmut Pollähne, "§ 61 StGB" [Art. 61 criminal code], in *Strafgesetzbuch* [Criminal code], 1st volume, 5th edition, ed. Urs Kindhäuser, Ulfried Neumann and Hans-Ulrich Pfaeffgen. [Baden-Baden: Nomos, 2017], recital 2.).

[28] Von Liszt, "purpose-idea", *supra* note 27, pp. 1 f., 33-36; Drenkhahn and Morgenstern, "It should not depend on the name", *supra* note 27, pp. 133 f., 168.

Although it was a counter-draft, Liszt described his approach as *"Vereinigungstheorie*" (unification theory), demanded that new scientific findings be taken into account and explained that the penalty for a purpose would be the evolution of the primitive penalty as in the criminal theories of Immanuel Kant and Georg Wilhelm Friedrich Hegel. (*Cf.* von Liszt, "purpose-idea", *supra* note 27, pp. 9-33, 43 f., 46 f.; Katrin Höffler, "Tätertypen im Strafrecht und in der Kriminologie" (Types of offenders in criminal law and criminology), *ZSTW* (issue 127[4], 2015): 1018 (1020).

[29] Von Liszt, "purpose-idea", *supra* note 27, pp. 33 f.; Wolfgang Joecks, "Einleitung" (Introduction) in *Münchener Kommentar zum Strafgesetzbuch* (Munich Commentary on the Criminal Code), 1st volume, 3th edition, ed. Wolfgang Joecks and Klaus Miebach, (Munich: C.H. Beck, 2017), recitals 62 f.

[30] Von Liszt, "purpose-idea", *supra* note 27, pp. 33 f.

[31] *Ibid*., pp. 35-42.

[32] Franz von Liszt, "Die Deterministischen Gegner der Zweckstrafe." (The Deterministic Opponents of the Purpose-driven Penalty.) *ZSTW* (1893): 325 (367 f.) [hereinafter: von Liszt, "Deterministic Opponents"].

[33] *Ibid*. Von Liszt opposed the idea of dividing the administration of the penitentiary system in two tracks, but was ready to accept a nominal division to achieve his goal of a purpose driven penalty. (*Cf.* Franz von Liszt, *Ibid*., pp. 368 f.; Drenkhahn and Morgenstern, "It should not depend on the name", *supra* note 27, pp. 133 f.).

[34] (Translation) The original quote is: "Dabei soll es uns auf den Namen nicht ankommen, den man dem Kinde geben will. Das ist ja die liebenswürdige Seite… unserer Gegner, daß sie zufirenden sind, wenn die altehrwürdigen Etiketten [meant is the punishing because of retribution] geschont werden." (Von Liszt, "Deterministic Opponents", *supra* note 32, pp. 367 f.).

[35] (Translation) The original quote is: "lächerlicher Widersinn" (Von Liszt, "Deterministic Opponents", *supra* note 32, p 368).

Despite this public mocking, the twin-track system including a securing measure, like suggested by von Liszt, became part of all draft reforms for the criminal code since 1906.[36]

According to von Liszt, his three types of purposes of penalties (deterrence[1], rehabilitation[2] and societal protection[3]), are simultaneously the three ways of protecting "*Rechtsgüter*" (legal protected goods[37]); from this, in turn, he draws the conclusion that his three corresponding categories of punishment (suspended sentence as warning[1], longish custodial sentences accompanied by resocialisation measures[2] and long custodial sentence[3] match three "*Tätertypen*" (types of offenders): the not in need of correction[1], the corrigible and in need of correction[2], and the incorrigible criminal[3].[38]

The idea of "*Tätertypen*", in turn, fitted well in the Nazi-ideology. The Nazis, finally on 24.11.1933, introduced the twin-track system including preventive detention as a custodial measure of prevention and betterment[39].[40] The criteria for ordering preventive detention was the "*Hang*" (propensity) to commit crimes and the necessity for public security.[41] The Nazis interpreted preventive detention according to their ideology and described the detainees as "unworthy life", as "parasites on the German's people's body" and handed them to extermination by work.[42] This shows the inherent danger of extreme utilitarian interpretations in von Liszt's, humanitarian-intended, special prevention.[43]

In the Federal Republic the law stayed almost unchanged, until reforms in 1969 and 1975 mainly limited the possibilities to order preventive detention.[44] The background was inter alia the idea to end preventive detention of non-dangerous offenders, to facilitate preventive detention of dangerous criminals and to emphasise its character as measure of last resort, as well as concerns regarding prognoses-accuracy.[45]

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[36] Ullenbruch, Drenkhahn and Morgenstern, "§ 66 StGB", *supra* note 1, recital 17; BVerfGE 109, 133, § 3.

[37] "*Rechtsgüter*" is roughly translated. Other translations include "legal interests" or "protected rights", but are not precise either.

[38] Von Liszt, "purpose-idea", *supra* note 27, pp. 35, 44 f.; Höffler, *supra* note 28, p. 1021. As von Liszt explains, the reasons for three different categories of offenders correspond to his three different reasons to punish: The retribution can only be vis-à-vis a concrete offence and this offence is inseparable from the offender. There is no crime that not the criminal committed. The penalty is directed against the criminal not against the notions of crimes. (*Cf.* Von Liszt, "purpose-idea", *supra* note 27, pp. 35, 44).

[39] The order of the words "prevention" and "betterment" was changed to betterment and prevention in 1975. (*Cf.* Bundestagsdrucksache 7/550 [Bundestag printed paper 7/550], p. 191).

[40] Habitual Offenders Act, *supra* note 5; BVerfGE 109, 133, § 3 f; Ullenbruch, Drenkhahn and Morgenstern, "§ 66 StGB", *supra* note 1, recital 17; *Ilnseher v. Germany* [GC] (Applications nr. 10211/12 and 27505/14, judgement of 4 December 2018), dissenting opinion of Judge Pinto de Albuquerque joined by Judge Dedov, § 3 [hereinafter: *Ilnseher v. Germany* [GC], dissenting opinion Judge Pinto de Albuquerque joined by Judge Dedov].

[41] Art. 1, 2 Habitual Offenders Act, *supra* note 5, (Art. 1 introduced Art. 20a in the StGB), Art. 2 introduced Art. 42e in the StGB; today, after major changes: Art. 66 StGB); Ullenbruch, Drenkhahn and Morgenstern, "§ 66 StGB", *supra* note 1, recital 18; *Ilnseher v. Germany* [GC], dissenting opinion Judge Pinto de Albuquerque joined by Judge Dedov, *supra* note 40.

[42] *Ilnseher v. Germany* [GC], dissenting opinion Judge Pinto de Albuquerque joined by Judge Dedov, *supra* note 40, § 4; Pollähne, "§ 61 StGB", *supra* note 27, recital 2; Ullenbruch, Drenkhahn and Morgenstern, "§ 66 StGB", *supra* note 1, recital 18.

[43] Pollähne, "§ 61 StGB", *supra* note 27, recital 2.

[44] BVerfGE 109, 133, §§ 5 f; In the German Democratic Republic, on the other hand, the highest court in 1952 abolished preventive detention, because it was based on the doctrine of "*Tätertypen*" (types of offenders) and therefore was considered contentual fascistic. (*Cf.* Tobias Mushoff, *Strafe – Maßregel – Sicherungsverwahrung. Eine kritsche Untersuchung über das Verhältnis von Schuld und Prävention* [Punishment – measure of correction and prevention - preventive detention. A critical examination of the relationship between guilt and prevention], [Frankfurt am Main: Peter Lang Internationaler Verlag der Wissenschaften, 2008], p. 28).

[45] Bundestagsdrucksache V/4094 (Bundestag printed paper V/4094), pp. 21. f; BVerfGE 109, 133, § 14.

The modern analysis of the twin-track system abandoned a general claim to truth.[46] The methodological approach is critical reflection of different disciplines, schools of thought and theories also of neighbouring sciences with the goal to analyse interdisciplinary and holistically complex societal realties.[47] This means to search in the state of tension between legitimate societal security interests on the one hand and human rights and the rule of law on the other hand for norms based on theory-driven empiricism.[48] The goal of preventive detention is to prevent grave crimes.[49] The prognosis of such crimes is the most important scientific challenge for the field of preventive detention.[50] In that field, the frequency with which grave crimes are committed after release is called base-rate.[51] Because of the small base-rate of such past-release offences the probability for false-positives (offenders that are forecasted to commit heavy offences, but would in fact not if released) is very high.[52] The prognosis is hard to verify as offenders diagnosed dangerous are normally not released.[53] False-positives make the justification of preventive detention in general a scientific challenge.[54]

The reforms from 1998 until 2008 expanding the possibilities to order preventive detention and its maximum duration were not scientifically driven.[55] For instance, the professional public just learned about the abolition of the 10-years maximum duration for preventive detention after it got into force in 1998.[56] Instead these reforms were either motivated by the view in politics that the public demanded for a recollection in the broader

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[46] Pollähne, "§ 61 StGB", *supra* note 27 recital 2.
[47] *Ibid.*
[48] *Ibid.*
[49] Jörg Kinzig, "Die Praxis der Sicherungsverwahrung. Ergebnisse eines empirischen Forschungsvorhabens" (The practice of preventive detention. Results of an empirical research project), *ZSTW* (issue 109[1], 1997): 122 (125 f.) [hereinafter: Kinzig, "results of a research project"]. In psychology in general, base-rate describes the distribution of characteristics in a group of the population. (*Cf.* "Lexikon der Psychologie: Basisraten" [Lexica of psychologie: base-rates], Spektrum.de. Available on: https://www.spektrum.de/lexikon/psychologie/basisraten/1937).
[50] Kinzig, "results of a research project", *supra* note 49, pp. 124-126.
[51] *Ibid*., pp. 125 f., footnote 17); Norbert Nedopil, "Prognosebegutachtungen bei zeitlich begrenzten Freiheitsstrafen - Eine sinnvolle Lösung für problematische Fragestellungen?" (Forecast assessments regarding prison sentences of limited duration - A sensible solution for problematic issues?), *NStZ, Neue Zeitschrift für Strafrecht* (issue 7, 2002): 344 (347 f.).
[52] Kinzig, "results of a research project", *supra* note 49, pp. 125 f; Nedopil, *supra* note 51, pp. 347 f.
Only a small number of people is in preventive detention, only a smaller number is released and only an even smaller number commits serious crimes afterwards. (*Cf.* Alex, *Debacle*, *supra* note 6, pp. 80, 102 f.)
Eisenberg and Schlüter state that a prognosis for young people is almost impossible because of engraved difficulties in predicting their personal and social development. (*Cf.* Ulrich Eisnberg and Susanne Schlüter, "Extensive Gesetzesauslegung bei Anordnung von Sicherungsverwahrung" [Extensive interpretation of the law when ordering preventive detention], NJW, *Neue Juristische Wochenschrift* [issue 3, 2001]: 188 [190]).
Brodowski cites Johannes Kaspar who stated that it is not proven that without preventive detention the level of crime would rise. (*Cf.* Brodowski, "Criminal Law Conference 2015", *supra* note 20, pp. 722 f.).
[53] Nedopil, *supra* note 51, pp. 346 f.
[54] Kinzig, "results of a research project", *supra* note 49, pp. 125 f.
[55] Alex, *Debacle*, *supra* note 6, pp. 20-23; Drenkhahn and Morgenstern, "It should not depend on the name", *supra* note 27, pp. 136 f.
Albrecht explains with regard to the entire reform of the sexual criminal law that it was not driven by scientific insights, but by public demands for harsher penalties. (*Cf.* Hans-Jörg Albrecht, "Die Determinanten der Sexualstrafrechtsreform" [determinants of the criminal law reform], *ZSTW* [issue 111(4), 1999]: 863 [869-874]).
Arthur Kreuzer is cited by Heger saying that the introduction of retrospective preventive detention was not based on verification of a real increase in crime, but on populistic considerations. (Cf. Martin Heger, "Diskussionsbeiträge der Strafrechtslehrertagung 2005 in Frankfurt/Oder" [Contributions to the discussion at the 2005 criminal law teachers' conference in Frankfurt/Oder], *ZSTW*, [issue 117(4), 2005]: 865 [881]).
[56] Drenkhahn and Morgenstern, "It should not depend on the name", *supra* note 27, pp. 136 f.

criminal law to harsh punishments actually carried out[57] or, as others describe it, by a reaction to extensive media coverage about individual sexually motivated child murders (by released offenders), although the total case numbers were declining.[58] Hence, they can be interpreted as a decision for enhanced public security in its tension-state with human rights and the rule of law.[59] Attempts to classify the motivation behind this shift towards the emphasis on security are the wish to prevent certain forms of criminality fully,[60] the demonization of certain offenders,[61] the idea to sanction also the threat to legally protected rights, instead of just their violation[62] or the effort to better the security-feeling of the population[63].

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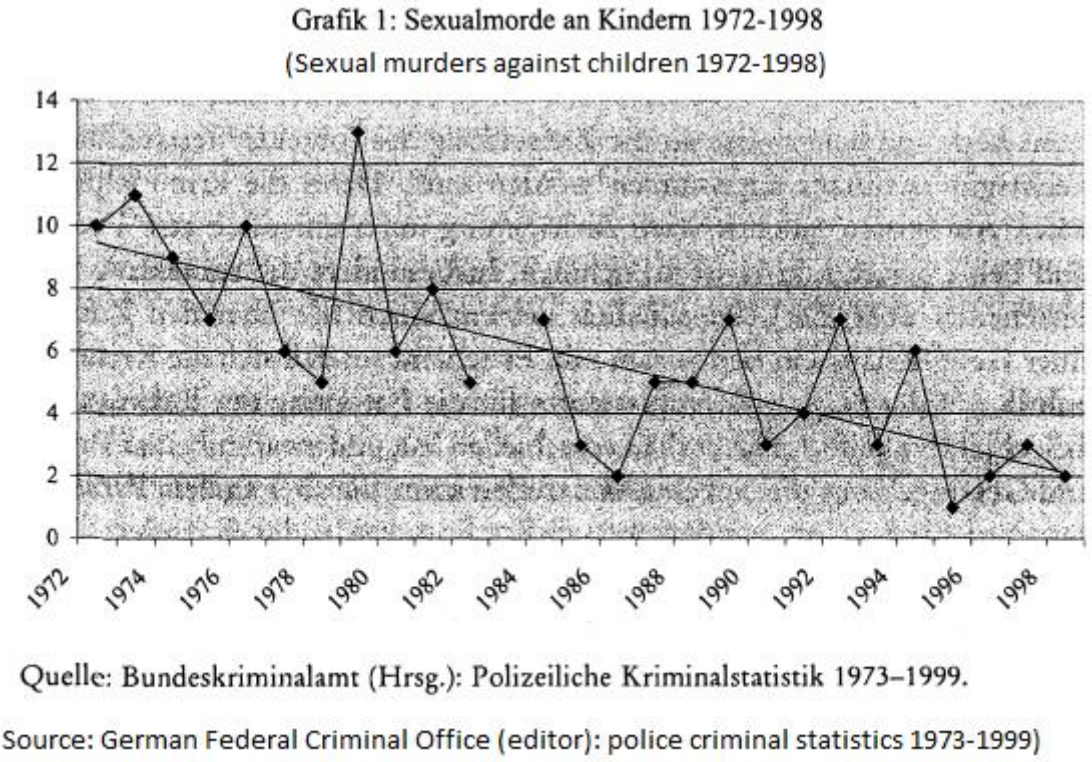
[57] Albrecht, *supra* note 55, pp. 865, 876-880.

[58] Alex, *Debacle*, *supra* note 6, p. 8-10; Katharina Ebner, *Die Vereinbarkeit der Sicherungsverwahrung mit deutschem Verfassungsrecht und der Europäischen Menschenrechtskonvention* (The compatibility of preventive detention with German constitutional law and the European Convention on Human Rights), (Hamburg: Verlag Dr. Kovač, 2015), pp. 27 f. Alex and Ebner name as examples the discovery of the case Dutroux in 1996 and one month later the sexual abuse and murdering of the seven-year-old Nathalie S. by an offenders released from prison early and in January 1997; the sexual abuse and murdering of a ten-year-old by an offender sentenced to six years before under juvenile criminal law for the murder of another child.
The in 1997 proposed legislation to alter the sexual criminal law and to extend the possibilities to order preventive detention begins with the explanation that the coming to light of sexual offences committed against children would show that protection of the general public would need to be improved. (*Cf.* Bundestagsdrucksache 13/7163 [Bundestag printed paper 13/7163], p. 1).
The expansion of the possibilities for preventive detention was also contrary to the development of child-murders connected to sexual-delicts: Graphic of sexual murders against children (Source: Albrecht, *supra* note 55, p. 872):



From 1987 until 1991 24 cases were registered in Germany, from 1997 until 2001 the number was 12. (*Cf.* Alex, *Debacle*, *supra* note 6, p. 181).

[59] Albrecht, *supra* note 55, p. 865.

[60] The idea to prevent some forms of criminality fully is deemed illusionary in criminology. (*Cf.* Albrecht, *supra* note 55, p. 876; Alex, *Debacle*, *supra* note 6, p. 102).

[61] Albrecht, *supra* note 55, pp. 876 f. Indicative is the quotation of Gerhard Schröder in the newspaper "Bild am Sonntag" on the 8.7.2001: "Wegschließen – und zwar für immer" (lock up - and forever), referring to adult men who abuse little girls, because he came more and more to the opinion that it is not possible to treat them and the only commandment would be to protect the children. (*Cf.* Der Spiegel "Gerhard Schröder 'Sexualstraftäter

The theoretical background for the reforms after *M. v. Germany* will be examined in chapter 5.

3. PREVENTIVE DETENTION IN GERMANY AND ITS COMPATIBILITY WITH THE ECHR BEFORE *M. V. GERMANY*

3.1. Overview of developments prior to *M. v. Germany*

After the Second World War, West Germany maintained the laws governing preventive detention, but preventive detention for juveniles was not reintroduced in the Juvenile Courts Act when it was newly promulgated in 1953.[64] The reforms in 1969 and 1975 tightened the thresholds for ordering preventive detention, ruled that the detention needs to be reviewed every two, instead of three years and introduced a 10-year maximum duration for preventive detention ordered for the first time.[65] Furthermore, preventive detention for young adults under 25 was abolished.[66] At this time, the bodies guarding the ECHR generally did not view preventive detention in Germany as incompatible with the Convention.[67]

After a low in the numbers of preventive detentions and its ordering in the nineties,[68] the expansion of the possibilities to order it started with *Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten* (The Combat of Sexual Offences and Other Dangerous Offences Act)[69]. With effect from 31.1.1998 it abolished the former 10-years maximum duration for the first preventive detention also with retrospective effect.[70]

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lebenslang wegsperren'" [Gerhad Schröder '"lock up sexual offenders for lifetime"], 08.07.2001. Available on: https://www.spiegel.de/politik/deutschland/gerhard-schroeder-sexualstraftaeter-lebenslang-wegsperren-a-144052.html).

[62] Bernd Heinrich, "Die Grenzen des Strafrechts bei der Gefahrprävention. Brauchen oder haben wir ein ‚Feindstrafrecht'?" (The limits of criminal law in the prevention of danger. Do we need or have an "enemy criminal law"?), *ZSTW* (issue 121[1], 2009): 94 (95 f., 99).

[63] Albrecht, *supra* note 55, p. 871. Kinzig, "results of a research project", *supra* note 49, pp. 163 f.; Klaus Laubenthal, "Die Renaissance der Sicherungsverwahrung" (The renaissance of preventive detention), *ZSTW* (issue 116[3], 2004): 703 (747).

[64] Alex, *Debacle*, *supra* note 6, p. 6.

[65] BVerfGE 109, 133, § 5; Art. 67d § 1 cl. 1 StGB old version of 1.1.1975. Old version available on: https://lexetius.com/StGB/67d,12.

[66] Art. 1 § 66 section 1 Zweites Gesetz zur Reform des Strafrechts (Second Criminal Justice Reform Act), passed: 4.7.1969, BGBl I (1969), p. 717. Available on: https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl169s0717.pdf%27%5D__1585209752091; Alex, *Debacle*, *supra* note 6, p. 6.

[67] In 1971 the European Commission of Human Rights examined preventive detention ordered in the judgement (Art. 20a and 42 e StGB at that time) and came to the conclusion that it did not violate the Convention. (*Cf. X. v. Germany*, [Application nr. 4324/69, Commission decision of 4 February 1971, published in Collection 37, pp. 98-100], *see* also *Dax v. Germany*, [application nr. 19969/92, Commission decision of 7 July 1992]); Dessecker, "§ 66 StGB", *supra* note 12, recital 6; Kristina Schuster, *Die Sicherungsverwahrung im Nationalsozialismus und ihre Fortentwicklung bis heute* (Preventive Detention under National Socialism and its further development until today), (Baden-Baden: Nomos, 2019), p. 204.

[68] Alex, *Debacle*, *supra* note 6, pp. 7, 9: Between 1975 and 1996 the number of preventive detainees went down from 337 to 176, and the numbers for new orderings of preventive detention were just 31 in 1991, compared to 230 orderings in 1959 and 219 orderings in 1969.

[69] Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten (The Combat of Sexual Offences and Other Dangerous Offences Act), passed: 26.1.1998, BGBl. I (1998), p. 160. Available on: https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl198s0160.pdf%27%5D__1583683826107.

[70] Art. 1 nr. 4 in conjunction wit Art. 2 nr. 3 The Combat of Sexual Offences and Other Dangerous Offences Act; Ebner, *supra* note 58, p. 28.

This means that the preventive detention could last till death, even if it was limited to 10 years at the time of the offence, at the time of the judgement ordering preventive detention, at the start of the detention or some days before its original end.

At the 28.8.2002, a law introduced the reservation of preventive detention in the judgement, while the preventive detention could be ordered before the release from prison.[71] On 1.4.2004 this possibility was introduced in the Juvenile Courts Act[72].[73] This constituted the first possibility since 1969 to order preventive detention for young adults.[74]

Retrospective preventive detention gets ordered before a prison-release without this possibility being mentioned in the convicting judgement.[75] On the 10.2.2004, the Federal Constitutional Court declared the laws in five *Ländern*[76] allowing retrospective preventive detention as contravention against the constitution because the federal legislator had the competence for criminal law.[77] It declared the unconstitutional laws temporary applicable until 30.9.2004.[78] Afterwards retrospective preventive detention was introduced very fast on

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With the law a new paragraph (3) in Art. 66 StGB, introduced catalogued crimes (against sexual self-determination, qualified forms of battery and the crime of intoxicating oneself and committing offences without criminal liability because of this intoxication), for that the ordering of preventive detention was possible under simpler conditions. A comparison between this version and the previous version of the law is available on: https://lexetius.com/StGB/66,9.

[71] Gesetz zur Einführung der vorbehaltenen Sicherungsverwahrung (Act on the introduction of reserved preventive detention), passed: 21.8.2002, BGBl I (2002), p. 3344. Available on: https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*%5B%40attr_id%3D%27bgbl102s3344.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl102s3344.pdf%27%5D__1583742737990.

[72] Jugendgerichtsgesetz, JGG (Juvenile Courts Act), (last amended by Article 1 of the 9.12.2019 [BGBl I (2019), p. 2146]), in ther version of the publication of 11.12.1974. Available on: https://www.gesetze-im-internet.de/jgg/.

[73] Art. 6 nr. 3 Gesetz zur Änderung der Vorschriften über die Straftaten gegen die sexuelle Selbstbestimmung und zur Änderung anderer Vorschriften (Reform of the Provisions on Offences against Sexual Self-determination and of Other Provisions Act), passed 27.9.2003, BGBl. I (2003) p. 3007. Available on: https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*%5B%40attr_id%3D%27bgbl103s3007.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl103s3007.pdf%27%5D__1583683620153; Alex, *Debacle*, *supra* note 6, pp. 14 f.

[74] Nina Nestler and Christian Wolf, "Sicherungsverwahrung gem. § 7 Abs. 2 JGG und der Präventionsgedanke im Strafrecht – kritische Betrachtung eines legislativen Kunstgriffs" (preventive detention according to Art 7 § 2 Juvenil Court Act and the idea of prevention in criminal law – critical examination of a legislative artifice), *Neue Kriminalpolitik* (issue 20 [4], 2008): 153 (154).

[75] Art. 1 nr. 2 Gesetz zur Einführung der nachträglichen Sicherungsverwahrung (The Retrospective Preventive Detention Act), passed: 23.7.2004, (BGBl. I (2004), p. 1838. Available on: https://www.bgbl.de/xaver/bgbl/start.xav?start=//*%5B@attr_id=%27bgbl104s1838.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl104s1838.pdf%27%5D__1583741964647.

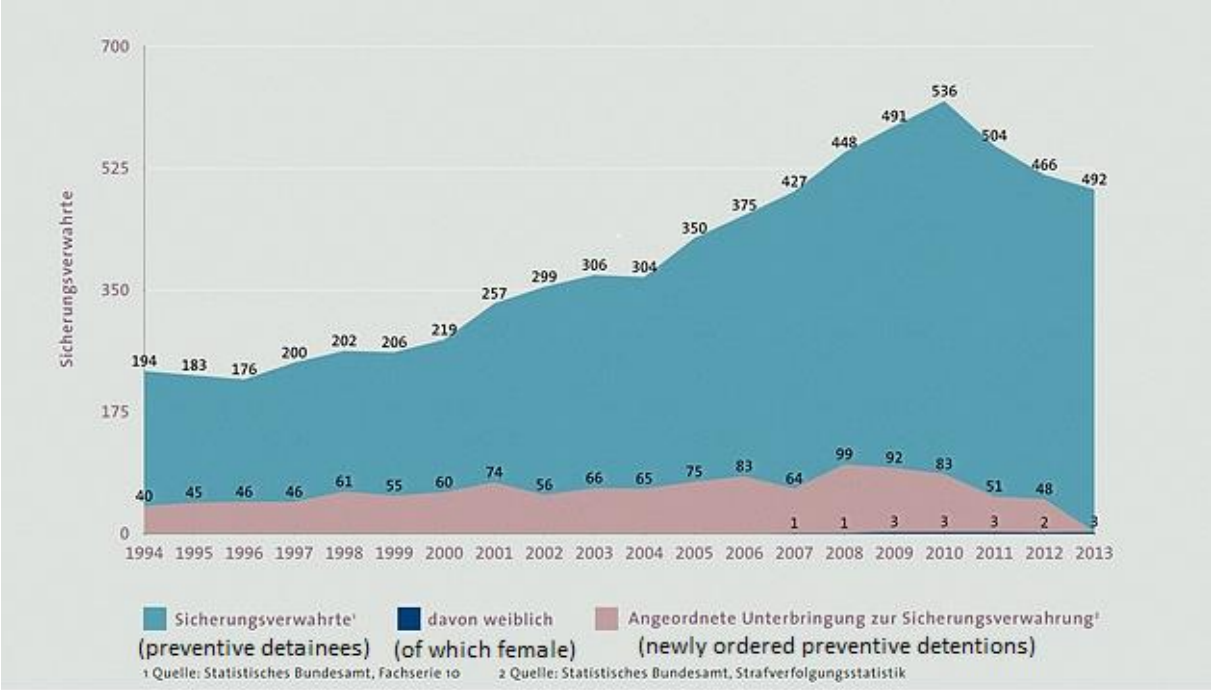
[76] Baden-Württemberg, Bavaria, Lower Saxony, Saxony-Anhalt, Thuringia. (*Cf.* old version prior to the 1.1.2011 of Art. 1a Einführungsgesetz zum Strafgesetzbuch, EGStGB [Introductory Act to the Criminal Code], [last amended by Art. 2 Act of 4 November 2016 (BGBl. I [2016] pp. 2460, 2462), passed 2.3.974, BGBl. I [1974] p. 469. Available on: http://www.gesetze-im-internet.de/stgbeg/, [Old version available on: https://www.buzer.de/gesetz/5387/al26916-0.htm]).

[77] BVerfGE 109, 190, "*Tenor*" (operative part of the ruling) nr. 2 a), b), § 81; Alex, *Debacle*, *supra* note 6, pp. 15-18.

[78] BVerfGE 109, 190, "*Tenor*" (operative part of the ruling) nr. 2 c), § 81. Because of this temporary continued application, the Federal Constitutional Court's judgement could be interpreted as a barely mantled instruction to the federal legislator to adopt similar measures on the federal level. (*Cf.* Thomas Ullenbruch and Kirstin Drenkhahn, "§ 66b StGB" [Art. 66b criminal code] in *Münchener Kommentar zum Strafgesetzbuch* [Munich Commentary on the Criminal Code], 2nd volume, 3th edition, ed. Wolfgang Joecks and Klaus Miebach [Munich: C.H. Beck, 2016], recital 13).
Indications, that the federal legislator understood the temporary continued application as invitation to adopt retrospective preventive detention, can be found in Bundestagsdrucksache 15/2887 (Bundestag printed paper 15/2887), p. 10. It states that the Constitutional Court imposed the tasked on the legislator to check whether it wants to introduce similar measures.

federal level.[79] In 2008, the climax of the expansion of preventive detention was reached with the introduction of retrospective preventive detention for minors who committed crimes at the age of criminal responsibility (14 years).[80] In its leading judgement *M. v. Germany*[81] the ECtHR halted this trend of expanding the preventive detention regime.[82] Starting with this judgment, the Court declared in individual cases the retrospective abolition of the 10-year maximum duration and the retrospective ordering of preventive detention as violation of the Convention.[83]

The expansion of the possibilities to order preventive detention was accompanied by an increase of the orderings of preventive detention and of the detainees, as the following table shows.



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Bundestagsdrucksache 15/3346 (Bundestag printed paper 15/3346), p. 3 translated reads: By ordering the continued application of the laws of the *Länder* for a transitional time period until 30.9.2004, the Court underlined the need for such provisions).
In line with that, the federal retrospective preventive detention, that was introduced before the Constitutional Court's transitional time period ended, entailed the possibility to keep individuals, who were detained under the *Länder's* unconstitutional retrospective preventive detention laws, in preventive detention. (*Cf.* the old version prior to the 1.1.2011 of Art. 1a Introductory Act to the Criminal Code, *supra* note 76. Old version available on: https://www.buzer.de/gesetz/5387/al26916-0.htm).

[79] The Retrospective Preventive Detention Act, *supra* note 75; Alex, *Debacle*, *supra* note 6, pp. 18-20; Ebner, *supra* note 58, pp. 35 f. The Constitutional Court's judgement was on the 10.2.2004 and already on the 2.3.2004 the first draft law regarding federal retrospective preventive detention entered the federal parliament (Bundestagsdrucksache 15/2576 [Bundestag printed paper 15/2576]).

[80] Gesetz zur Einführung der nachträglichen Sicherungsverwahrung bei Verurteilung nach Jugendstrafrecht (Act on the introduction of subsequent preventive detention for convictions under the criminal law relating to young offenders), passed: 8.7.2008, BGBl. I (2008) p. 1212. Available on: https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&bk=Bundesanzeiger_BGBl&start=//*[@attr_id=%27bgbl108s1212.pdf%27]#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl108s1212.pdf%27%5D__1583742225326; Nestler, and Wolf, *supra* note 74, p. 154.

[81] *M. v. Germany*, *supra* note 10.

[82] *Ilnseher v. Germany* [GC], dissenting opinion Judge Pinto de Albuquerque joined by Judge Dedov, *supra* note 40, § 21.

[83] Dessecker, "§ 66 StGB", *supra* note 12 recital 6. (For examples, *see infra* chapter 3.2.3.).

[84] Source: Erstes Deutsches Fernsehen (First German TV Channel), Zahlen zur Sicherungsverwahrung in Deutschland (Numbers regarding preventive detention in Germany). Available on:

Noteworthy is that the trend of ordering more and more preventive detention and the total numbers declined after *M. v. Germany* in late 2009. This indicates that the ECtHR's assessment of the conformity with the ECHR had an important effect on the system of preventive detention in Germany.

3.2. Conformability with the ECHR

This subchapter will examine the system of preventive detention before 2010 under the scrutiny of the ECHR.[85] Later, the legal changes after *M. v. Germany*, that finally took effect on the 1.6.2013 will be outlined (chapter 4.) and the conformity of the resulting new rules with the Convention will be analysed (chapter 5.).

3.2.1. Ordered in the judgement

Until 2002, the only possibility to order preventive detention was regulated in Art. 66 StGB.[86] Art. 66 StGB provides that the convicting court orders preventive detention in addition to ordinary imprisonment in the same judgement, provided certain requirements are met. Normally, a court responsible for the execution of sentences decides at the end of the prison-term whether the preventive detention is executed.[87] It also periodically reviews whether all conditions for perpetuation of the detention are still present.[88]

Firstly, I will examine preventive detention ordered in the judgement under the same criteria the ECtHR applied, secondly I will argue why it is necessary to assess preventive detention more thoroughly and thirdly I will apply a broader scope than the Court to assess the compatibility with the Convention.

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https://www.daserste.de/unterhaltung/film/ein-offener-kaefig/specials/diagramm-zahlen-sicherungsverwahrung-deutschland100.html. Numbers might be higher. According to Kinzig, preventive detention was ordered 79 times in 2007 and 111 times in 2008. (*Cf.* Jörg Kinzig, "Das Recht der Sicherungsverwahrung nach dem Urteil des EGMR in Sachen M. gegen Deutschland," (the law governing preventive detention after the judgement of the ECtHR in M. *v.* Germany), *NStZ* (issue 5, 2010): 233 (234) [hereinafter: Kinzig, "Preventive detention after *M. v. Germany*"].

Because the number of female preventive detainees is so low, there are special rules on the execution of preventive detention for females and most scientific studies disregard female detainees. Therefore, I will not assess specially the particularities of preventive detention for females and I will use the grammatical masculine when referring to preventive detainees in general.

[85] The system of laws governing preventive detention was quite chaotic. (*Cf.* Jörg Kinzig, "Die Neuordnung des Rechts der Sicherungsverwahrung" [The reorganisation of the law on preventive detention], *NJW* [issue 4, 2011]: 177 [177]) [hereinafter: Kinzig, "The reorganisation"]. Therefore, and because of the word limit only the parts of the system of preventive detention that are relevant for the compatibility with the ECHR will be examined.

Sources might be also cited, that refer to a newer legal situation, where it does not make a difference for preventive detention's compatibility with the ECHR. (For an overview of the changes *see infra* chapter 4.).

[86] Ullenbruch, Drenkhahn and Morgenstern, "§ 66 StGB", *supra* note 1, recitals 20 f.

[87] Art. 67 c § 1 StGB, Art. 463 § 3, 454, 462a § 1 Strafprozessordnung, StPO (Code of Criminal Procedure), (last amended by Art. 2 of the Act of 3.3.2020 [BGBl. I (2020), p. 431], in the version of the publication of 7.4.1987. Available on: https://www.gesetze-im-internet.de/stpo/, Art 78b § 1 nr. 1 Gerichtsverfassungsgesetz, GVG (Court Constitution Act), (last amended by Art. 3 of the Act of 12.12.20019 [BGBl. I (2019), p. 2633]), in the version of the publication of 9.1975. Available on: https://www.gesetze-im-internet.de/gvg/GVG.pdf. Old version of Art. 67c StGB available on: https://lexetius.com/StGB/67c,2; Mushoff, *supra* note 44, p. 89; *M. v. Germany*, *supra* note 10, §§ 36, 96.

[88] Art. 67e § 1, 2 StGB. Apart from exceptions this applies also for preventive detention that was ordered differently. Old version of Art. 67e § 2 StGB available on: https://lexetius.com/StGB/67e,2).

3.2.1.1. Criteria applied by the ECtHR

The ECHR only allows the deprivation of liberty for one of the reasons enlisted in Art. 5 § 1 cl. 2 lit. a)-f).[89] All exceptions in this exhaustive list are to interpret narrowly, to fulfil the Articles aim, namely prevention from arbitrary deprivation of liberty.[90]

Art. 5 § 1 cl. 2 lit. c) ECHR is not qualified in the ECtHR's established jurisprudence as a justification for preventive detention because the wording "necessary to prevent his committing an offence" demands a concrete and specific offence, instead of general dangerousness.[91]

According to the ECtHR it might be possible to base preventive detention on lit. e), the detention "of persons of unsound mind".[92] Apart from the fact that German courts did not base preventive detention on "unsound mind", the legal framework before the reform process after *M. v. Germany* indicated that preventive detention disregarded mental health: Art. 66-66b StGB[93] enabled preventive detention of offenders with full or diminished criminal liability, whereas Art. 63 StGB allowed the placement in a psychiatric hospital only in case of diminished or no liability originating from different mental conditions. Thus preventive detention could not be justified by lit. e). Additionally, the ECtHR pointed out that lit. e) only justifies the placement in a hospital or comparable institution that is appropriate to treat mental health conditions.[94] The conditions in preventive detention facilities did not achieve this standard.[95]

The only possible justification for preventive detention left is lit. a), the detention "after conviction by a competent court". The ECtHR's judgements concerning preventive detention's conformity with Art. 5 § 1 cl. 2 lit. a) ECHR are mainly based on its interpretation of "after" in lit. a). It interprets "after" as "causal connection"[96] between the conviction and the deprivation of liberty. This mandatory causal connection gets weaker over time and might break, when the deprivation of liberty does not relay on the same grounds and does not follow

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[89] *M. v. Germany*, *supra* note 10, § 86.

[90] *Winterwerp v. the Netherlands* (Application nr. 6301/73, judgement of 24 October 1979, published in Series A nr. 33), § 37; *Haidn v. Germany* (Application nr. 6587/04, judgement of 13 January 2011), § 88; *Glien v. Germany* (Application nr. 7345/12, judgement of 28 November 2013), § 71 with further references.

[91] *M. v. Germany*, *supra* note 10, §§ 89, 102, that is cited e.g. in *O.H. v. Germany* (Application nr. 4646/08, judgement of 24 November 2011), § 76; Kristin Drenkhahn and Christine Morgenstern, "Sicherungsverwahrung in Deutschland und Europa" (preventive detention in Germany and Europe), in *Strafrecht Wirtschaftsstrafrecht Steuerrecht. Gedächtnisschrift für Wolfgang Joecks* (Criminal law Commercial criminal law Tax law. Memorial publication for Wolfgang Joecks), edited by Friede Dünkel et al. (Munich: C.H. Beck, 2018), 25 (39).

[92] *M. v. Germany*, *supra* note 10, § 103.

[93] Also Art. 66b § 3 StGB in the version before the 1.1.2011 only allowed preventive detention for criminally liable offenders, although the offenders were placed *before* in a psychiatric hospital for the time they had a mental condition infringing their criminal liability. Old versions available on: https://lexetius.com/StGB/66b,4, https://lexetius.com/StGB/66b,3.

[94] *Kallweit v. Germany* (Application nr. 17792/07, judgement of 13 January 2011), §§ 55, 57; *S. v. Germany* (Application nr. 3300/10, judgement of 28 June 2012), §§ 82, 96.

[95] The ECtHR always decides individual cases and therefore only accesses the respective institution in that the offender was detained. Nevertheless, before the reform process after *M. v. Germany* resulted in the changes governing the conditions of preventive detention with effect from 1.6.2013, the Court did not hold that any facility for preventive detention fulfilled the required standard. For instance, in *S. v. Germany*, *supra* note 94, § 99, concerning the Straubing prison the therapy possibilities were not hold sufficient. (*Cf.* furthermore, *Kallweit v. Germany*, *supra* note 94, §§ 55).

[96] *M. v. Germany supra* note 10, § 88. In *Weeks v. the United Kingdom*, (Application nr. 9787/82, judgement of 2 March 1987, published in Series A nr. 114), § 42, the ECtHR for the first time spoke of a "causal connection". Before in *Van Droogenbroeck v. Belgium* (Application nr. 7906/77, judgement of 24 June 1982, published in Series A nr. 50), § 39, the Court demanded a "sufficient connection".

the same objectives that the conviction does.[97] For preventive detention, a causal connection persists as long as the periodical decisions to continue it are based on the same grounds as its ordering in the conviction.[98] This can regularly be the case when both are based on the likelihood that the offender will commit a certain type of crime.[99]

For "conviction" in the terms of Art. 5 § 1 cl. 2 lit. a) ECHR, the assessment of guilt is a necessary precondition.[100] Hence, the periodic decisions themselves are no convictions in the sense of, because they do not entail the assessment of guilt.[101]

The deprivation of liberty also needs to be lawful.[102] The law needs to be of certain "quality [making it] compatible with the rule of law"[103]. This enables the ECtHR to examine national law.[104] In the ECtHR's judgements concerning preventive detention, foreseeability is the main-criterion to assess the lawfulness of the deprivation of liberty.[105] The ECtHR regards

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[97] *Grosskopf v. Germany* (Application nr. 24478/03, judgement of 21 October 2010), §§ 44, 48, 50, 52 f.; *M. v. Germany*, *supra* note 10, §§ 88, 97; *Van Droogenbroeck v. Belgium*, *supra* note 96, § 40; *Del Río Prada v. Spain* [GC] (Application nr. 42750/09, judgement of 21 October 2013), § 124; *H.W. v. Germany* (Application nr. 17167/11, judgement of 19 September 2013), § 102.

[98] *Grosskopf v. Germany*, *supra* note 97, §§ 47 f. The preventive detention against Mr. Grosskopf was ordered in 1996, before the reforms expanding the possibilities to order preventive detention started. (*Cf. Ibid*, §§ 6 f.); Already in 1971 the Commission examined less thoroughly preventive detention that was ordered in the judgement (Art. 20a and 42 e StGB at that time) with focus on the confirmation of the Nazi-legislation governing preventive detention by the Federal Republic's legislator and did not deal with the problematic of the causal connection between judgement and deprivation of liberty. (*Cf. X. v. Germany*, [Application nr. 4324/69, Commission decision of 4 February 1971, published in Collection 37, pp. 98-100], *see* also *Dax v. Germany*, [application nr. 19969/92, Commission decision of 7 July 1992]).; Jens Meyer-Ladewig, Stefan Harrendorf and Stefan König, "Art. 5" in *Europäische Menschenrechts Konvention Handkommentar*, (European Convention on Human Rights Hand Comment), 4th edition, ed. by Jens Meyer-Ladeswig, Martin Nettesheim and Stefan Raumer. (Baden-Baden: Nomos, 2017), recital 29.

[99] For instance, a high likelihood of property offences at the time of ordering preventive detention and at the times, when its continuation was decided, was seen as sufficient in *Grosskopf v. Germany*, *supra* note 97, §§ 49 f.

[100] *Müller v. Germany* (Application nr. 264/13, decision of 5 March 2015), §§ 45, 50; *Guzzardi v. Italy* (Application nr. 7367/76, judgement of 6 November 1980, published in Series A nr. 39), § 100; *Van Droogenbroeck v. Belgium*, *supra* note 96, § 35; *M. v. Germany*, *supra* note 10, § 87.

[101] *M. v. Germany*, *supra* note 10, §§ 95 f; Meyer-Ladewig, Harrendorf and König, "Art. 5", *supra* note 98, recital 29.

[102] Art. 5 § 1 cl. 2 states that the depravation of liberty must be: "in accordance with a procedure prescribed by law" and the different possibilities in Art. 5 have the condition "lawful"; *M. v. Germany*, *supra* note 10, § 90.

[103] *Ibid*., § 90.

[104] That Art. 5 § 1 cl. 2 states that the depravation of liberty must be: "in accordance with a procedure prescribed by law" and the condition "lawful" in Art. 5 § 1 cl. 2 lit a)-f), make it for the ECtHR in principle possible to control the observance of national laws, in particular procedural and constitutional law. (*Cf. Ibid.*, § 104; Christine Morgenstern, *Die Untersuchungshaft. Eine Untersuchung unter rechtsdogmatischen, kriminologischen, rechtsvergleichenden und europarechtlichen Aspekten* [The Detention Awaiting Trial. An investigation among legal-dogmatic, criminological, comparative and European law aspects], [Baden-Baden: Nomos, 2018], p. 269; Veith Mehde "Art. 104", in *Grundgesetz. Kommentar* [Basic Law. Commentary], 7 volumes, ed. Theodor Maunz and Günter Dürig, [Munich: C.H. Beck, years 1962 ff. (status: 88th supplementary delivery August 2019)], recital 14).

[105] *Müller v. Germany*, *supra* note 100, § 48: "Any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f) of Article 5 § 1, be 'lawful'. […] In order to comply with the rule of law, domestic law authorising deprivation of liberty must further be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness";
M. v. Germany, *supra* note 10, § 104: "The Court further observes that the present application raises an issue in terms of the lawfulness of the applicant's detention. It reiterates that national law must be of a certain quality and, in particular, must be foreseeable in its application, in order to avoid all risk of arbitrariness";
Haidn v. Germany, *supra* note 90, § 79: "The standard of "lawfulness" set by the Convention thus requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail";

the foreseeability of preventive detention ordered in the judgement, that is regulated by law since 1934, as unproblematic.[106]

Therefore, and because of the found causal link, the ECtHR does not see preventive detention that is ordered in the judgement as problematic.[107]

3.2.1.2. Reasons to assess preventive detention with a broader scope

It is confusing that the ECtHR solely examined a causal link and foreseeability, but at the same time stressed that all exceptions in Art. 5 § 1 ECHR need to be interpreted narrowly in order to fulfil the aim of Art. 5 ECHR to avoid all forms of arbitrary deprivation of liberty.[108] There were several reasons to examine preventive detention more critically than just examining a causal link and foreseeability. For instance, issues indicating that preventive detention violated the ECHR might be that the prediction of heavy crimes produces many false positives or that the conditions of the execution of preventive detention seemed very similar to the execution of prison-sentences.

Since the ECtHR did not explain why it solely assessed the causal link and foreseeability for preventive detention, I need to speculate. The reason might be that the ECtHR tries not to examine details too specifically because it is too remote from the individual cases and their decisive details in the Convention States.[109] This may lead the Court to be generally reluctant to assess the adequacy of criminal provisions and criminal sentences too precisely. The Court just carries out a supervision of the national systems on a European level, while it leaves the Member States a margin of appreciation.[110] It reviews only common European standards, but not all details to which the national courts are much closer.[111] As the Grand Chamber explained in *Vinter and others v. the United Kingdom*:

> issues relating to just and proportionate punishment are the subject of rational debate and civilised disagreement. Accordingly, Contracting States must be allowed a margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes. As the Court has stated, it is not its role to decide what is the appropriate term

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Ilnseher v. Germany [GC], dissenting opinion Judge Pinto de Albuquerque joined by Judge Dedov, *supra* note 40, § 127.

[106] It is foreseeable in which cases the application of Art. 66, 67d and 67e StGB leads to preventive detention according to *Grosskopf v. Germany*, *supra* note 97, § 53. Nevertheless, one could discuss, whether the different laws that formed the system of preventive detention were too complicated and incoherent to really foresee the consequences. *(Cf.* Kinzig, "The reorganisation", *supra* note 85, p.177) One could also argue that the methodology and outcome of prognosis for heavy recidivism mainly based on prison behaviour are too unclear to reach the extreme high threshold for releases in Art. 67d § 2 StGB between 31.1.1998 and 31.7.2016: "as soon as it is to be expected that the person concerned will not commit any further unlawful acts on his or her release". (Different versions Art. 67d § 2 StGB available on: https://lexetius.com/StGB/67d,10, https://lexetius.com/StGB/67d,2, regarding the prognosis-problematic *cf.* e.g. Kinzig, "The reorganisation", *supra* note 85, p. 179).

[107] *Grosskopf v. Germany*, *supra* note 97, §§ 42-54.

[108] *See supra* note 90.

[109] William A., Schabas, The Convention on Human Rights: A Commentary. (Oxford: Oxford University Press, 2015), pp. 75 f., 78 f., 81.

[110] *Vinter and others v. the United Kingdom* [GC] (Applications nr. 66069/09, 130/10 and 3896/10, judgement of 9 July 2013), § 104; Yutaka Arai-Takahash, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerpen *et al*: Intersentia, 2002), pp. 2-4.

[111] Art. 53 ECHR; Alexander Somek, *The Cosmopolitan Constitution*, (Oxford: Oxford University Press, 2014), pp. 187 f.; Jörg Polakiewicz, "Europe's multi-layered human rights protection system: challenges, opportunities and risks." Transcript of lecture at Waseda University Tokyo, 14.2016, under the heading "European Court of Human Rights". Available on: https://www.coe.int/en/web/dlapil/speeches-of-the-director/-/asset_publisher/ja71RsfCQTP7/content/europe-s-multi-layered-human-rights-protection-system-challenges-opportunities-and-risks?inheritRedirect=false.

> of detention applicable to a particular offence or to pronounce on the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court [.][112]

It is possible that this is an underlying principle, namely that the ECtHR does not control the length of prison-sentences for particular crimes. This possible underlying principle might have led the Court to the conclusion that for Art. 5 § 1 cl. 2 lit. a) ECHR the scope of the examination of arbitrariness is reduced to the assessment of a causal link. At least the Court indicated so in *Saadi v. the United Kingdom* [GC]:

> The Court applies a different approach towards the principle that there should be no arbitrariness in cases of detention under Article 5 § 1 (a), where, in the absence of bad faith or one of the other grounds set out in paragraph 69 above, as long as the detention follows and has a sufficient causal connection with a lawful conviction, the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for the Court under Article 5 § 1 [.][113]

One could interpret this quotation to mean that the ECtHR just assesses a causal link, if the process of the judgement was without arbitrariness, and that the Court does not examine whether the outcome of the judgement is arbitrary. For instance, the outcome of a lawful judgement could be arbitrary when it led to an arbitrary form of confinement suggested by domestic law.

In the following I will show an argument speaking against the existence of such a possible principle stating that only a causal link in Art. 5 § 1 cl. 2 lit. a) ECHR is examined. Then a reason why such a principle should not exist will be named. Finally, I will argue that if such a principle existed, the German preventive detention would not fit in it. Also, I will show why such a possible principle *should* not be applied on German preventive detention.

Against the existence of such a principle argues the following older quotation indicating that the requirement of a causal connection is an additional one, instead of a replacement for the other requirements of Art. 5 § 1 ECHR:

> The "lawfulness" required by the Convention presupposes not only conformity with domestic law but also, as confirmed by Article 18…, conformity with the purposes of the deprivation of liberty permitted by sub-paragraph (a) of Article 5 para. 1… **Furthermore**, the word "after" in sub-paragraph (a) does not simply mean that the detention must follow the "conviction" in point of time: in addition, the "detention" must result from… the "conviction" [.] [emphasis added][114]

Independently from the actual existence of a principle reducing the scope of the arbitrariness assessment to a causal link, in my opinion such a principle should not be in place. The following "fundamental principle"[115] is too important to allow such a broad exception:

> no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.[116]

If the arbitrariness of a deprivation of liberty was not controlled, because a conviction was involved, then "the fundamental purpose of Article 5 § 1… to protect the individual from

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[112] *Vinter and others v. the United Kingdom* [GC], *supra* note 110, § 105 with further references.
[113] *Saadi v. the United Kingdom* [GC], (Application nr. 13229/03, judgement 29 January 2008), § 71.
[114] *Weeks v. the United Kingdom*, *supra* note 96, § 42.
[115] *Saadi v. the United Kingdom* [GC], *supra* note 113, § 67.
[116] *Ibid*.

arbitrariness"[117], could not be fulfilled. Then Member States could just implement convictions to enable arbitrary deprivations of liberty.

Independently from the existence of a general principle narrowing the scope for Art. 5 § 1 cl. 2 lit. a) ECHR to the assessment of a causal link, there are the following reasons not to apply such a principle on German preventive detention, but to assess the possible arbitrariness of it thoroughly.

The previous cited paragraph in *Vinter and others v. the United Kingdom*, that might explain the underlying principle limiting the scope of arbitrariness assessments, indicates many reasons why not to apply such a limited scope to German preventive detention:

> Contracting States must be allowed a margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes.[118]

Firstly, "margin of appreciation" indicates that there are absolute limits regarding the appropriateness of confinements. "Margin" does not equal absolute freedom for the states to punish.

Secondly, preventive detention does not get inflicted "for **particular** crimes" [emphasis added], instead Art. 66 StGB does not require specific crimes so that many and various crimes can be an occasion to decide whether offenders are deemed too dangerous to live in freedom.

Furthermore, preventive detention also does not fully fit in the description above as it is not a "prison sentence" in the German law tradition and in the governments explanations before the Court.[119] Instead it is seen as a purely preventive measure that is precisely no penalty, but gets imposed because of dangerousness.[120] Later the ECtHR accepted that preventive detention can be the detention "of persons of unsound mind" as permitted by Art. 5 § 1 lit e) ECHR and no penalty in the terms of Art. 7 § 1 cl. 2 ECHR if another justification is retrospectively added (treatment of mental disorder) and it is executed with more therapy.[121] Therefore, preventive detention has an ambiguous character. When applying a human rights treaty, this ambivalence of the measure cannot be interpreted to the disadvantages of the individual victims of the measure, here the preventive detainees.

In general, it might be unnecessary for the ECtHR to examine whether six or seven years would be more "appropriate… for particular crimes", but the question whether preventive detention is arbitrary or not has much more consequences. The minimum requirement for imposing preventive detention is a conviction to two years imprisonment.[122] If preventive detention was not imposed because it was arbitrary, then it can make the difference between two years of imprisonment and lifelong confinement. When the difference can be so extreme, it seems necessary that the ECtHR assesses the arbitrariness thoroughly. In *Vinter and others v. the United Kingdom*, the Grand Chamber examined thoroughly the

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[117] *Hassan v. the United Kingdom* (Application nr. 29750/09, judgement of 16 September 2014), *Vinter and others v. the United Kingdom* [GC], *supra* note 110, § 105.

[119] Kristin Drenkhahn, "Secure Preventive Detention in Germany: Incapacitation or Treatment Intervention?", *Behavioral Sciences and the Law* (issue 31, 2013): 312 (314) [hereinafter: Drenkhahn, "Incapacitation or Treatment Intervention?"; BVerfGE 109, 133, §§ 127-144; *M. v. Germany*, *supra* note 10, §§ 113-116.

[120] Drenkhahn, "Incapacitation or Treatment Intervention?", *supra* note 119; BVerfGE 109, 133, §§ 127-144; *M. v. Germany*, *supra* note 10, §§ 113-116.

[121] *Bergmann v. Germany* (Application nr. 23279/14, judgement of 7 January 2016), §§ 118-133, 153-182; *W.P. v. Germany* (Application nr. 55594/13, judgement of 6 October 2016), §§ 50-68, 75-79; *Ilnseher v. Germany* [GC] (Applications nr. 10211/12 and 27505/14, judgement of 4 December 2018), §§ 146-170, 210-236.

[122] Art. 66 § 1 StGB.

possible gross disproportionality of life-sentences, albeit under Art. 3 ECHR.[123] Preventive detention can have the same effect as life-sentences and is arguably worse because it can also be imposed for non-major crimes and is not limited by the offenders guilt.[124] Hence, it seems adequate to assess its proportionality as well. The ECHR also knows a proportionality assessment for Art. 5 § 1.[125] But the ECtHR did not assess the proportionality of German preventive detention. Since proportionality tests like arbitrariness assessments entail a thoroughly examination, also proportionality considerations argue for assessing preventive detention more rigorously than just establishing a causal link.[126]

To conclude, preventive detention does not fit to the benchmarks of a possible principle regarding Art. 5 § 1 cl. 2 lit. a) ECHR that narrows the scope of arbitrariness assessments.

In addition to the foregoing considerations about preventive detention fitting in such a principle, such a principle *should* not be applied on preventive detention because preventive detention is conflicting in many ways with the ECHR. Since the following arguments interpreted too strictly could already lead to the conclusion that German preventive detention is incompatible with the ECHR, at least a rigours arbitrariness assessment seems appropriate.

Firstly, the German Constitutional Court declared the execution of the entire system of preventive detention in Germany as unconstitutional in 2011 because it did not differ enough from prison-sentences to have a clear prevention-character and was unproportional.[127] Due to the limits of this thesis, I will not assess constitutional details. But an extremely strict interpretation of the fact that the Constitutional Court discovered that preventive detention had been executed unconstitutional before, could lead to the conclusion that preventive detention was not "lawful" in terms of a narrowly interpreted Art. 5 § 1 ECHR.

Secondly, the ECtHR made statements in other judgements on Art. 5 § 1 ECHR that interpreted literally would lead to the conclusion that preventive detention always violates Art. 5 § 1 ECR. In *Hassan v. the United Kingdom*, the ECtHR stated:

> It can only be in cases of international armed conflict, where… the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.[128]

A simple argumentum e contrario would lead to the conclusion that Art. 5 ECHR does not allow to preventively detain civilians in peace times. But preventive detention differs from detaining dangerous civilians according to humanitarian law in so far as additionally the

[123] *Vinter and others v. the United Kingdom* [GC], *supra* note 110, §§ 59-75, 83-88, 102-130.
[124] Ullenbruch, Drenkhahn and Morgenstern, "§ 66 StGB", *supra* note 1, recital 3; *M. v. Germany*, *supra* note 10, § 132.
[125] Carine Simons contre la Belgique (Application nr. 71407/10, decision of 28 August 2012), § 32; Jean-François Renucci, Introduction to the European Convention on Human Rights. The rights guaranteed and the protection mechanism (Strasbourg: Council of Europe Publishing, 2005), pp. 7, 57 f.
[126] In the case of possible objections arguing that such a proportionality-test would only fit under Art. 3 ECHR, I want to answer that proportionality-considerations are just one of different arguments for assessing the arbitrariness of preventive detention more carefully. It would infringe the clarity of this thesis' structure to examine proportionality under Art. 3 ECHR.
[127] BVerfGE 128, 326, "*Leitsatz*" (headnote/guiding principle) nr. 3 a), b), "*Tenor*" (operative part of the ruling) II, §§ 96-109, 128.
[128] *Hassan v. the United Kingdom*, *supra* note 117, § 104.

conviction for several or grave crimes is demanded.[129] Also the following quotation from *Hassan v. the United Kingdom* interpreted literally would rule out preventive detention:

> the list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time[130]

When the German preventive detention is conducted there is no intention to bring criminal charges at all, but in case of the German version, criminal charges have already been brought prior to the convictions.

Furthermore, Art. 18 ECHR states:

> The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

One could argue that this forbids to use Art. 5 § 1 cl. 2 lit. a) ECHR that uses convictions, that are "signifie[d]"[131] by a determination of guilt, to impose preventive measures that are based on dangerousness. Lit. c) already regulates the detention to prevent offences, but does not allow to detain someone because of abstract dangerousness.[132] One could argue that the Convention – by regulating detention to prevent offences this way in Art. 5 § 1 cl. 2 lit. c) ECHR – excluded in connection with Art. 18 ECHR all similar circumstances as reason for the deprivation of liberty. On the other hand, prevention is a typical part of penalties[133] and penalties get inflicted "after conviction" as in lit. a).

To conclude, German preventive detention does not fit in a possible principle that narrows the scope of arbitrariness assessment to the question whether a causal link between the deprivation of liberty and a conviction persists. Additionally, there are reasons to question whether German preventive detention could have been in line with the ECHR at all. Hence, it seems adequate to assess possible arbitrariness of preventive detention ordered in the judgement much more rigorously than just to establish a causal link like the ECtHR did it.

Thus, I will assess in the next subchapter with a broad scope whether preventive detention is arbitrary in the sense of a narrowly interpreted Art. 5 § 1 ECHR.

3.2.1.3. Assessment of preventive detention with a broader scope

For arbitrariness of preventive detention argues that it is potentially lifelong and that it is not possible to predict the future dangerousness precisely.[134] The ECHR is a human rights instrument. When applying it one should also take into account scientific developments and "present-day conditions"[135] in order to secure a standard of human rights protection that is adequate for the time concerned.[136] Modern criminology and psychology show that the

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[129] Art. 66 §§ 1 nr.1, 2, 3 cl. 1 StGB in the version before 1.1.2011. Available on: https://lexetius.com/StGB/66,5; Art. 66a § 1 StGB in the version before 1.1.2011. Available on: https://lexetius.com/StGB/66a,3; Art. 66b §§ 1 cl. 1, 2, 3 nr. 1 StGB in the version before 1.1.2011. Available on: https://lexetius.com/StGB/66b,3.

[130] *Hassan v. the United Kingdom*, *supra* note 117, § 97.

[131] *M. v. Germany*, *supra* note 10, § 95.

[132] *See supra* note 91.

[133] *M. v. Germany*, *supra* note 10, § 130; *Vinter and others v. the United Kingdom* [GC], *supra* note 110, § 108. Joecks, "Einleitung", *supra* note 29, recitals 36, 61-74.

[134] Kinzig, "results of a research project", *supra* note 49, pp. 125 f.; Nedopil, *supra* note 51, pp. 346 f.

[135] *Tyrer v. the United Kingdom* (Application nr. 5856/72, judgement of 25 April 1978), § 31.

[136] *Rees v. the United Kingdom* (Application nr. 9532/81, judgement of 17 October 1986), § 47; *Demir and Baykara v. Turkey* (Application nr. 34503/97, judgement of 12 November 2008); § 146; *Winterwerp v. the Netherlands*, *supra* note 90, § 37; ECtHR Registry, Judicial Seminar 2020. The Convention as a Living

prediction of future grave crimes leads to a very high number of false positives.[137] For preventive detention, this means that a high percentages of offenders is detained although they would not commit grave crimes if released. This can also not change significantly with better prediction methods.[138] The main new scientific insight from the field of predicting future heavy crimes is that it is not precisely possible, independent of prediction methods.[139]

For preventive detention this is easy to explain with modern concepts regarding the execution of penalties. The offenders have been long in prison before their preventive detention starts.[140] The judgement, that ordered it, is therefore from long ago. But modern penal laws and penal-execution laws strives to enable offenders to live in the society again, as the Grand Chamber explained and substantiated thoroughly with international law in *Vinter and others v. the United Kingdom*.[141] The judge ordering preventive detention cannot reliably foresee, whether this betterment approach will work. That those modern approaches to the execution of penalties might not be the standard in Germany,[142] cannot be an argument. It is not compatible with the ECHR as human rights treaty to allow a low standard of human rights protection in one field to serve as a reason for a low standard in another field.

Also, mathematically, the high rate of false positives for preventive detention is explainable. False positives are always especially numerous if the base-rate is small and most probably no future prognosis technique can change that.[143] The base-rate for preventive detention is the frequency of heavy crimes after prison-release.[144] Preventive detention gets only imposed on very few offenders, who normally stay detained for a long time after their prison-sentence.[145] Of those released once only a very small number commits heavy

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Instrument at 70. Background Document. Available on: https://www.echr.coe.int/Documents/Seminar_background_paper_2020_ENG.pdf, pp. 3-5; Ineta Ziemele, "European Consensus and International Law" in *The European Convention on Human Rights and General International Law*, ed. Anne van Aaken and Iulia Motoc, (Oxford: Oxford University Press, 2018), pp. 23 (23 f.).

[137] Kinzig, "results of a research project", *supra* note 49, pp. 125 f.; Nedopil, *supra* note 51, pp. 346 f.; Alex, *Debacle*, *supra* note 6, pp. 79-81, 86-92.

[138] Kinzig, "results of a research project", *supra* note 49, pp. 125 f.; Nedopil, *supra* note 51, pp. 346 f.

[139] Kinzig, "results of a research project", *supra* note 49, pp. 125 f., Nedopil, *supra* note 51, pp. 346-348; Michael Alex, "– Wie zuverlässig lässt sich Rückfallgefahr vorhersagen?" (Prediction of crime and legal probation - How reliably can the risk of recidivism be predicted), in Brauchen wir eine Reform der freiheitsentziehenden Sanktionen? (Do we need a reform of custodial sentences?), ed. Katrin Höffler, (Göttingen: Universitätsverlag Göttingen, 2015), pp. 21 (23, 32-34) [hereinafter: Alex, "how reliably?"].

[140] Between 2002-2011, the median for the duration of the combination of prison-sentence and preventive detention was 14,3 years, while the median for preventive detention alone was 6,8 years. In 2010 and 2011 after the ECtHR judgements starting with *M. v. Germany* above average offenders have been released from preventive detention. (*Cf.* Axel Dessecker, *Lebenslange Freiheitsstrafe und Sicherungsverwahrung. Dauer und Gründe der Beendigung in den Jahren 2011 und 2012 mit einer Stichtagserhebung zur lebenslangen Freiheitsstrafe* [Life imprisonment and preventive detention. Duration and reasons for termination in 2011 and 2012 with a key date survey on life imprisonment], [Wiesbaden: Eigenverlag Kriminologische Zentralstelle e.V., 2013], pp. 48 f. Available on: https://www.krimz.de/fileadmin/dateiablage/forschung/texte/LF_SV_2011-12.pdf [hereinafter: Dessecker, *Duration and termination*].

[141] *Vinter and others v. the United Kingdom* [GC], *supra* note 110, §§ 61-81, 111-122.

[142] *Ilnseher v. Germany* [GC], dissenting opinion Judge Pinto de Albuquerque joined by Judge Dedov, *supra* note 40, § 53.

[143] Kinzig, "results of a research project", *supra* note 49, pp. 125 f.

[144] *Ibid*., p. 126, footnote 17.

[145] Axel Dessecker and Fredericke Leuschner, *Sicherungsverwahrung und vorgelagerte Freiheitsstrafe. Eine empirische Untersuchung zur Ausgestaltung der Unterbringung und des vorhergehenden Strafvollzugs* (Preventive detention and prior imprisonment. An empirical study on the design of the detention and the previous prison sentence), (Wiesbaden: Eigenverlag Kriminologische Zentralstelle e.V, 2019), p. 5. Available on: https://www.krimz.de/fileadmin/dateiablage/E-Publikationen/BM-Online/bm-online14.pdf [hereinafter: Dessecker and Leuschner, *empirical study*]; Dessecker, *Duration and termination*, *supra* note 140, p. 49: From 2002-2001 the median was 6,8 years duration of preventive detention.

offences.[146] Hence, the base-rate, that is an important factor for the accuracy of the prognosis, whether to preventively detain an individual will prevent heavy crimes, is very small.[147] Therefore, predictions especially at the time of the judgement will produce many false positives. For assessing the necessity to preventively detain, typically very sensitive prediction methods are used to keep the number of offenders wrongly assessed as not dangerous (false negatives) very small.[148] If the sensitivity is big, mathematically the specificity declines resulting in a high number of false negatives, especially in combination with a small base-rate.[149] Furthermore, prediction of future crimes gets more imprecise the longer the prediction timeframe is, but usually prediction on very distance future is demanded from experts opinions regarding preventive detention.[150]

All attempts to assess the actual number of false positives in preventive detention are confronted with the obstacle that normally allegedly dangerous offenders will not be released.[151] Therefore, one cannot be sure how many offenders sit in preventive detention, although they would not commit heavy crimes if released. For instance, Alex found a way to cope with this obstacle.[152] He investigated how many heavy crimes were committed by 77 offenders whom prison authorities, prosecutors or first instance courts and, in 53 out of 56 conducted experts' opinions, at least one expert, assessed as dangerous, but against whom no retrospective preventive detention was ordered due to other reasons.[153] Because of the small case numbers, short observation periods and different premises such as that the released offenders are as dangerous as the continuously detained ones,[154] Alex's study cannot be very precise either. Nevertheless, it indicates that the number of false positives in preventive detention is very high. In the first 1,5-5 years after release only 10 out of 77 offenders deemed as very dangerous were sentenced to more than one year prison of whom only 6 committed crimes against physical integrity or sexual self-determination and only 4 were sentenced to preventive detention.[155] Taking into account other studies, Alex came to the conclusion that about 85% of preventive detainees would not commit heavy crimes if released.[156] For the reasons explained above such conclusions can never be safe, but at least a rough idea is given how high the number of false positives could be. However, when Alex later expanded the

[146] Kinzig, "results of a research project", *supra* note 49, p. 126.
[147] Nedopil, *supra* note 51, pp. 346 f.
[148] *Ibid*.; Eisnberg and Schlüter, *supra* note 52, pp. 188 f.; Brodowski, "Criminal Law Conference 2015", *supra* note 20, pp. 722 f., citing Johannes Kaspar who stated that it is not proven that without preventive detention the level of crime would rise.
[149] Nedopil, *supra* note 51, pp. 346 f.
[150] Michael Alex, "Rückfälligkeit nach nichtangeordneter nachträglicher Sicherungsverwahrung" (Recidivism after non-ordered retrospective preventive detention*), Forensische Psychiatrie, Psychologie, Kriminologie* (issue 5, 2011): 244 (245 f.) [hereinafter: Alex, "Recidivism"]; Nedopil, *supra* note 51, p. 348.
[151] Nedopil, *supra* note 51, p. 346.
[152] Alex, *Debacle*, *supra* note 6; "Michael Alex, Nachträgliche Sicherungsverwahrung – eine empirische erste Bilanz" (retrospective preventive detention a first empirical conclusion), *Neue Kriminalpolitik* (issue 20 [4], 2008): 150 (152) [hereinafter: Alex, "First empirical conclusion"].
[153] Alex, "Recidivism", *supra* note 150, pp. 245-247; Michael Alex and Thomas Feltes, *Sicherungsverwahrung – „Die Gefahr wird extrem überschätzt"* (Preventive Detention – "The danger is extremely overestimated"), written version of the presentation at the conference "Sicherungsverwahrung und Führungsaufsicht – Wie gehen wir mit gefährlichen Straftätern um?" (Preventive detention and supervision of conduct – How do we deal with dangerous criminals?") from 18.-19.7.2011 in the Evangelischen Akademie Bad Boll, p. 5. Available on: https://www.thomasfeltes.de/pdf/vortraege/2011_Alex_Feltes_Manuskript_Bad_Boll_kurz.pdf.
[154] Alex, *Debacle*, *supra* note 6, p. 104.
[155] Alex, "Recidivism", *supra* note 150, pp. 245 f.; Alex, "First empirical conclusion", *supra* note 152, pp. 150-152.
[156] Alex, "First empirical conclusion", *supra* note 152, p. 152.

research to 121 cases and the observation periods became longer, the result was that 15,7% of offenders deemed dangerous committed heavy sexual or violent crimes.[157]

Hence, the future dangerousness cannot be precisely predicted in the convicting judgement.

The periodic reviews of the preventive detention are only based on the offender's conduct in prison, besides on the offences of long ago. But this conduct is usually not the heavy criminality, against which preventive detention should protect.[158] Additionally, the circumstances in prisons are very different from the reality in freedom. Hence, the conduct in prison circumstances is inappropriate to predict behaviour outside.[159]

Also, the realities in the German preventive detention, at least before *M. v. Germany*, facilitated a high number of false positives in the periodic reviews. There were very limited adequate therapy possibilities.[160] If a detainee would not accept them, he was in danger, that from this fact his dangerousness would be concluded.[161] If he engaged with psychologists he would be in danger that his words will be used to establish his dangerousness or mental disorder on which more preventive detention could be based. This happened at least to Mr. Ilnseher.[162]

Detainees had also another obstacle to show that they are not dangerous. To prove a low level of dangerousness especially the conduct during detention relaxations, like leaving the prison for a certain period of time, was very important, but the prison authorities decided about relaxations with their own discretion.[163] It is very likely that prison authorities exercise their discretion under big influence of presumed danger of bad publicity and civil or criminal liability.[164] In general, relaxations were granted extremely restrictively.[165] For instance, in 8 out of 14 facilities no preventive detainee left the prison, 1 did not answer and the others granted maximal 2 detainees relaxations, in the course of one year, at the reporting date

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[157] Michael Alex, "Risikofaktoren für gravierende Rückfalldelinquenz – Nachlese einer Studie zur nachträglichen Sicherungsverwahrung" (Risk factors for serious relapse delinquency - Review of a study on preventive detention), *Neue Kriminalpolitik* (issue 20 [1], 2015): 48 (49 f.). Similar numbers can be found in Albrecht, *supra* note 55, p. 882 f.

[158] Grischa Merkel, "incompatible Contrasts - Preventive Detention in Germany and the European Convention on Human Rights" *German Law Journal* (volume 11, issue 9, September 2010): 1046 (1063), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/1EAD06D2F61B16100E9AA3D7CF9743E8/S2071832200020095a.pdf/incompatible_contrasts_preventive_detention_in_germany_and_the_european_convention_on_human_rights.pdf.

[159] Alex, "how reliably?", *supra* note 139, pp. 21 (33 f.); BGHSt 50, 121, § 16.

[160] Tillmann Bartsch, "Verfassungsgerichtlicher Anspruch und Vollzugswirklichkeit Ergebnisse. einer empirischen Studie zum Vollzug der Sicherungsverwahrung*" (Aspirations of the constitutional court and reality of execution. Result of an empirical study on the execution of preventive detention), *Zeitschrift für Internationale Strafrechtsdogmatik, ZIS* (issue 6, 2008): 280 (282-288).

[161] BGHSt 50, 121, §§ 15-17.

[162] *Ilnseher v. Germany* [GC], *supra* note 121, §§ 34-37, 47, 153-155; *Ilnseher v. Germany* [GC], dissenting opinion Judge Pinto de Albuquerque joined by Judge Dedov, *supra* note 40, §§ 111-115.

[163] Nedopil, *supra* note 51, pp. 349; Christine Morgenstern and Kristin Drenkhahn, "§ 66c StGB" (Art. 66c criminal code) in Münchener Kommentar zum Strafgesetzbuch (Munich Commentary on the Criminal Code), 2nd volume, 3th edition, edited by Wolfgang Joecks and Klaus Miebach, (Munich: C.H. Beck, 2016), rn. 20; Dessecker and Leuschner, *empirical study*, *supra* note 145, p. 13.

[164] Bartsch, *supra* note 160, p. 288; C.H. Beck, editorial staff beck-aktuell, "BGH: Strafvollzugsbedienstete haften nicht für Straftat eines Gefangenen im offenen Vollzug" (Federal Court of Justice: Prison officers are not liable for offences committed by a prisoner in open prison), 26.11.2019. Available on: https://rsw.beck.de/aktuell/meldung/bgh-strafvollzugsbedienstete-nicht-fuer-toedlich-endende-verkehrsstraftat-eines-strafgefangenen-im-offenen-vollzug-verantwortlich; Kinzig, "results of a research project", *supra* note 49, p. 156.

[165] Morgenstern and Drenkhahn, "§ 66c StGB", *supra* note 163, recitals 69 f.

31.8.2006.[166] Hence, detainees that were deemed dangerous by the prison authorities had very small chances to get relaxations and to be finally released. Prisoners against whom preventive detention was ordered even could not get any confinement relaxations during their prison-sentence due to administrative regulations.[167]

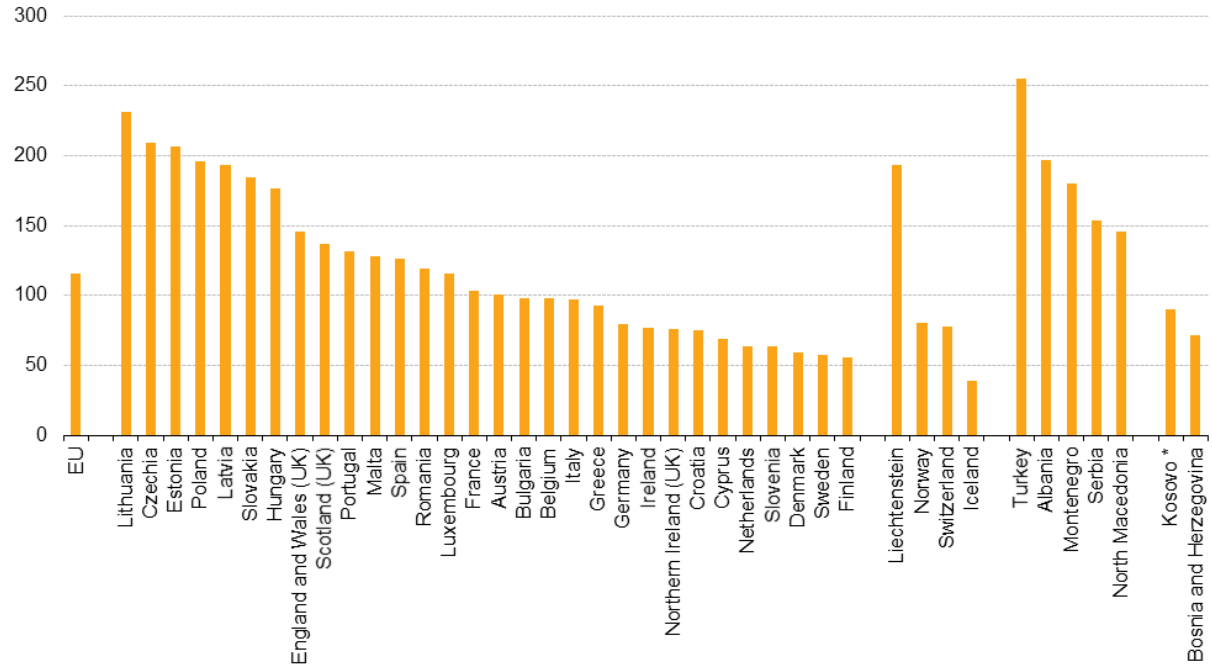
To aggravate, the legislation only foresaw the release from detention, if it is to be expected that the person detained will not commit any further unlawful acts outside the detention.[168] This threshold was reduced by German courts, for instance, only unlawful acts, that would allow to order preventive detention, count.[169] However, also the reduced threshold is very hard to reach.[170] As explained above, such a high sensitivity mathematically leads to a low specificity and therefore a high number of false positives. Since 1998, Art. 67d § 4 StGB eased the conditions for releases, after the detention lasted 10 years.[171] But this does not alter the overall result, that the preventive detention's reviews maintain many false positives.

Consequently, also the periodic reviews are not sufficient to predict the future dangerousness precisely.

One could conclude that an as imprecise as described, hard to end, possible lifelong detention, that is not proportional to the offender's guilt, is in fact arbitrary. But one needs to see the matter holistically. The German approach is to limit prison-sentences by the offender's guilt.[172] This leads to much fewer prisoners and shorter sentences compared to other European states:

[166] Bartsch, *supra* note 160, pp. 283, 287 f.
[167] Morgenstern and Drenkhahn, "§ 66c StGB", *supra* note 163, recital 70.
[168] Art. 67d § 2 cl. 1 StGB old versions applicable on: https://lexetius.com/StGB/67d,3.
[169] Dominik Best and Dieter Rössner, "Der Maßregelvollzug und die Aussetzung der Maßregelvollstreckung zur Bewährung" (The execution of measure of betterment and prevention and the suspension of the execution of a measure on probation), in *Handbuch der Forensischen Psychiatrie* (Manual of Forensic Psychiatry), 1st volumen, ed. Hans-Ludwig Kröber *et al*., (Germany: Steinkopff Verlag, 2007), pp. 323 (336 f.).
[170] *M. v. Germany*, *supra* note 10, § 132.
[171] Old version of Art. 67d StGB available on: https://lexetius.com/StGB/67d,10.
[172] BVerfGE 128, 326, § 104.

Prisoners by 100 000 inhabitants, 2017



* Kosovo: this designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

Source: Eurostat [crim_pris_cap]

eurostat

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[173] Source: Eurostat, *File:Prisoners by 100 000 inhabitants 2017 .png*, last modified on 18.12.2019. Available on: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Prisoners_by_100_000_inhabitants_2017_.png.

In *Ilnseher v. Germany* [GC], *supra* note 121, § 92 the Grand Chamber cited the following numbers that Germany picked from the Council of Europe Annual Penal Statistics (SPACE I) for 2015: Prisoner with terms of 10 years or more and preventive detainees:

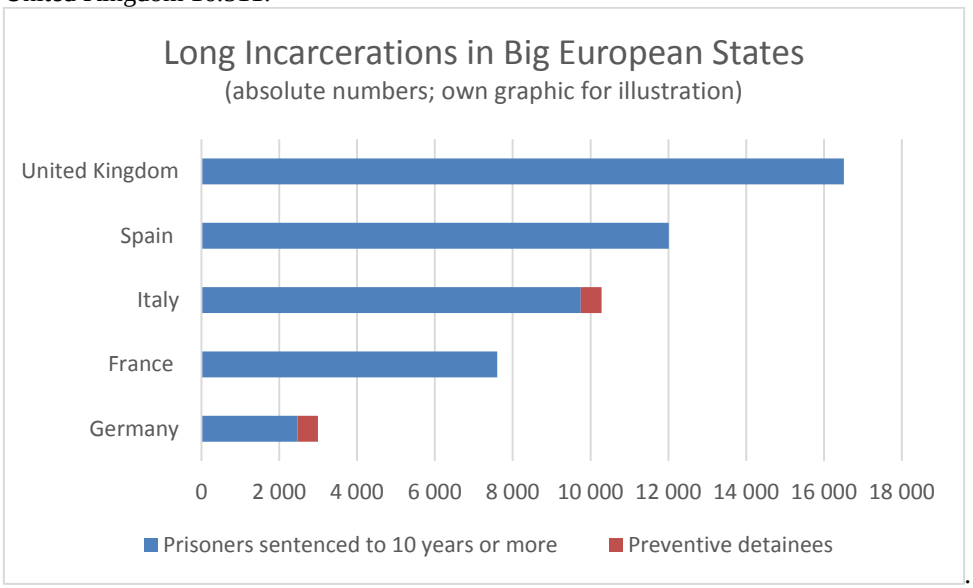
Germany 2.471+521=2.992;

France (figure available for 2014 only) 7.603;

Italy 9.747+540=10.287;

Spain 12.012;

United Kingdom 16.511.



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(Detailed numbers substantiating the claims about German incarceration and preventive detention as well as a statistical comparison of long prison-sentences between Germany and Great Britain are provided in Appendix 1.)

In other states (for instance Great Britain) the potential dangerousness is traditionally factored into the prison-sentences.[174] This then can lead to many long sentences. In Germany, not only the number of long-time prisoners is low, but also the number of preventive detainees was only 500 shortly before the judgement *M. v. Germany* on 31.8.2009.[175]

The question what to do with potential dangerous offenders is very delicate. But the tension between legitimate societal security interests on one hand and individual human rights and the rule of law, on the other hand, needs to be resolved somehow. Surely, preventive detention is very problematic. Nevertheless, it is arguably better to use it in a targeted way than incorporating potential dangerousness into sentences on a large scale. Also, the ECHR cannot demand that all potentially dangerous offenders are just released after a prison-sentence that is proportionate to their guilt. Some fraction of offenders would commit heavy crimes with irreparable damage for the legal rights of others. Prevention is an accepted part of penalties.[176]

The modern criminology indicates that the best way to proceed with potential dangerous offenders is to carefully and gradually reintegrate them into society with a close-meshed net of therapy, social work and monitoring.[177] This way, the rights of the offenders get protected and also the likelihood of recidivism can be held low. It is logical that a gradual release into freedom comes to better results than to lock offenders up longer and then just release them without securing their abilities to live law-abidingly in freedom. On the contrary, the idea to erase certain types of crimes is populistic, but not achievable. Even if one would lock up certain types of offenders forever, as ex-chancellor Schröder once suggested,[178] the offence would still be committed by the offenders not caught. Hence, a state, that takes human rights seriously, must balance the rights of the potential victims of crimes or rather the general public with the rights of the potential dangerous offender. Such a proportionality-assessment is also known to the ECHR and also in the course of Art. 5 § 1 ECHR.[179] The crimes that the potentially dangerous, once-caught offender might commit, can never be fully erased. Consequently, to fully side with the potential victims and to lock up all offenders forever can only bring a small gain in security compared to state-of-the-art reintegration measures, but it infringes the offenders' rights maximally. Therefore, such conduct can never be proportional.

But does the ECHR force the Contracting States to always obey to the highest scientific standards at the time concerned when restricting the rights of offenders? Is only the objectively best solution non-arbitrary and proportional? I would argue that some margin of appreciation remains for the states. Scientific standards change. Also populistic demands of

[174] Kinzig, "results of a research project", *supra* note 49, p. 124; *M. v. Germany*, *supra* note 10, § 73.
[175] Kinzig, "Preventive detention after *M. v. Germany*", *supra* note 84, p. 234.
[176] *M. v. Germany*, *supra* note 10, § 130; Joecks, "Einleitung", *supra* note 29, recitals 36, 61-74.
[177] Bernd Maelicke, "Wie Wasser von Klippe zu Klippe geworfen. Plädoyer für einen anderen Umgang mit Mehrfach- und Intensivtätern" (Like water thrown from cliff to cliff. Plea for another approach to serial and intensive offenders) *Forensische Psychiatrie, Psychologie, Kriminologie*, (issue 5, 2011): 215 (215-218); Dessecker, "§ 66 StGB", *supra* note 12, recitals 21 f.; Axel Dessecker, "§ 66c StGB" (Art. 66c criminal code), in *Strafgesetzbuch* (criminal code), 1st volume, 5th edtion, ed. Urs Kindhäuser, Ulfired Neumann and Hans-Ulrich Pfaeffgen. Baden-Baden: Nomos, 2017, recital 17; Dessecker and Leuschner, *empirical study*, *supra* note 145, p. 13; Nedopil, *supra* note 51, p. 349.
[178] Der Spiegel "Gerhard Schröder", *supra* note 61.
[179] Renucci, *supra* note 125, pp. 7, 57 f.; Sandra Stahl, *Schutzpflichten im Völkerrecht – Ansatz einer Dogmatik* (Obligations to protect in international law – approach of a dogmatic), (Heidelberg: Springer, 2012), p. 315.

the general population can be legitimate to a certain extent.[180] It is hard to demand from the citizens to accept the most recent criminological findings telling them that, directly after his guilt-adequate prison-sentence, regardless of dangerousness a convicted, repeat-child-rapist and murderer[181] will move next to them, for human rights reasons and to calm them with statistics about false positive offenders sitting wrongfully in preventive detention. The general public might not be fully rational. However, if there was not at least the possibility to confine convicted criminals perceived as extremely dangerous for a very long time, the state's monopoly of violence would be hard to explain to the this public.[182] Therefore, the security-feeling of the population has at least some value when balancing different rights.

The ECHR just constitutes a common minimum standard for human rights in Europe.[183] The raising of the human rights standard in the very diverse Member States of the Council of Europe can only progress gradually.[184] At the same time, the "State's choice of a specific criminal justice system… is in principle outside the scope of the supervision the Court"[185]. As long as this aforementioned common standard allows very long prison-sentences not limited by guilt on a broad scale for prevention purposes, it does not necessarily help the cause of human rights protection to forbid the combination of short guilt-adequate sentences with a few long detentions for the convicted offenders deemed most dangerous to ensure prevention. It is desirable that societal realities are altered towards more understanding of criminological findings. But as long as the societal realities include strong fears of some perceived types of offenders, these realities need to be regarded. It is desirable that the common minimum standard evolves to allow only preventive measures which do not require deprivation of liberty. However, before such a minimum standard is established, the Convention, taking also into account legitimate security-feelings of the general public, does not forbid preventive measures against grave crimes that include confinement.

Hence, I conclude, that preventive detention is not per se against the Convention. But it stays a very problematic measure from a human rights perspective. Therefore, in order not to violate Art. 5 § 1 ECHR, it must be executed itself in the least arbitrary and most proportional manner.

The German Constitutional Court rightly stated that a special sacrifice is inflicted on the preventive detainees with the aim to increase the security in the society.[186] A small number of detainees pays the price, that Germany can normally limit prison-sentences proportionally to the guilt. An honest interpretation of the concept of guilt must come to the conclusion that it is not the preventive detainees' fault, that they are in detention. But they have to endure all negative effects, while the general population enjoys a higher security or at least a higher security-feeling. In *M. v. Germany* the Court concluded that preventive detention gets a penal character if not everything is done to reduce the dangerousness of the detainees and consequently to shorten their detention.[187] Against the background of the explanations above, I would go further and conclude that preventive detention can only be classified as non-arbitrary and proportional, if the state does everything in its power to keep

[180] Albrecht, *supra* note 55, p. 871.
[181] Not to get a life-sentence for murder is possible if convicted under juvenile law.
[182] Related statement by Uwe Hellmann cited by Brodowski in Brodowski, "Criminal Law Conference 2015", *supra* note 20, p. 722.
[183] *See supra* notes 109-111.
[184] Arai-Takahash, *supra* note 110, pp. 3 f.; Ziemele, *supra* note 136.
[185] *Vinter and others v. the United Kingdom* [GC], *supra* note 110, § 104.
[186] BVerfGE 128, 326, § 101.
[187] *M. v. Germany*, *supra* note 10, §§ 128 f.

preventive detention as short as possible. Otherwise it would be arbitrary in the sense, that the likelihood of releases from detention is lower just because the state does not try everything to lower the dangerousness of the offenders. A truly narrow interpretation of Art. 5 § 1 ECHR, that precludes all forms of arbitrary deprivation of liberty, cannot allow that individuals are kept in detention, because the state did not decide to help them, although it inflicted on them a special sacrifice for benefit of the general public. That means that the state must start from the beginning of the guilt-adequate prison-sentence to reintegrate the offender and lower his dangerousness so that a subsequent preventive detention can become superfluous.[188]

The German Constitutional Court applied a proportionality test and rightly argued that the preventive detention also needs to be executed as close to life in freedom as possible in order to mitigate the burden of this special sacrifice.[189] Proportionality is also necessary when applying the ECHR.[190] To detain someone because of abstract dangerousness, is a severe interference of the right to liberty. That this interference is inflicted "after conviction" as per Art. 5 § 1 cl. 2 lit. a) ECHR, cannot release from the requirement of proportionality. Hence, also the ECHR demands for an execution of preventive detention that mitigates its burden as much as possible.

Additionally, one could question whether it can be proportional to preventively detain someone because he could cause serious economic damage, as Art 66 § 1 nr. 3 StGB named as one reason for preventive detention.[191] Economic damage of victims can easily be compensated with money, but this is not possible for the deprivation of liberty. It seems to be sufficient to preserve resources if a habitual thief or fraudster gets convicted and imprisoned after every new crime, instead of preventively detained. If the state has to use all its available resources to make preventive detention non-arbitrary, as deduced above, it is hard to explain why the state should be allowed to preventively detain with resource preservation as a goal.

It can be deemed as sufficiently established that Germany had not done everything in its power to facilitate releases and mitigate the burden, before reforms in Germany changed the whole system of preventive detention with effect from 1.6.2013.[192] The ECtHR established thoroughly in *M. v. Germany* that preventive detention did not differ substantially from ordinary prison sentences and that the possibilities for adequate therapy to reintegrate the offenders were insufficient.[193] Also the German Constitutional Court, taking the ECtHR's reasoning into account, declared on 4.5.2011 all forms of preventive detention as unconstitutional because there was no sufficient difference between preventive detention and ordinary prison-sentences to compensate the special sacrifice.[194] The following examples shall outline the conditions in preventive detention.

The legal framework foresaw that offenders are firstly detained to protect the general public, while the help for reintegration was secondary.[195] In principle, the same provisions as

[188] BVerfGE 128, 326, § 112.
[189] *Ibid*., §§ 101, 108.
[190] Renucci, *supra* note 125, pp. 7, 57 f.; Stahl, *supra* note 179.
[191] Old version of Art. 66 StGB available on: https://lexetius.com/StGB/66,5.
[192] Gesetz zur bundesrechtlichen Umsetzung des Abstandsgebotes im Recht der Sicherungsverwahrung (Preventive Detention Distinction Act), passed 5.12.2012, BGBl. I (2012), p. 2425. Available on: https://www.bgbl.de/xaver/bgbl/start.xav?start=//*%5B@attr_id=%27bgbl112s2425.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl112s2425.pdf%27%5D__1583683377402.
[193] *M. v. Germany*, *supra* note 10, §§ 127-130.
[194] BVerfGE 128, 326, §§ 101, 115, 119 f.
[195] Art. 129 Strafvollzugsgesetz, StVollzG (Execution of Sentences Act), (last amended by Article 7 of the Act of 9.12.2019 [BGBl. I (2019), p. 2146, 2152), passed: 16.3.1976. Available on: https://www.gesetze-im-

for prisoners applied *mutatis mutandis*.[196] This led, for instance, to a work obligation for detainees.[197] Special regulations for preventive detention were, for example, that equipment and measures should protect detainees from damages caused by long custody.[198] Detainees were allowed subordinate amenities like the right to own clothes and to get more pocket money than prisoners.[199] But regarding the central aspects of preventive detention, the legislation did not prescribe details for care, motivation and treatment and therefore did not effectively press prison authorities to focus on therapeutic measure that serve release.[200] Also the equipment and staffing was not described precisely. No rules facilitated that measures already during the prison-term try to reduce the dangerousness.[201] The detention just had to get reviewed every two years.[202]

These normative deficits were reflected in the actual situation. Preventive detention was normally executed in the same prisons as prison-sentences, but in different wings.[203] In 2006, 85% of detainees were placed in such competent entities, but against the law, 5 out of 14 prisons did not have special sections for preventive detainees.[204]

Mostly preventive detainees had more comfortable prison cells and more possibilities to equip them.[205] Nothing more was done to alleviate the preventive detainees' dangerousness with the goal of shorter detention than for long-time prisoners.[206]

In *M. v. Germany* the Court rightly agreed with the Council of Europe's Commissioner for Human Rights and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) that preventive detainees are in an especially problematic situation because their detention is possibly indefinite.[207] Thus, they need a distinctively high level of psychological care to cope with this possible hopeless seeming situation.[208] But while visiting one preventive detention unit, the CPT observed that contacts between inmates and staff were minimal, because the staff with special qualifications for therapy or social work was absent.[209] The therapy possibilities were described as inadequate.[210] The CPT argued that immediate therapy plans were necessary together with a system targeting release as well as multi-disciplinary staff providing a high level of care.[211] These results were predominantly confirmed by a comprehensive study by Bartch fully

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internet.de/stvollzg/BJNR005810976.html; Morgenstern and Drenkhahn, "§ 66c StGB", *supra* note 163, recital. 14.

[196] Art. 130 Execution of Sentences Act, *supra* note 195.

[197] Art. 41 § 1 Execution of Sentences Act, *supra* note 195; Axel, Dessecker "Das neue Recht der Sicheurngsverwahrung: ein erster Überblick" (The new law of preventive detention: a first overview), Bewährungshilfe (issue 4, 2013): 309 (317 f.) [hereinafter: Dessecker, "The new law of preventive detention"].

[198] Art. 131 Execution of Sentences Act, *supra* note 195.

[199] Art. 133 Execution of Sentences Act, *supra* note 195.

[200] BVerfGE 128, 326, § 121.

[201] *Ibid*.

[202] Art. 67e § 1, 2 StGB. Old version available on: https://lexetius.com/StGB/67e,2); BVerfGE 128, 326, § 121.

[203] *M. v. Germany*, *supra* note 10, §§ 125, 127.

[204] Bartsch, *supra* note 160, p. 283.

[205] *Ibid*., p. 289; *M. v. Germany*, *supra* note 10, § 127.

[206] *M. v. Germany*, *supra* note 10, §§ 128 f.

[207] *Ibid*., § 129; Council of Europe, 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, CPT/Inf (2007) 18, 17.4.2007, § 96. Available on: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806963 04.

[208] *M. v. Germany*, *supra* note 10, § 129.

[209] *Ibid*., § 77; CPT/Inf (2007) 18, *supra* note 207, § 97.

[210] *M. v. Germany*, *supra* note 10, § 77; CPT/Inf (2007) 18, *supra* note 207, § 99.

[211] *M. v. Germany*, *supra* note 10, § 77; CPT/Inf (2007) 18, *supra* note 207, § 100.

published after *M. v. Germany*.[212] He questioned all institutions in the *Länder* and conducted interviews with 35 overseers and 40 detainees in 2006 and 2007 for the study.[213] Bartsch observed, that the execution of preventive detention was problematic. He described a big discrepancy between the laws governing preventive detention and the reality of its execution regarding the relaxation of the execution, the offering of therapy, the number of staff and financial benefits like payment for work in prison.[214] As showed above, the confinement relaxations were minimal, although they are very important for reintegration.[215] Dessecker and Leuschner describe preventive detention as executed before the reforms as traditionally little-therapy-orientated.[216]

One could summarise aggressively that *Sicherungsverwahrung* was its literal translation "securing storage" – of humans, deemed dangerous. Due to the limitations of this thesis, I will not discuss potential conflicts with the human dignity, but just conclude that requirements deduced above regarding facilitating the release and mitigating the burden of preventive detention were not met.

As the ECtHR only decides individual cases, it is possible that some individuals were placed in therapeutic institutions[217] so easily distinguishable from prisons and got so sufficient therapy that their preventive detention cannot be classified as arbitrary and unproportional in the sense of Art. 5 § 1 ECHR. Therefore, the precise conclusion should be that preventive detention and its execution were *normally* against the Convention. Being very critical, one could ask, whether it is "lawful" in the sense of Art. 5 § 1 ECHR when a court orders preventive detention, that is usually executed against the Convention as well as against the constitution, and just per coincidence the detainee ends up in good conditions.

To summarise, only Art. 5 § 1 cl. 2 lit. a) ECHR was a possible justification for preventive detention. The main criteria the ECtHR used to assess it, namely causal link and foreseeability were met. But it would have been also necessary to assess the issue of arbitrariness carefully. Because preventive detention is not in line with the most modern criminological findings and inflicts a severe special sacrifice on the detainees, it can only be non-arbitrary and proportional if the state does everything to shorten and mitigate. As Germany did not do that, preventive detention before *M. v. Germany* must be classified as arbitrary and unproportional. Hence, it constituted a violation of Art. 5 § 1 ECHR.

3.2.2. Reserved in the judgment

In 2002, Art. 66a StGB introduced preventive detention, that is reserved in the judgment, whereas normally the same court[218] decided at least six months before release from ordinary

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[212] Dessecker and Leuschner, *empirical study*, *supra* note 145, p. 8.
[213] Bartsch, *supra* note 160, pp. 282-289.
[214] *Ibid*., pp. 285-289); Dessecker and Leuschner, *empirical study*, *supra* note 145, p. 8.
[215] *See* the main text at *supra* notes 166 f.
[216] Dessecker and Leuschner, *empirical study*, *supra* note 145, p. 54.
[217] *Ibid*., p. 23.
[218] Art. 74f § 1 Court Constitution Act, *supra* note 87. All versions of Art. 74f Court Constitution Act (before 12.7.2008, after 12.7.2008 and after the 1.1.2011) say that if the "*Strafkammer*" (criminal court with tree judges and two lay judges or one judge and two lay judges) reserved the preventive detention, the *Strafkammer* decides about the order in first instance. Versions of Art. 74f Court Constitution Act available on: https://www.buzer.de/gesetz/6164/al13175-0.htm, https://www.buzer.de/gesetz/6164/al26909-0.htm. Contrary, Kinzig stated 2011 without further explanation that the preventive detention is precisely not decided by the court that decides about the conviction (and therefore the reservation of preventive detention). (*Cf.* Kinzig, "The reorganisation", *supra* note 85, p.179). However, in the case concerning reserved preventive detention decided

prison on the base of the offender's dangerousness.[219] For reserved preventive detention a lower probability of dangerousness is sufficient than for preventive detention ordered in the judgement.[220]

As argued above, preventive detention violated Art. 5 § 1 ECHR, before the reforms that took effect on 1.6.2013. The reason is that it is arbitrary and unproportional to keep offenders potentially forever in detention on the grounds of imprecise prediction of dangerousness without doing everything to lower their dangerousness and to mitigate the negative effects on them. The arbitrariness and unproportionality of reserved preventive detention are comparable to those of preventive detention ordered in the judgement. The threshold to finally order detention in Art. 66a StGB demanded an overall assessment showing that the offender can be expected to commit serious offences that cause serious harm, whereas Art. 66 StGB required that an overall assessment shows that he is dangerous for the general public.[221] Art. 66a StGB, contrary to Art. 66 StGB, named only danger of severe mental or physical harm as reason for detention, but not danger of serious economic damage.[222] Regarding these conditions, Art. 66a StGB could even be seen as less unproportional than preventive detention ordered in the judgement. However, it stays arbitrary and unproportional to preventively detain without serious steps to reintegrate the offenders and to mitigate their burden.

Nevertheless, a thorough analysis demands to apply the principles and the main test-criterion the ECtHR uses to assess preventive detention's compatibility with Art. 5 § 1 cl. 2. lit. a) ECHR, namely the "causal link" between conviction and deprivation of liberty.

According to the ECtHR's established jurisprudence "conviction" in lit. a) must contain a finding of guilt.[223] The subsequent decision about ordering the previous reserved preventive detention does not contain an assessment of guilt.[224] Hence, it cannot serve as a conviction in the sense of lit. a).

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by the ECtHR, the reservation of preventive detention as well as its ordering were decided by the same court, namely the Deggendorf Regional Court. *(Cf. Müller v. Germany*, *supra* note 100, §§ 4, 9 f., 12).

[219] Art. 1 nr.1 and nr. 3. Art. 2 nr. 4a Act on the introduction of reserved preventive detention, *supra note* 71; Art. 275a § 5 Code of Criminal Procedure, *supra* note 87.

[220] Until 2011 Art. 66 § 1 nr. 3 StGB read: "An overall evaluation of the offender and the offences committed leads to the conclusion that, on account of the propensity to commit serious crimes… the offender poses a danger to the general public." While Art. 66a StGB refers to Art. 66 StGB: "If, at the time of conviction… it cannot be established with sufficient certainty whether the offender is dangerous to the general public within the meaning of § 66 par. 1 nr. 3." (Old versions of Art. 66a and 66 StGB available on: http://www.buzer.de/gesetz/6165/al26894-0.htm, https://www.buzer.de/gesetz/6165/al26893-0.htm).
Since 2011, Art. 66 § 1 nr. 4 StGB reads: "an overall evaluation of the offender and the offences committed leads to the conclusion that, on account of the propensity to commit serious crimes… the offender poses a danger to the general public at the time of the conviction." To this refers Art. 66a § 1 nr. 3 StGB in the version since 2011, (and Art. 66a § 2 nr. 3 StGB [difference in square brackets]): "it is [at least] probable that the conditions of Art. 66 § 1 cl. 1 nr. 4 are met."
Thomas Ullenbruch and Christine Morgenstern, "§ 66a StGB" (Art. 66a criminal code) in Münchener Kommentar zum Strafgesetzbuch (Munich Commentary on the Criminal Code), 2nd volume, 3th edition, ed. Wolfgang Joecks and Klaus Miebach (Munich: C.H. Beck, 2016), recital 2; Schuster, *supra* note 67 p. 212.

[221] Art. 66a § 2 cl. 2 StGB in the version before the 1.1.2011. Available on: https://lexetius.com/StGB/66a,3; Art. 66 § 1 nr. 3 StGB in the version before the 1.1.2011. Available on: https://lexetius.com/StGB/66,5.

[222] Art. 66a § 2 cl. 2 StGB in the version before the 1.1.2011. Available on: https://lexetius.com/StGB/66a,3; Art. 66 § 1 nr. 3 StGB in the version before the 1.1.2011. Available on: https://lexetius.com/StGB/66,5.

[223] *Müller v. Germany*, *supra* note 100, §§ 45, 50; *Guzzardi v. Italy*, *supra* note 100, § 100; *Van Droogenbroeck v. Belgium*, *supra* note 96, § 35; *M. v. Germany*, *supra* note 10, § 87.

[224] Art. 66a § 2 StGB in the version before 1.1.2011. Available on: http://www.buzer.de/gesetz/6165/al26894-0.htm.

However, this later ordering, compared to preventive detention ordered directly in the judgement, might dissolve the demanded causal connection [225]. The principles established by the ECtHR state that the causal connection gets weaker over time and might break

> if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the initial decision [.][226]

The time span between the first judgement reserving preventive detention and its order can be very long, for instance, the detention can theoretically be ordered six months before a life-imprisonment ends.[227] This might make the causal connection in individual cases considerably weak. Also, the grounds for reserving preventive detention in the convicting judgement differ from the grounds of ordering it. For the reservation, only an overall assessment of the offender and his offences committed at the time of the judgement[228] determine his dangerousness; for the subsequent ordering, equally the offender's development in prison is taken into account.[229] Merkel argues that courts deciding about the reservation and the ordering of preventive detention can be different ones.[230] Also because the assessment of dangerousness is not completely determined by the guilty verdict, but also by later potential non-criminal behaviour in custody, there would be no sufficient causal link.[231] Since Merkel neither shows a principle requiring exclusively the same grounds for a deprivation of liberty to be applied as in the connected conviction, his argumentation is not convincing for reserved preventive detention in which already the dangerousness is assessed for the reservation. Also, essentially the same prognosis is made for the decision about the execution of preventive detention ordered in the judgement as per Art. 67c § 1 StGB and the decision to order reserved preventive detention as per Art. 66a § 3 StGB.[232] For both, the dangerousness is assessed shortly before the end of the prison-term and for both, the conduct in prison is taken into account.[233] This execution order of preventive detention ordered in the judgement has essentially the same effect as the decision to order preventive detention that was reserved in the judgement. For instance, regarding these execution orders by the courts responsible for the execution of sentences or in *Van Droogenbroeck v. Belgium*, the ECtHR accepted that different bodies decide over the execution of a measure than the courts that originally ordered

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[225] For the derivation of the necessity of a causal connection see *supra* chapter 3.2.1.1.
[226] *M. v. Germany*, *supra* note 10, § 88 (*Cf.* also *supra* note 97).
[227] Normally, the life-sentence will not be suspended when the offender is still dangerous. Nevertheless, the Federal Jourt of Justice and Peglau argue that it is possible to order preventive detention together with a life sentence and the Federal Court of Justice explains that it can be in fact applied after a life-sentence with the goal to use preventive detenion's regime of supervison of conduct. (*Cf.* BGHSt 62, 211; Jens Peglau, "Zur Anordnung der Sicherungsverwahrung neben lebenslanger Freiheitsstrafe" [On ordering preventive detention in addition to life imprisonment], *NJW* [issue 40, 2000], 2980 [2981].
[228] That the dangerousness at the time of the judgement was decisive was established jurisprudence before it was included into the law on the 1.1.2011 in Art. 66 § 1 nr. 4. (*Cf.* Kinzig, "The reorganisation", *supra* note 85, p. 178).
[229] The rules governing the reservation are Art. 66a § 1 StGB in the version before 1.1.2011 in conjunction with Art. 66 § 1 nr. 3 StGB in the version before the 1.1.2011. The rule governing the later ordering of the previous reserved preventive detention is in Art. 66a § 2 cl. 2 StGB StGB in the version before 1.1.2011. Old versions available on: http://www.buzer.de/gesetz/6165/al26893-0.htm, http://www.buzer.de/gesetz/6165/al26894-0.htm.
[230] Merkel, *supra* note 158, p. 1063.
[231] *Ibid*.
[232] Mushoff, *supra* note 44. 89; *Müller v. Germany*, *supra* note 100, § 59; Jens Peglau, "Die Sicherungsverwahrung im 'Dialog' zwischen EGMR und BVerfG" (Preventive detention in the "dialogue" between the ECtHR and the German Constitutional Court), *Juristische Rundschau* (issue 9, 2016): 491 (497) [hereinafter: Peglau, "Dialogue"].
[233] *Müller v. Germany*, *supra* note 100, § 55 (*Cf. M. v. Germany*, *supra* note 10, § 59.

it.[234] Hence, Merkel's argument, that the same court must decide over the reservation and the subsequent order, has no basis in the ECtHR's case-law.

To argue against Art. 66a StGB providing a causal connection between conviction and deprivation of liberty, one can also refer to *Van Droogenbroeck v. Belgium*.[235] In this case, a detention after the prison sentence of the offender was "placed at the Government's disposal"[236] by the Belgian court's judgement. The ECtHR saw the causal link as given.[237] Critics of Art. 66a StGB emphasise that in the Belgian case the detention was already ordered in the judgement, contrary to Art. 66a StGB.[238] But one can also argue in favour of Art. 66a StGB as, although Mr. Droogenbroeck was detained several times on the base of this measure and the link dissolved, the ECtHR still saw the causal connection as sufficient.[239]

The above cited principle[240] about the gradual weakening of the causal connection was already similarly formulated in *Droogenbroeck v. Belgium*:

> The link might eventually be broken if a position were reached in which those decisions were based on grounds that had no connection with the objectives of the legislature and the court [.][241]

Applying this principle to Art. 66a StGB one must note that the reservation of the preventive detention is based on the dangerousness as well as the later ordering and both have the goal to secure the general public, but only if proportionate, as Art. 62 StGB demands. The difference just lies in the way the dangerousness is assessed, in particular for the latter the conduct in prison is equally taken into account. This cannot be classified as having "no connection" between the grounds of the judgement and the later ordering as formulated in *Droogenbroeck v. Belgium* or as "inconsistent"[242] as formulated in *Müller v. Germany*.

In the latter case, the Court after mentioning the aforementioned principle[243] without deploying it, concluded that its previous case-law denouncing retrospectively abolished maximum duration for preventive detention[244] and retrospectively ordered preventive detention[245] results in the following principle: a causal connection is given

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[234] *Van Droogenbroeck v. Belgium*, *supra* note 96, §§ 9, 42: The Court did not condemn that the Belgian government effectively decided whether Mr. Van Droogenbroeck is detained after his regular prison sentence; *Grosskopf v. Germany*, *supra* note 97, § 6: The Cologne Regional Court ordered the preventive detention in the judgement according to Art. 66 StGB and the "Aachen Regional Court, sitting as a chamber for the execution of sentences (*Strafvollstreckungskammer*), decided that the applicant should be kept in preventive detention following the end of his prison term" (*Ibid*., § 9). The ECtHR did not even discuss whether it was problematic that another court decides over the execution of the sentence than the court that ordered it, but instead discussed whether the reasons for the judgement and the execution were consistent. (*Ibid*., § 50.) Finally, it came to the conclusion that there was no violation of Art. 5 § 1 cl. 2 lit. a). (*Ibid*., § 54.).

[235] *Van Droogenbroeck v. Belgium*, *supra* note 96; Ullenbruch and Morgenstern, "§ 66a StGB", *supra* note 220, recital 39.

[236] *Van Droogenbroeck v. Belgium*, *supra* note 96, § 9.

[237] *Ibid.*, § 40.

[238] Ullenbruch and Morgenstern, "§ 66a StGB", *supra* note 220, recital 39.

[239] *Van Droogenbroeck v. Belgium*, *supra* note 96, §§ 11-13, 17; Ullenbruch and Morgenstern, "§ 66a StGB", *supra* note 220, recital 39.

[240] For instance, the principle was also stated in: *Weeks v. the United Kingdom*, *supra* note 96, § 49; *Eriksen v. Norway* (Application nr. 17391/90, Judgement of 27 May 1997, published in Reports 1997-III), § 78; *M. v. Germany*, *supra* note 10, § 88.

[241] *Van Droogenbroeck v. Belgium*, *supra* note 96, § 40.

[242] *Müller v. Germany*, *supra* note 100, § 47.

[243] *Ibid*.

[244] *M. v. Germany*, *supra* note 10; *Mautes v. Germany* (Application nr. 20008/07, judgement of 13 January 2011); *Schummer v. Germany (*Applications nr. 27360/04 and 42225/07, judgement of 13 January 2011).

[245] *B. v. Germany* (Application nr. 61272/09, judgement of 19 April 2012); *S. v. Germany*, *supra* note 94.

> if, and as long as that detention occurs within the framework established by the judgment of the sentencing court, read in the light of the law applicable at the relevant time [.][246]

I do not estimate this to be a compulsory conclusion[247] and would summarise it as foreseeability that is already the main-testing-criterion for "lawfulness"[248] also demanded for Art. 5 § 1 ECHR. Nevertheless, it is not contradictory to the ECtHR's established principles used to determine causal connections. Applying the cited conclusion, the ECtHR rightly states that in connection with Art. 66a StGB the order of preventive detention was clearly foreseeable at the time of the conviction.[249] Hence, also doubts about the "lawfulness" are alleviated.[250]

Furthermore, the Court argued that the later ordering of preventive detention is not an additional penalty for the offenders conduct in prison, although this behaviour is taken into account, because it is just one part of the assessment of dangerousness and comparable to the assessment regarding the execution of preventive detention ordered in the judgement.[251]

Hence, reserved preventive detention was in line with the established principles used by the ECtHR to assess preventive detention's conformity with Art. 5 § 1 cl. 2 lit. a) ECHR.

Nonetheless, as explained above, these established principles are not sufficient to assess Art. 5 § 1 ECHR.[252] Regarding the issue of arbitrariness of preventive detention. *Droogenbroeck v. Belgium* also shows that it is possible to test the danger of releasing an offender, instead of continually, preventively detaining him. After being placed under the government's disposal, Mr. Van Droogenbroeck was released five times and was only detained again after disappearing or committing crimes.[253] On the other hand, he committed only offences against property.[254] Art. 66a StGB can only be applied to protect against severe mental or physical harm. Contrary to property infringements, such harm cannot easily be undone. Therefore, it is not mandatory to conclude from the example of the Belgian practice, that reserved preventive detention is especially arbitrary due to a lack of provisional releases.

However, reserved preventive detention was already arbitrary and unproportional because not everything was done to reintegrate the offenders and to mitigate their burden. Provisional releases can be an important part of reintegration, but Germany did not even use adequately therapy options that are applicable in full custody.

Hence, the conclusion deduced before remains, namely that reserved preventive detention was shaped arbitrary and unproportional, resulting in a violation of Art. 5 § 1 ECHR.

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[246] *Müller v. Germany*, *supra* note 100, § 55. (*Cf. M. v. Germany*, *supra* note 10, § 99).
[247] It seems also logically possible that preventive detention occurs in the judgement's framework, but is ordered for completely different reasons than the reasons that were kept in mind while referring to detention in the judgement. For instance, if the preventive detention is mentioned because of concerns that the offender might attack his parents, but his parents are dead at the time when the preventive detention is ordered on different grounds. In those cases, it would be inadequate to name it a causal connection. Hence, I deem the testing-criteria of consistency between the grounds for the conviction and the order of the detention, on the one hand, and the grounds for the actual deprivation of liberty, on the other hand, much more adequate than the question whether some detention occurs in the judgement.
[248] *See supra* note 105.
[249] *Müller v. Germany*, *supra* note 100, §§ 56 f.
[250] *Ibid*., § 65.
[251] *Ibid*., §§ 58 f., 61 f.
[252] *See supra* chapter 3.2.1.2.
[253] *Van Droogenbroeck v. Belgium*, *supra* note 96, §§ 10-13, 16 f.
[254] *Ibid*., §§ 9-12, 16-18.

3.2.3. Retrospectively ordered/prolonged

In 1998, the 10-years maximum duration of the first preventive detention was abolished also affecting offenders already in preventive detention. Since 2004, Art. 66b StGB allowed retrospectively ordered preventive detention.[255] The ECtHR ruled both incompatible with Art. 5 and 7 ECHR.[256] On 4.5.2011, the German Constitutional Court, taking into account the ECtHR's decisions, declared this forms of preventive detention under the conditions at that time as unconstitutional.[257] Starting in 2014, the German government admitted in individual cases for strike-outs as per Art. 37 § 1 lit. c) ECHR that retrospectively prolonged or retrospectively ordered preventive detention had previously violated the Convention.[258] For these reasons and because, as deduced above, the execution of preventive detention in Germany was arbitrary and unproportional and consequently violated Art. 5 § 1 ECHR, I will focus on the ECtHR's line of reasoning, instead of counter-arguments.

3.2.3.1. Retrospective prolongation of preventive detention

As stated above, the exhaustive list of possibilities to deprive liberty in Art. 5 § 1 cl. 2 ECHR must be interpreted narrowly and for lit. a) a causal connection is demanded.[259] This connection between conviction and deprivation of liberty gets weaker over time and can vanish.[260] The causal connection gets interrupted as soon as the continuation of detention is based on reasons that do not arise from the conviction.[261]

The German convictions in conjunction with the legal framework before 1998 did not entail the possibility to order the first preventive detention for more than 10 years.[262] This was only possible due to a law change and therefore due to reasons that did not arise from the conviction.[263] Hence, the detention for longer than 10 years lacked a causal connection.[264] Consequently, lit. a) could not justify the deprivation of liberty.

As explained above, the other possibilities in Art. 5 § 1 ECHR did not permit preventive detention either.[265]

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[255] In Art. 66b StGB in the version before the 1.1.2011 existed three different possibilities for preventive detention. Old versions available on: https://lexetius.com/StGB/66b,4. See *infra* chapter 3.2.3.2.

[256] *M. v. Germany*, *supra* note 10; *Haidn v. Germany*, *supra* note 90; *G. v. Germany* (Application nr. 65210/09, judgement of 7 June 2012); *K. v. Germany* (Application nr. 61827/09, judgement of 7 June 2012).

[257] BVerfGE 128, 326, "*Leitsatz*" (headnote/guiding principle) nr. 2, "*Tenor*" (operative part of the ruling) II, §§ 86-94. (See *infra* chapter 4.).

[258] In *W.P. v. Germany supra* note 121, §§ 26 f., 29, the unilateral declaration by the German government regarded the retrospective extension of preventive detention over the 10-years maximum duration and in *Ilnseher v. Germany* (Applications nr. 10211/12 and 27505/14, judgement of 2 February 2017), §§ 46-48, the declaration regarded the retrospective order of preventive detention according to the Juvenile Courts Act.
Although the ECtHR decides individual cases, the declaration of the German government can be understood as admission that before the constitutional so-called "*Abstandsgebot*" (distance requirement) was implemented around the 1.6.2013, the concerned forms of preventive detention violated the Convention. (For explanation of the distance requirement *see* chapter IV).

[259] *See supra* note 90; Meyer-Ladewig, Harrendorf and König, "Art. 5", *supra* note 98, recital 29.

[260] *Cf. supra* note 97.

[261] *M. v. Germany*, *supra* note 10, §§ 88; *Del Río Prada v. Spain* [GC], *supra* note 97, § 124; *H.W. v. Germany supra* note 97, § 102; Meyer-Ladewig, Harrendorf and König, "Art. 5", *supra* note 98, recital 29.

[262] Art. 67d § 1 cl. 1 StGB in the version before 31.1.1998. Old version available on: https://lexetius.com/StGB/67d,10; *M. v. Germany*, *supra* note 10, § 100.

[263] *Ibid.*

[264] *Ibid.*, § 100.

[265] *Ibid.*, §§ 102 f. specifically for retrospectively prolonged preventive detention. For preventive detention in general *see supra* chapter 3.2.1.1.

Additionally, the foreseeability as main criterion to assess the lawfulness of deprivation of liberty is problematic for the retrospective extension of preventive detention.[266] Since the ECtHR had already established that the causal link was missing, it did not decide on foreseeability.[267] Although, according to German law, preventive detention is not a penalty resulting in no application of the prohibition of worsening penalties,[268] the retrospective prolongation was very hard to foresee. The 10-years maximum duration was introduced inter alia to make judges, who deemed preventive detention as equivalent to life-sentences, less reluctant to order it.[269] Against this background, it is demanded too much for a potential offender to foresee, that preventive detention might become indefinite after a change in law by a state claiming to honour the rule of law, before he commits his offence. Hence no sufficient foreseeability was given resulting in lack of lawfulness.

Consequently, detention for longer than the former maximum duration violated Art. 5 § 1 ECHR.[270]

For the retrospective prolongation of preventive detention, the ECtHR also assessed Art. 7 § 1 cl. 2 ECHR. This provision prohibits that "a heavier penalty [is] imposed than the one that was applicable at the time the criminal offence was committed." The notion of "penalty" is interpreted autonomously.[271] First, the ECtHR examines whether the measure "is imposed following conviction for a 'criminal offence'"[272], then it assesses the nature and purpose, the characterisation in the national law, the foreseen procedure of the implementation and the sanction's severity (so-called "*Welch*-criteria").[273]

Assessing these criteria, preventive detention generally follows a conviction.[274] Although Germany does not qualify preventive detention as a penalty,[275] predominantly the same laws applied *mutatis mutandis* as for ordinary prison-sentences and it was executed very similarly to prison-sentences, as described above.[276] Preventive detention is also easily to understand as entailing a deterrent element.[277] It is ordered by criminal courts.[278] Also, a detention with indefinitely ending only under the hard to prove condition of no danger of further heavy crimes is very severe.[279]

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[266] *M. v. Germany*, *supra* note 10, §§ 90, 104.
[267] *Ibid*., § 104.
[268] BVerfGE 109, 133, §§ 127-144.
[269] *Ibid*., § 14.
[270] *M. v. Germany*, *supra* note 10, §§ 100 f., 105; *Schummer v. Germany*, *supra* note 244, §§ 57 f.; *Mautes v. Germany*, *supra* note 244, § 46.
[271] *M. v. Germany*, *supra* note 10, §§ 120, 126.
[272] *Ibid*., § 120.
[273] *Welch v. the United Kingdom* (Application nr. 17440/90, judgement of 09 February 1995, published in Series A nr. 307-A), §§ 27 f.; *M. v. Germany*, *supra* note 10, § 120, cited in *Mautes v. Germany*, *supra* note 244, § § 52; *Kallweit v. Germany*, *supra* note 94, § 65; *Schummer v. Germany*, *supra* note 244, § 64; Jens Meyer-Ladewig, Stefan Harrendorf and Stefan König, "Art. 7" in Europäische Menschenrechts Konvention Handkommentar, (European Convention on Human Rights Hand Comment), 4th edition, ed. Jens Meyer-Ladeswig, Martin Nettesheim and Stefan Raumer, (Baden-Baden: Nomos, 2017), recitals 7, 9.
[274] Art. 66 § 1, 66a § 1 StGB and Art. 66b §§ 1, 2 StGB in the version before 1.1.2011 require that a conviction to a prison sentence precede the ordering or serving of preventive detention. Only Art. 66b § 3 StGB old version (now Art. 66b § 1 StGB) does not require a conviction. Old version of Art. 66b StGB available on: https://lexetius.com/StGB/66b,3; *M. v. Germany*, *supra* note 10, § 124.
[275] The history of the twin-track system's introduction into German law cast doubts about the purely preventive nature of preventive detention. *See supra* chapter 2.
[276] *See supra* chapter 3.2.1.3.
[277] *M. v. Germany*, *supra* note 10, § 130.
[278] *Ibid*., § 131.
[279] *Ibid*., § 132; *See supra* chapter 3.2.1.3.

Hence, preventive detention before 2010 had to be qualified as a penalty in the terms of Art. 7 ECHR.[280]

The law before 1998 clearly forbid the first preventive detention to last longer than 10 years.[281] Thus more than 10 years for the first preventive detention for crimes committed before 1998 is "a heavier penalty" in the terms of Art. 7 § 1 cl. 2 ECHR and consequently, it constitutes a violation thereof.[282]

Although retrospectively prolonged preventive detention could be seen as conflicting with the basic rule of law principle *ne bis in idem*, this will not be examined in this thesis because Germany did not ratify protocol nr. 7 ECHR that includes this principle in its Art. 4.[283]

To conclude, retrospectively prolonged preventive detention violated Art. 5 § 1 and Art. 7 § 1 cl. 2 ECHR.

3.2.3.2. Retrospectively ordered

In 2004, Art. 66b StGB introduced preventive detention that is ordered retrospectively when the offender already is serving a prison-term, without the detention or its reservation being part of the convicting judgement.[284] Former Art. 66b §§ 1, 2 StGB entailed two possibilities to retrospectively order preventive detention.[285] The following conditions needed to be present: certain facts emerging after the trial (*nova*),[286] sentences for catalogued crimes, certain durations and count of sentences as well as dangerousness.[287]

Former Art. 66b § 3 StGB allowed under similar conditions preventive detention.[288] It concerned offenders who were previously placed in a psychiatric hospital according to

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[280] *M. v. Germany*, *supra* note 10, § 133; Meyer-Ladewig, Harrendorf and König, "Art. 7", *supra* note 273, recital 9. The ECtHR only decides individual cases. Nevertheless, the general situation was that preventive detention in Germany needed to be qualified as penalty. *See*, for instance, *K. v. Germany*, *supra* note 256, §§ 81-83 confirming that the general situation had to be qualified as penalty and in particular the situation of K in Schwalmstadt prison.

[281] Art. 67d § 1 StGB in the version before the 31.1.1998. Available on: https://lexetius.com/StGB/67d,10 *M. v. Germany*, *supra* note 10, § 136.

[282] *M. v. Germany*, *supra* note 10, § 136 f.

[283] Council of Europe, Protocol Nr. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (last amended by Protocol nr. 11 published: 22 November 1984). Available on: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007a082. List of ratifications available on: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/117/signatures?p_auth=jFa84vtF.

[284] The Retrospective Preventive Detention Act, *supra* note 79.
Already in 1934 the Nazis introduced retrospective preventive detention, but only as a transitory provision in Art. 5 Habitual Offenders Act, *supra* note 5. (*Cf.* BVerfGE 109, 133, § 4; Ullenbruch and Drenkhahn, "§ 66b StGB" *supra* note 78, recital 6).

[285] Art. 66b §§ 1, 2 StGB in the version before 1.1.2011. Old version available on: https://lexetius.com/StGB/66b,3.

[286] The requirement for *nova* was relaxed in the version of Art. 66b § 1 StGB since 18.4.2007. It regulated that preventive detention can be retrospectively ordered on grounds that were recognisable at the time of the conviction if preventive detention just not had been ordered in the conviction for legal reasons. Old versions of Art. 66b StGB available on: https://www.buzer.de/gesetz/6165/al6632-0.htm).

[287] More precise description of the requirements for retrospective preventive detention in Art. 66b § 1, 2 StGB in the version before the 1.1.2011:
Art. 66b § 1: a catalogued crime comes together with *nova*, the requirements of Art. 66 StGB and high dangerousness.
Art. 66 § 2: a catalogued crime comes together with *nova*, at least five-years of prison-sentence, and high dangerousness.

[288] Art. 66b § 3 StGB in the version before 1.1.2011. Old version available on: https://lexetius.com/StGB/66b,3.

Art. 63 StGB. Art. 63 StGB allows to place offenders in a psychiatric hospital if they committed an offence in the state of diminished or removed criminal liability as regulated in Art. 20 f. StGB and are dangerous because of the mental condition diminishing or removing their criminal liability.[289] Art. 67d § 6 StGB rules that such offenders need to be released from psychiatric hospitals as soon as their condition, that influenced their criminal liability, ceases to exist or it is established that the offender did not suffer from this mental condition from the beginning. In those cases, Art. 66b § 3 StGB allowed to order retrospectively preventive detention against the offenders who had to be released from psychiatric hospitals. The previous offences and the current dangerousness must also meet certain criteria.

Already after the ECtHR had ruled in *M. v. Germany* that the retrospective extension of preventive detention infringed Art. 5 § 1 and Art. 7 ECHR, some German courts, classified retrospective preventive detention as violation of the Convention.[290] On 13.1.2011, the ECtHR firstly ruled accordingly in *Haidn v. Germany*.[291]

The "causal connection" between the conviction and the detention, as Art. 5 § 1 cl. 2 lit. a) ECHR demands,[292] does not exist, if in convicting judgements neither preventive detention was ordered nor even its possibility was mentioned.[293] That a prison-sentence is the precondition for preventive detention does not suffice to establish a causal connection.[294] Hence, retrospectively ordered preventive detention could not be justified by lit. a).

This also applies for former Art. 66b § 3 StGB. There is no causal connection between the judgement ordering the placement in a psychiatric hospital and the preventive detention after the release from this hospital on the grounds that there is no mental condition anymore.[295] For all orders of placement in a psychiatric hospital as per Art. 63 StGB, this was not even foreseen in the law before 2004. If an offender is placed in a psychiatric hospital on the grounds that he is not criminal liable, there is not even a conviction entailing the establishment of guilt. Hence lit. a) could not justify Art. 66b § 3 StGB either.

As explained above, also Art. 5 § 1 ECHR's other alternatives could not justify preventive detention.[296]

This is not different for Art. 66 § 3 StGB in combination with Art. 5 § 1 cl. 2 lit. e) ECHR, namely the detention of persons of unsound mind.[297] In the

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[289] Art. 63 cl. 1. StGB in the version before 1.8.2016. Old version available on: https://lexetius.com/StGB/63,2.

[290] The Higher Regional Court Hamm ruled that retrospective ordered preventive detention violates Art. 5 I ECHR and the Federal Court of Justice ruled that retrospective preventive detention as in Art. 66b § 3 StGB violated Art. 7 § 1 cl. 2 ECHR. Oberlandesgericht (Higher Regional Court) Hamm, Beschluss vom 22.7.2010, file number 4 Ws 171/10, excerpts published in *NStZ-Rechtssprechungsreport* (issue 12, 2010), 388 (388). Additionally available online: https://beck-online.beck.de/Dokument?vpath=bibdata%2Fzeits%2Fnstz-rr%2F2010%2Fcont%2Fnstz-rr.2010.388.1.htm&anchor=Y-300-Z-NSTZ-RR-B-2010-S-388&readable=2&VorgaengerDokumentStreffer3=Beschluss%20vom%2020.07.2010%20-%205%20StR%20199%2F10&VorgaengerDokumentFullname=bibdata%2Fzeits%2Fnstz-rr%2F2010%2Fcont%2Fnstz-rr.2010.387.2.htm; Federal Court of Justice, Beschluss vom 12.5.2010, file number 4 StR 577/09, NStZ (issue 10, 2010) 567, §§ 20-22.

[291] *Haidn v. Germany*, *supra* note 90; Thomas Fischer, *Strafgesetzbuch mit Nebengesetzen* (Criminal code with subsidiary laws), 67th edition, (Munich: C.H. Beck, 2020), § 66, recital 12.

[292] *See supra* chapter 3.2.1.1.

[293] *Haidn v. Germany*, *supra* note 90, §§ 86, 88; Meyer-Ladewig, Harrendorf and König, "Art. 5", *supra* note 98, recital 29.

[294] *Haidn v. Germany*, *supra* note 90, § 88.

[295] *S. v. Germany*, *supra* note 94, §§ 84-90.

[296] For preventive detention in general, *see supra* chapter 3.2.1.1. For retrospective preventive detention in particular, *see*: *Haidn v. Germany*, *supra* note 90, §§ 90-95.

application area of Art. 66b § 3 StGB, the offender was precisely released from psychiatric hospital, because he stopped to have a sufficient severe condition to detain him in such hospitals. Before 2010, also no German court based this form of preventive detention on any mental condition. For Art. 66b § 3 StGB, such a mental condition would need to be severe enough for "unsound mind" in the sense of Art. 5 § 1 cl. 2 lit. e) ECHR, on the one hand, but constitute full criminal liability in the sense of Art. 66b § 3 StGB, read in connection with Art. 20 f. StGB, on the other hand. In the here examined period before 2010, the courts and the law did not even know such a category of mental conditions.

Therefore, no alternative in Art. 5 § 1 ECHR allowed any form of retrospective preventive detention as governed by Art. 66b StGB.

Later, the ECtHR declared retrospective preventive detention also as incompatible with Art. 7 § 1 cl. 2 ECHR.[298] The Court rightly explained that there is no reason to depart from the assessment in M. *v.* Germany that preventive detention is a penalty in the terms of the Convention.[299] As it was not possible before 29.7.2004 to retrospectively order preventive detention, those penalties are also "heavier" in the terms of Art. 7 § 1 cl. 2 ECHR.[300] Hence, retrospective preventive detention violated the Convention. Offences, that were committed after the possibility of retrospective preventive detention was introduced, are negligible as probably, ordinary preventive detention or the 2002 introduced reserved preventive detention would have been typically used.[301] However, they would at least violate Art. 5 § 1 ECHR.

4. CHANGES IN THE GERMAN SYSTEM OF PREVENTIVE DETENTION

Before the judgement in *M. v. Germany*, the government's coalition agreement already announced a future reform of the system of preventive detention.[302] After the ECtHR's decision, a debate emerged in Germany whether the consequences of the judgement entailed that all approximately 70 offenders with retrospectively prolonged detention and about 30 with retrospectively ordered detention needed to be released, resulting in about 40 releases ordered by courts.[303] At the end of 2010, the Reform of Preventive Detention Act changed the

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[297] *S. v. Germany*, *supra* note 94, §§ 92-101.

[298] In *G. v. Germany*, *supra* note 256, § 80 and *K. v. Germany*, *supra* note 256, § 89, both decided on the 7.6.2012, the Court decided for the first time on retrospective preventive detention's compatibility with Art. 7 § 1 cl. 2 ECHR. These cases regarded Art. 66b § 3 StGB old version (retrospective preventive detention because of release from psychiatric hospital by continued dangerousness). In a previous case regarding Art. 66b § 2 StGB the ECtHR dismissed the claim against Art. 7 ECHR because of "non-exhaustion of domestic remedies" (*B. v. Germany*, *supra* note 245, § 99).

[299] *G. v. Germany*, *supra* note 256, § 72.

[300] *Ibid*., §§ 75 f., 80.

[301] Alex, *Debacle*, *supra* note 6, p. 187.
Because Germany did not ratify protocol nr. 7 ECHR including its Art. 4, also here possible conflicts with *ne bis in idem* will not be discussed. *See supra* note 283.

[302] Ullenbruch, Drenkhahn and Morgenstern, "§ 66 StGB", *supra* note 1, recital 24.

[303] *Ibid*., recital 24; Fischer, *supra* note 291, § 66, recital 5; Meyer-Ladewig, Harrendorf and König, "Art. 5", *supra* note 98, recital 30; Christian Rath, "Der Trick mit der Therapie" (The trick with the therapy), *taz*, 8.1.2016. Available on: https://taz.de/Kommentar-Sicherungsverwahrung/!5267575/.
As examples, for the different variations of the court decisions concerning the continuation of preventive detention against the judgements of the ECtHR and examples for the reasoning behind *see* on the one hand, Oberlandesgericht (Higher Regional Court) Hamm Beschluss vom 12.5.2010, file number 4 Ws 114/10 Available on the database juris. There cited as: "OLG Hamm, Beschluss vom 12. Mai 2010 – 4 Ws 114/10 –, juris". The OLG Hamm explained that the ECtHR judgements have to be taken into account in a proportionality test for the decision whether the detention (that's 10-year maximum duration was retrospectively abolished) is further executed. Thus the release of a detainee was lawful.

pre-requisites to order preventive detention, abolished the possibility to order retrospective preventive detention for the future, except for Art. 66b § 3 StGB, and introduced the Therapy Detention Act.[304] The aim of the Therapy Detention Act is to keep preventive detainees in custody who would have had to be released because of the ECtHR judgement *M. v. Germany*.[305] Art. 1 Therapy Detention Act states until today that in case a person cannot be placed in preventive detention any longer because of a prohibition of retrospective worsening, then the competent court can order detention in an appropriate facility. Complementary to a high dangerousness[306] the act introduced the new requirement of a "*psychische Störung*"[307] (mental disorder).[308] This criterion, "mental disorder", aims at the justification for deprivation of liberty in Art. 5 § 1 cl. 2 lit. e) ECHR, the detention "of persons of unsound mind".[309] Whether this attempt succeeded will be analysed in the next chapter. However, on 4.5.2011 the Constitutional Court issued a transitional provision stating that all individuals, who were still detained against the judgements of the ECtHR, namely because of retrospective ordered or retrospective prolonged preventive detention, needed to be released, if they did not suffer from "mental disorder" as defined in the Therapy Detention Act and had not an especially high level of dangerousness[310].[311]

At the end of the Constitutional Court's transitional provision in effect from 1.6.2013, the German legislator, in turn, adopted in Art. 316f Introductory Act to the Criminal Code a

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The fourth penal law chamber of the Federal Court of Justice ruled that *M. v Germany* must result in the release of preventive detainees with retrospectively ordered preventive detention, meaning for the concrete case before the chamber that the detainee had to be released immediately. (*Cf.* Federal Court of Justice, 4 StR 577/09, *supra* note, 290.)

On the other hand, the fifth penal law chamber of the Federal Court of Justice ruled that detainees in retrospectively prolonged detention do not have to be released if they are highly dangerous. The chamber suggested the lower courts not to release the offenders in the concrete cases concerned. (*Cf.* BGHSt 56, 73, §§ 42, 49).

[304] Art. 1 nr. 2 f., 4 a), b), 5 f., Art. 5 Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung und zu begleitenden Regelungen (Reform of Preventive Detention Act and accompanying provisons), passed: 22.12.2010, BGBl. I (2010), p. 2300. Available on: https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl110s2300.pdf%27%5D__1583742965238. Art. 66b § 3 StGB became through this modification Art. 66 § 1 StGB. This is the paragraph that allows to order preventive detention when an offender has to be released from a psychiatric hospital.

[305] Meyer-Ladewig, Harrendorf and König, "Art. 5", *supra* note 98, recital 30.

[306] The level of dangerousness that Art. 1 § 1 nr. 1 Therapy demanded at its introduction was that an overall assessment of personality of the offender concerned, his past life and his living conditions results in a high likelihood that the offender concerned will infringe significantly the life, the physical integrity, the personal liberty or the sexual self-determination of another person.

[307] Art. 1 § 1 nr. 1 Therapieunterbringungsgesetz (Therapy Detention Act), (last amended by Article 8 of the Act of 5.12.2012 [BGBl. I (2012), p. 2425]), passed 22.12.2010, BGBl. I (2010), p. 2300, 2305. Available on: https://www.gesetze-im-internet.de/thug/index.html#BJNR230500010BJNE000100000.

[308] BVerfGE 128, 326, § 173.

[309] Bundestagsdrucksache 17/3403 (Bundestag printed paper 17/3403), pp. 4, 53 f.

[310] The required level of dangerousness was reached, if a high-level risk of the most serious violent or sexual offences has to be inferred from specific circumstances relating to the personality or behaviour of the person detained. (*Cf.* BVerfGE 128, 326, "Tenor" [operative part of the ruling] III. nr. 2). This level of risk is higher than the level of risk the Therapy Detention Act demanded at the time of its introduction. In BVerfGE 134, 33, "Tenor" (operative part of the judgement), nr. 3, §§ 69, 75, the Constitutional Court, taking Art. 5 § 1 and Art. 7 § ECHR into account, ruled that the Therapy Detention Act is only constitutional if the same higher level of dangerousness as in BVerfGE 128, 326 also applies for it.

[311] BVerfGE 128, 326, "*Tenor*" (operative part of the ruling) III. nr. 2 in connection with II. nr. 2, § 173. Art. 63 StGB demands proportionality for all measures of betterment and prevention. The Constitutional Court took the ECtHR's assessments concerning Art. 5 and 7 ECHR into account and demanded a rigorous proportionality test. (*Cf. Ibid.*, "*Leitsatz*" [headnote/guiding principle] nr. 4, §§ 137-165).

transitional provision with the same content.[312] This way, it has been continuously possible until today to keep allegedly heavily dangerous offenders in preventive detention, although the German Constitutional Court declared their preventive detention as unconstitutional[313] and these forms of detention violated the ECHR. Additionally, both transitional provisions allow the ordering of new retrospective detention or prolongation over the 10-years maximum duration for all triggering offences committed before the 1.6.2013.[314]

Whether this German course of action to add stricter requirements to previous Convention-violating forms of preventive detention, changed the confirmability with the Convention, will be assessed in the next chapter.

The Constitutional Court is of the view, that it is engaged in a dialogue with the ECtHR, in which it does not schematically copy the ECtHR's reasoning, but regards the ECtHR's assessments while interpreting the law within the German constitutional framework.[315] The consideration of the ECtHR's views will be typically done in the constitutional criteria of proportionality.[316] This explains why the Constitutional Court ruled that forms of preventive detention violating the Convention can become constitutional when stricter requirements are added.

The Constitutional Court in general took into account that the ECtHR classified preventive detention as "penalty" in terms of Art. 7 ECHR and declared the entire preventive detention system as unconstitutional because of insufficient distinction between punishing prison-sentences and preventive detention.[317] For preventive detention to become constitutional, the legislator had to implement the so-called *Abstandsgebot* (distinction requirement[318]) to sufficiently differentiate between both measures.[319] It was concretised with seven supplementary minimum-requirements[320] to ensure that the – always maintained in the

[312] Art. 316f § 2 Introductory Act to the Criminal Code, *supra* note 76. Under the mentioned conditions also the newly ordering for retrospective preventive detention or retrospectively prolongation despite the former 10-years maximum duration remained possible, if the triggering offences were committed before the end of the transitional period. The legislator's transitional provision is only in so far different to the Constitutional Courts judgement, that in the Introductory Act the dangerousness must be a result of the mental disorder.
[313] BVerfGE 128, 326, "*Tenor*" (operative part of the ruling) II, §§ 84 f.
[314] *Ibid*., "*Tenor*" (operative part of the ruling) III. nr. 2); Art. 316f §§ 1, 2 Introductory Act to the Criminal Code, *supra* note 76.
[315] BVerfGE 128, 326, "*Leitsatz*" (headnote/guiding principle) nr. 2, §§, §§ 86-94; BVerfGE 111, 307, §§ 30-63.
[316] BVerfGE 128, 326, § 94.
[317] *Ibid*. "*Leitsatz*" (headnote/guiding principle) nr. 3 a), b), "*Tenor*" (operative part of the ruling) II, §§ 96-109.
[318] The literal translation would be "distance commandment".
[319] BVerfGE 128, 326, "*Leitsatz*" (headnote/guiding principle) nr. 3 b). Headnote nr. 3 c) states that the entire public and governmental authority needs to follow the distance requirement, but that the legislator is the one that needs to act first.
[320] BVerfGE 128, 326, §§ 110-118. The seven requirements/commands are:

- The ultima-ratio-principle, stating that preventive detention is only allowed a measure of last resort. The requirements to order preventive detention, the execution and already the preceding prison-sentence must be in accordance with the ultima-ratio-principle. Consequently, the prison-sentence must aim at making the execution of the preventive detention superfluous.
- The individualisation and intensification requirement states that the preventive detainees must get an individual plan for the execution of their detention and their treatment that is based on a modern scientific examination. The treatment plan must be appropriate to lower the dangerousness precisely of the individual concerned. As far as standardized treatment methods are not sufficient, an individual treatment needs to be developed and applied.
- The motivation requirement states that the detainee's willingness to take part in the treatment program has to be encouraged precisely.
- The separation requirement demands that the distinction requirement materializes visibly in a physical segregation between preventive detainees and prisoners.

German law tradition[321] – preventive character of the detention prevails. The federal legislator did that with the Preventive Detention Distinction Act.[322] Its most important part is Art. 66c StGB in which, for the first time in Germany, preventive detention was legally defined differently than just separating dangerous offenders from the general public.[323] Art. 66c § 1 StGB states that preventive detention is executed in facilities that provide a certain level of therapy with the aim to make the detainees ready to be released and which have conditions that burden the detainees as little as possible. If no adequate therapy is offered to the detainee fast enough, he has to be released.[324]

Now only the danger of serious physical or psychological damage justifies preventive detention, but not danger of heavy economic damage anymore.[325]

Because of the federal competence division, the individual *Länder* enacted laws to implement the distinction requirement into the laws governing the execution of the detention.[326] The *Länder* invested more than 200 million euro to build and equip preventive detention facilities according to the new requirements.[327]

In the next chapter, I will examine whether the reforms and their execution were sufficient to make all forms of preventive detention consistent with the ECHR.

5. COMPATIBILITY OF PREVENTIVE DETENTION WITH THE ECHR AFTER THE CHANGES

The aforementioned reforms in Germany, that should bring preventive detention in line with the constitution and the Convention, took effect on 1.6.2013 and the German government indirectly admitted that preventive detention violated the Convention prior to that date, in order to achieve strike-out decisions in ECtHR proceedings.[328] Therefore, I will examine hereafter, whether the system of preventive detention has been compatible with the ECHR since 1.6.2013.

5.1. Ordered in judgement

The legal changes in Germany since 2010 did not result in any differences for the causal connection between the conviction and deprivation of liberty as demanded for

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- The minimisation requirement demands that the limitations of liberty need to be as small as possible. This shall be achieved with the help of early and far reaching relaxation of detention and a diligently planed preparation for release.
- The requirement of legal protection and support says that detainees must have effective enforceable legal claims regarding measures that reduce their dangerousness. Those legal claims must be effectively secured procedurally.
- The requirement of control states that courts must secure the aforementioned requirement of legal protection and support with regular revision of the execution of the detention ex officio.

[321] One can have serious doubts, whether preventive detention as a concept always had primary preventive character. (*See supra* chapter 2.).
[322] Preventive Detention Distinction Act, *supra* note 192.
[323] Ullenbruch, Drenkhahn and Morgenstern, "§ 66 StGB", *supra* note 1, recital 27; Drenkhahn, "Incapacitation or Treatment Intervention?"; *supra* note 119, pp. 314, 320.
[324] Art. 66d § 2 cl. 2 StGB.
[325] Art. 66 § 1 nr. 1 a), 4 StGB. Old version available on: https://lexetius.com/StGB/66,5.
[326] Ullenbruch, Drenkhahn and Morgenstern, "§ 66 StGB", *supra* note 1, recital 27.
[327] *Ilnseher v. Germany* [GC], *supra* note 121, § 81.
[328] *See supra* note 258 concerning the declarations of the German government.

Art. 5 § 1 cl. 2 lit. a) ECHR. This causal link persists for preventive detention ordered in the judgement.

The big question is whether the changes were in fact sufficient to make preventive detention non-arbitrary and proportional. Nowadays, does the German state do everything in its power to keep preventive detention as short as possible so that nobody gets deprived of his liberty unnecessarily and hence arbitrarily in the sense of a restrictively interpreted Art. 5 § 1 ECHR? Does Germany arrange the execution of preventive detention in the most beneficial way for the detainees in order to make the special sacrifice inflicted on them proportional? There are two different possibilities to examine these questions.

Firstly, one could assess whether the new legal framework is appropriate to secure these requirements and whether the execution of preventive detention in fact meets those standards.

The second option would be to define the "gold standard" of detention and to assess whether this standard is reached by preventive detention. Concretely for Germany, this could mean that one defines the placement in a psychiatric hospital as per Art. 63 StGB as highest standard possible and assess whether preventive detention is executed similarly and whether differences are justified by the needs of detainees not mentally ill. In *Bergmann v. Germany*, the ECtHR stated, that the preventive detention facility was similar to psychiatric hospitals regarding the staffing.[329] But according to the most comprehensive study of all preventive detention facilities in Germany by Dessecker and Leuschner the difference is a total lack of care staff in preventive detention.[330] Consequently, Dessecker states that the ECtHR is wrong because no preventive detention facility is equipped and staffed like a psychiatric hospital.[331] Upon request, he explained that the staff composition in psychiatric hospitals is totally different from that in preventive detention and that there is no detailed empiric research on that issue.[332] Further he explained that it is not useful to compare the performance of psychiatric hospitals to preventive detention facilities because the types of treatment and the preconditions vary.[333] Since I do not have the means to conduct such an empirical study, I will not further investigate on the second option. However, I conclude that the ECtHR's unsubstantiated claim, that a preventive detention facility is staffed like a psychiatric hospital, is wrong and therefore cannot be an argument for the compatibility of preventive detention with Art. 5 § 1 ECHR.

For the first option, regarding the avoidance of arbitrariness of the deprivation of liberty, the legal framework now stresses in Art. 66c StGB that the goal is to end preventive detention as fast as possible through reduction of the dangerousness. The article prescribes that a plan needs to be drafted and renewed to motivate detainees and offer psychiatric, psychological or social treatment and therapy, individualised if necessary.[334] The obligation to offer adequate treatment is secured by Art 67d § 2 cl. 2 StGB. If no adequate treatment is offered to the detainee during a time limit of maximal six months, a competent court has to halt the preventive detention's execution. Additionally, detainees need to be released if a general overview of their detention entails not enough treatment.[335] Already in the preceding

[329] *Bergmann v. Germany*, *supra* note 121, §§ 38, 125.
[330] Dessecker and Leuschner, *empirical study*, *supra* note 145, p. 29.
[331] Dessecker, "§ 66c StGB", *supra* note 177, recital 13.
[332] Axel Dessecker, e-mail to author, 16.4.2020.
[333] *Ibid.*
[334] Art. 66c § 1 nr. 1 a) StGB.
[335] Art. 67c § 1 nr. 2 StGB.

prison-sentence, therapy and treatment must be offered with the goal of making preventive detention superfluous.[336] The offering is controlled by courts.[337] This legislation has rather strict regulations for therapy and treatment to make the detention superfluous. In combination with the judicial safeguards it seems fit to facilitate a deprivation of liberty that is not arbitrary because of unnecessary long detention.

The goal of fast releases is supported by the obligation to provide relaxations of confinement, as long as it is not prevented by imperative security reasons, and to provide support for released offenders.[338] As explained above, relaxations and after-release support are very important to reintegrate offenders. At the same time relaxations are often personnel-intensive and lead to protest of local residents.[339] Hence, it is very positive from a human rights perspective that the federal legislator included these obligations. They do not directly legally entitle the detainees, but the *Länder's* execution laws can.[340]

These laws in the different *Länder* also define the minimum requirements of the treatment and therapy plan prescribed by Art. 66c § 1 nr. 1 StGB with between 12 and 19 specifications describing aspects of treatment and therapy that serve the goal of reducing the offenders' dangerousness.[341] If executed diligently, these laws seem to be suited to facilitate such treatment.

In practice, it is hard to measure whether the treatment and therapy provided is in fact optimal for the detainees. Most preventive detainees are placed in the newly established preventive detention facilities.[342] Over 10% of preventive detainees are placed in other facilities like socio-therapeutic ones that have special places for preventive detainees, few detainees are still placed in ordinary prisons, e.g. for security reasons, and few are detained in facilities like psychiatric hospitals for therapy reasons.[343] This thesis tries to give an overview whether preventive detention in general is in line with the ECHR. Hence, I will focus on the usual cases wherever the data allows so.

However, the most comprehensive, current (2019) study about the execution of preventive detention by Dessecker and Leuschner evaluated questionnaires that were send to

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[336] Art. 66 § 2 StGB.
[337] Art. 119a Execution of Sentences Act, *supra* note 195.
[338] Art. 66c § 1 nr. 3 StGB.
[339] Ronja Ringelstein, "Offender Vollzug für Sicheurngsverwahrte stößt in Berlin auf Widerstand" (open prison for preventve detainees meets with resistance in Berlin), *der Tagesspiegel*, 7.12.2019. Available on: https://www.tagesspiegel.de/berlin/freiheit-mit-restrisiko-offener-vollzug-fuer-sicherungsverwahrte-stoesst-in-berlin-auf-widerstand/25309268.html; Michael Grottendieck, "Forensik. Protest gegen Aufhebung der Ausgangsregelung" (Psyiachatric hospital. Protest against the repeal of the day-release arrangement), Westfälische Nachrichten, 15.4.2018. Available on: https://www.wn.de/Muenster/3253646-Forensik-Protest-gegen-Aufhebung-der-Ausgangsregelung.
[340] Dessecker, "The new law of preventive detention", *supra* note 197, p. 312; Jörg Kinzig, "§ 66c StGB" (Art. 66c criminal code), in *Strafgesetzbuch Kommentar* (criminal code commentary), 30th edition, ed. Adolf Schönke and Horst Schröder (Munich: C.H. Beck, 2019), recital 10.
[341] Dessecker, "The new law of preventive detention", *supra* note 197, p. 315. For instance, *see* Art. 10 Gesetz zur Regelung des Vollzuges der Sicherungsverwahrung in Nordrhein-Westfalen (Law regulating the execution of preventive detention in North Rhine-Westphalia), (last amended by Article 3 of the Act of 2.7.2019 [G*V*. NRW (2019), p. 339]), passed 30.4.2013, G*V*. NRW (2013), p. 212). Available on: https://recht.nrw.de/lmi/owa/br_text_anzeigen?v_id=13201306030945351 13#FV.
[342] Dessecker and Leuschner, *empirical study*, *supra* note 145, p. 67.
[343] *Ibid*., pp. 23 f, 26, 41, 67; Angela Wiese "Kommen Sicherungsverwahrte in NRW bald in den offenen Vollzug?" (Are preventive detainees in North Rhine-Westphalia coming soon into the open enforcement?), Neue Westfälische, 8.3.2019. Available on: https://www.nw.de/nachrichten/thema/22396006_Kommen-Sicherungsverwahrte-in-NRW-bald-in-den-offenen-Vollzug.html?fbclid=IwAR1lKHsOJI7VK6-FLtvybPRhAeEvT1RCBf8y46TTim7Pvu5dVWdj5bf1wYE.

all facilities accommodating preventive detainees or prisoners with ordered or reserved preventive detention.[344] The scientists compared the numbers of offenders suitable for relaxations of confinement with the relaxations actually conducted for prisoners against whom preventive detention was ordered or reserved and preventive detainees.[345] Also the number of such prisoners and detainees with need for treatment and therapy was compared to measures actually conducted.[346] As the different specialists working in the facilities filled out the questionnaires,[347] they are potentially biased and the real conditions might be worse.

The following table shows how many offenders are deemed by prison or facility personnel suitable for different relaxation measures with ascending degree of freedom.[348] The first measure (excursion to preserve abilities to live) only serves the protection from damage caused by confinement and the conservation of human dignity, whereas the others serve reintegration into society.[349]

Table A.15: Suitability for confinement relaxations sorted by status at 31.3.2014 and 31.3.2015 (multiple answers) (translation)

2014	Status*				total
	Adult prisoners with ordered preventive detention	Prisoners with reserved preventive detention	Preventive detainees	Execution ended or paused	
totally unsuitable	414	38	20	≤ 5	474
	75,7%	76,0%	3,9%		
excursion to preserve abilities to live	129	11	477	15	632
	23,6%	22,0%	93,5%	78,9%	
excursion with the possibility of progression	44	≤ 5	187	12	246
	8,0%		36,7%	63,2%	
excursion with prison personnel	17	≤ 5	105	7	134
	3,1%		20,6%	36,8%	
excursion with other persons	6	≤ 5	57	7	73
	1,1%		11,2%	36,8%	
excursion without escort	≤ 5	≤ 5	41	7	55
			8,0%	36,8%	
long excursion/ vacation	≤ 5	≤ 5	23	≤ 5	28
			4,5%		
work outside / temporary leave	≤ 5	≤ 5	30	≤ 5	35
			5,9%		
open prison	≤ 5	≤ 5	19	≤ 5	25
			3,7%		
	547	50	510	19	1126

* Percentage based on cases

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[344] Dessecker and Leuschner, *empirical study*, *supra* note 145, p. 14.
[345] *Ibid*., pp. 43-49.
[346] *Ibid*., pp. 50-59.
[347] *Ibid*., pp. 13 f., 30, 70.
[348] *Ibid*., pp. 43 f.
[349] *Ibid*.
[350] *Ibid*., p. 103.

Table A.15: Suitability for confinement relaxations sorted by status at 31.3.2014 and 31.3.2015 (multiple answers) (translation) - continuation					
2015	Status*				total
	Adult prisoners with ordered preventive detention	Prisoners with reserved preventive detention	Preventive detainees	Execution ended or paused	
totally unsitable	344	32	10	8	394
	70,8%	71,1%	2,0%	20,0%	
excursion to preserve abilities to live	133	12	481	31	657
	27,4%	26,7%	96,0%	77,5%	
excursion with the possibility of progression	47	≤ 5	202	21	274
	9,7%		40,3%	52,5%	
excursion with prison personnel	23	≤ 5	112	20	159
	4,7%		22,4%	50,0%	
excursion with other persons	10	≤ 5	55	17	86
	2,1%		11,0%	42,5%	
excursion without escort	9	≤ 5	49	15	75
	1,9%		9,8%	37,5%	
long excursion/ vacation	≤ 5		31	8	43
			6,2%	20,0%	
work outside / temporary leave	6		42	9	57
	1,2%		8,4%	22,5%	
open prison	≤ 5		29	6	38
			5,8%	15,0%	
	486	45	501	40	1072

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It is noticeable that less than 10% of prisoners with ordered or reserved preventive detention were assessed as suited for relaxations that serve reintegration, instead of only conservation.[352] The difference to 37-40% suitability for reintegration of preventive detainees is hardly explainable by their longer confinement. The enormous difference between prisoners and detainees regarding the total unsuitability for relaxations to keep offenders able to cope with life, cannot be explained only by short previous confinement.[353] This suggests that prisoners with ordered or reserved preventive detention get assessed too cautiously. At least a positive trend from 2014 to 2015 in assessing more suitability for relaxations is noticeable.

The following table compares suitability with actually conducted relaxations.

[351] *Ibid*., p. 104.
[352] *Ibid*., pp. 43, 45.
[353] *Ibid*., p. 45.

Table 8: Confinement relaxations: Suitability and realisation sorted by status at 31.3.2014 and 31.3.2015 (multiple answers) (translation)

2014	preventive detainees		prisoners (p.d. ordered/reserved)	
	suitability	realisation	suitability	realisation
excursion to preserve abilities to live	477	375	140	103
excursion with possibility of progression	187	144	47	26
excursion with personnel	105	77	22	11
excursion with other persons	57	31	9	≤ 5
excursion without escort	41	37	7	≤ 5
long excursion / vacation	23	17	≤ 5	≤ 5
work outside / temporary leave	30	17	≤ 5	≤ 5
open prison	19	11	≤ 5	≤ 5

2015	preventive detainees		prisoners (p.d. ordered/reserved)	
	suitability	realisation	suitability	realisation
excursion to preserve abilities to live	481	413	145	110
excursion with the possibility of progression	202	158	51	36
excursion with personnel	112	90	27	19
excursion with other persons	55	32	14	6
excursion without escort	49	38	11	7
long excursion / vacation	31	17	≤ 5	≤ 5
work outside / temporary leave	42	24	6	6
open prison	29	13	≤ 5	≤ 5

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Keeping in mind that confinement relaxations can be challenging for the authorities and that relaxations were given very restrictive before 1.6.2013,[355] it might be defensible that still so many offenders did not receive relaxations although they were deemed suitable for them. Also, a positive trend here shows that from 2014 to 2015 more relaxations are actually conducted. If the trends in assessing suitability for relaxations and actually carrying them out continued in the following years, then Germany is on a good way to preventive detention that is non-arbitrary and proportional.

Therapy is the basic element to reintegrate offenders. The next table compares the need of therapy with the actual participation.

Table 9: Treatmeant participation of offenders with ordered/reserved preventive detention and the preventive detainees sorted by assumption of a need of treatment (multiple answers) (translation)

	2014			2015		
	need	participation		need	participation	
	abs.	abs.	%	abs.	abs.	%
motivation	746	511	*68,5*	740	531	*71,8*
psychiatry	204	127	*62,3*	197	130	*66,0*
psychotherapy (individually)	679	366	*53,9*	683	393	*57,5*
psychotherapy (in groups)	377	106	*28,1*	375	124	*33,1*
social therapy	611	276	*45,2*	595	289	*48,6*
sex offender programme	477	152	*31,9*	467	158	*33,8*
violent offender programme	353	72	*20,4*	369	56	*15,2*
addiction treatment	500	181	*36,2*	501	212	*42,3*
social training	605	217	*35,9*	595	197	*33,1*
school	136	42	*30,9*	129	46	*35,7*
vocational education	244	61	*25,0*	232	64	*27,6*
work therapy	179	90	*50,3*	172	86	*50,0*
work	769	623	*81,0*	803	628	*78,2*
other	437	267	*61,1*	450	289	*64,2*

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Still many useful treatments are not conducted. But apart from the violent offender programme, work and work therapy the trends from 2014 to 2015 are positive. However, treatment and therapy are much less subjected to security concerns and local protest than confinement relaxations. Hence, it seems especially arbitrary that not everything in this area is

354 *Ibid*., p. 48.
355 Morgenstern and Drenkhahn, "§ 66c StGB", *supra* note 163, recitals 69 f.
356 Dessecker and Leuschner, *empirical study*, *supra* note 145, p. 58.

done to keep the detention as short as possible. But one also needs to look at the reasons for the lack of treatment.

Table A.30: Current or ended participation in treatment on 31 March 2014 and 31 March 2015 according to need of treatment (multiple answers) (translation)

need of treatmeant 2014		Participation							total
		No, due to lack of offer	No, due to lack of motivation	No, but planned	Yes, currently running	Yes, ended prematurely	Yes, finished as scheduled	Participation already earlier	
motivation or preparation for therapy	not identifiable	4	0	0	4	0	7	11	26
		15,4%	0,0%	0,0%	15,4%	0,0%	26,9%	42,3%	100,0%
	identifiable	10	186	39	432	23	52	4	746
		1,3%	24,9%	5,2%	57,9%	3,1%	7,0%	0,5%	100,0%
psychiatric treatment	not identifiable	6	1	0	2	0	0	0	9
		66,7%	11,1%	0,0%	22,2%	0,0%	0,0%	0,0%	100,0%
	identifiable	8	57	12	112	6	8	1	204
		3,9%	27,9%	5,9%	54,9%	2,9%	3,9%	0,5%	100,0%
individual psychotherapeutic treatment	not identifiable	1	2	1	0	0	0	11	15
		6,7%	13,3%	6,7%	0,0%	0,0%	0,0%	73,3%	100,0%
	identifiable	65	147	101	310	19	22	15	679
		9,6%	21,6%	14,9%	45,7%	2,8%	3,2%	2,2%	100,0%
psychotherapeutic group therapy	not identifiable	4	7	0	0	0	2	6	19
		21,1%	36,8%	0,0%	0,0%	0,0%	10,5%	31,6%	100,0%
	identifiable	75	133	63	79	12	10	5	377
		19,9%	35,3%	16,7%	21,0%	3,2%	2,7%	1,3%	100,0%
sociotherapeutic treatment	not identifiable	3	2	1	3	1	0	6	16
		18,8%	12,5%	6,3%	18,8%	6,3%	0,0%	37,5%	100,0%
	identifiable	15	200	120	237	19	6	14	611
		2,5%	32,7%	19,6%	38,8%	3,1%	1,0%	2,3%	100,0%
treatment programme for sex offenders	not identifiable	3	2	0	0	0	2	12	19
		15,8%	10,5%	0,0%	0,0%	0,0%	10,5%	63,2%	100,0%
	identifiable	21	208	96	96	13	26	17	477
		4,4%	43,6%	20,1%	20,1%	2,7%	5,5%	3,6%	100,0%
treatment programme for violent offenders	not identifiable	4	2	0	0	0	0	9	15
		26,7%	13,3%	0,0%	0,0%	0,0%	0,0%	60,0%	100,0%
	identifiable	24	156	101	41	8	16	7	353
		6,8%	44,2%	28,6%	11,6%	2,3%	4,5%	2,0%	100,0%

Table A.30: Current or ended participation in treatment on 31 March 2014 and 31 March 2015 according to need of treatment (multiple answers) (translation) - continuation									
		Participation							total
need of treatmeant 2014		No, due to lack of offer	No, due to lack of motivation	No, but planned	Yes, currently running	Yes, ended prematurely	Yes, finished as schedul ed	Participation already earlier	
treatment of addiction	not identifiable	0	2	0	1	0	1	3	7
		0,0%	28,6%	0,0%	14,3%	0,0%	14,3%	42,9%	100,0%
	identifiable	15	211	93	130	7	29	15	500
		3,0%	42,2%	18,6%	26,0%	1,4%	5,8%	3,0%	100,0%
social training	not identifiable	0	1	3	1	0	1	7	13
		0,0%	7,7%	23,1%	7,7%	0,0%	7,7%	53,8%	100,0%
	identifiable	48	244	96	121	15	50	31	605
		7,9%	40,3%	15,9%	20,0%	2,5%	8,3%	5,1%	100,0%
educational measures	not identifiable	3	3	0	0	0	1	4	11
		27,3%	27,3%	0,0%	0,0%	0,0%	9,1%	36,4%	100,0%
	identifiable	10	60	24	25	8	6	3	136
		7,4%	44,1%	17,6%	18,4%	5,9%	4,4%	2,2%	100,0%
vocational training, qualification	not identifiable	3	3	0	0	0	4	4	14
		21,4%	21,4%	0,0%	0,0%	0,0%	28,6%	28,6%	100,0%
	identifiable	26	77	80	44	7	7	3	244
		10,7%	31,6%	32,8%	18,0%	2,9%	2,9%	1,2%	100,0%
work therapy	not identifiable	4	2	0	3	0	1	1	11
		36,4%	18,2%	0,0%	27,3%	0,0%	9,1%	9,1%	100,0%
	identifiable	6	68	15	61	12	10	7	179
		3,4%	38,0%	8,4%	34,1%	6,7%	5,6%	3,9%	100,0%
work	not identifiable	1	3	1	9	0	0	0	14
		7,1%	21,4%	7,1%	64,3%	0,0%	0,0%	0,0%	100,0%
	identifiable	17	79	50	582	24	9	8	769
		2,2%	10,3%	6,5%	75,7%	3,1%	1,2%	1,0%	100,0%
other	not identifiable	1	6	2	4	0	1	2	16
		6,3%	37,5%	12,5%	25,0%	0,0%	6,3%	12,5%	100,0%
	identifiable	13	104	53	217	18	27	5	437
		3,0%	23,8%	12,1%	49,7%	4,1%	6,2%	1,1%	100,0%

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[357] *Ibid.*, pp. 128 f.

Table A.30: Current or ended participation in treatment on 31 March 2014 and 31 March 2015 according to need of treatment (multiple answers) (translation) - continuation

need of treatmeant 2015		Participation							total
		No, due to lack of offer	No, due to lack of motivation	No, but planned	Yes, currently running	Yes, ended prematurely	Yes, finished as scheduled	Participation already earlier	
motivation or preparation for therapy	not identifiable	0	0	0	7	0	14	6	27
		0,0%	0,0%	0,0%	25,9%	0,0%	51,9%	22,2%	100,0%
	identifiable	5	184	20	466	19	41	5	740
		0,7%	24,9%	2,7%	63,0%	2,6%	5,5%	0,7%	100,0%
psychiatric treatment	not identifiable	5	1	0	1	0	0	1	8
		62,5%	12,5%	0,0%	12,5%	0,0%	0,0%	12,5%	100,0%
	identifiable	5	48	14	116	7	4	3	197
		2,5%	24,4%	7,1%	58,9%	3,6%	2,0%	1,5%	100,0%
individual psychotherapeutic treatment	not identifiable	2	3	0	2	0	4	5	16
		12,5%	18,8%	0,0%	12,5%	0,0%	25,0%	31,3%	100,0%
	identifiable	49	153	88	330	33	20	10	683
		7,2%	22,4%	12,9%	48,3%	4,8%	2,9%	1,5%	100,0%
psychotherapeutic group therapy	not identifiable	8	3	0	5	0	4	2	22
		36,4%	13,6%	0,0%	22,7%	0,0%	18,2%	9,1%	100,0%
	identifiable	54	138	59	102	7	12	3	375
		14,4%	36,8%	15,7%	27,2%	1,9%	3,2%	0,8%	100,0%
sociotherapeutic treatment	not identifiable	2	3	0	2	2	2	1	12
		16,7%	25,0%	0,0%	16,7%	16,7%	16,7%	8,3%	100,0%
	identifiable	8	198	100	235	28	11	15	595
		1,3%	33,3%	16,8%	39,5%	4,7%	1,8%	2,5%	100,0%
treatment programme for sex offenders	not identifiable	3	1	1	0	1	8	11	25
		12,0%	4,0%	4,0%	0,0%	4,0%	32,0%	44,0%	100,0%
	identifiable	19	204	86	111	12	20	15	467
		4,1%	43,7%	18,4%	23,8%	2,6%	4,3%	3,2%	100,0%
treatment programme for violent offenders	not identifiable	1	3	2	0	0	7	2	15
		6,7%	20,0%	13,3%	0,0%	0,0%	46,7%	13,3%	100,0%
	identifiable	27	171	115	34	12	7	3	369
		7,3%	46,3%	31,2%	9,2%	3,3%	1,9%	0,8%	100,0%

Table A.30: Current or ended participation in treatment on 31 March 2014 and 31 March 2015 according to need of treatment (multiple answers) (translation) - continuation									
		Participation							total
need of treatmeant 2015		No, due to lack of offer	No, due to lack of motivation	No, but planned	Yes, currently running	Yes, ended prematurely	Yes, finished as scheduled	Participation already earlier	
treatment of addiction	not identifiable	1	0	1	0	0	3	6	11
		9,1%	0,0%	9,1%	0,0%	0,0%	27,3%	54,5%	100,0%
	identifiable	21	184	84	145	14	41	12	501
		4,2%	36,7%	16,8%	28,9%	2,8%	8,2%	2,4%	100,0%
social training	not identifiable	2	2	4	3	1	5	6	23
		8,7%	8,7%	17,4%	13,0%	4,3%	21,7%	26,1%	100,0%
	identifiable	31	262	105	125	9	42	21	595
		5,2%	44,0%	17,6%	21,0%	1,5%	7,1%	3,5%	100,0%
educational measures	not identifiable	1	0	2	0	0	1	1	5
		20,0%	0,0%	40,0%	0,0%	0,0%	20,0%	20,0%	100,0%
	identifiable	10	50	23	33	8	3	2	129
		7,8%	38,8%	17,8%	25,6%	6,2%	2,3%	1,6%	100,0%
vocational training, qualification	not identifiable	1	2	3	2	0	5	0	13
		7,7%	15,4%	23,1%	15,4%	0,0%	38,5%	0,0%	100,0%
	identifiable	28	73	67	37	12	11	4	232
		12,1%	31,5%	28,9%	15,9%	5,2%	4,7%	1,7%	100,0%
work therapy	not identifiable	2	0	2	5	0	1	3	13
		15,4%	0,0%	15,4%	38,5%	0,0%	7,7%	23,1%	100,0%
	identifiable	6	67	13	56	16	7	7	172
		3,5%	39,0%	7,6%	32,6%	9,3%	4,1%	4,1%	100,0%
work	not identifiable	2	1	4	6	1	0	0	14
		14,3%	7,1%	28,6%	42,9%	7,1%	0,0%	0,0%	100,0%
	identifiable	22	88	65	573	33	10	12	803
		2,7%	11,0%	8,1%	71,4%	4,1%	1,2%	1,5%	100,0%
other	not identifiable	1	4	3	13	0	4	0	25
		4,0%	16,0%	12,0%	52,0%	0,0%	16,0%	0,0%	100,0%
	identifiable	4	114	43	253	15	15	6	450
		0,9%	25,3%	9,6%	56,2%	3,3%	3,3%	1,3%	100,0%

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That preventive detainees still do not get treatment because of a lack of offers is very problematic. For psychotherapeutic group therapy 14-20% detainees with need of such therapy received none in 2014 and 2015. Keeping in mind that prison-staff filled out the questionnaires, one needs to consider that lack of motivation might be recorded too often as reason for not conducting a treatment. Anyhow, the motivation for treatment is the task of the execution and maybe the quality of the treatment or the environment's friendliness towards therapy needs to be increased.[359] Nevertheless, an overall trend from 2014 to 2015 shows a decrease in lack of treatment offers.

Post-reforms, the question whether the conditions to detain are met is reviewed at least every 12 months, instead of every 24 months.[360] Two detainees were released until 31.3.2015 because no sufficient treatment was offered to them.[361] This indicates that the judicial control of preventive detention works.

Is preventive detention ordered in the judgement after the reforms in Germany still arbitrary in the sense of a narrowly interpreted Art. 5 § 1 ECHR? The overall assessment shows that preventive detention changed its character from a measure that mainly confines offenders to protect the general public and just conducts some treatment without a specific plan or goal to a measure in that treatment, therapy and confinement relaxations are conducted

[358] *Ibid*., pp. 130 f.
[359] BVerfGE 128, 326, § 123; *Ilnseher v. Germany* [GC], dissenting opinion Judge Pinto de Albuquerque joined by Judge Dedov, *supra* note 40, § 53.
[360] Art. 67e § 2 StGB. Comparison with the old law available on: https://lexetius.com/StGB/67e,2.
[361] Dessecker and Leuschner, *empirical study*, *supra* note 145, p. 42.

in a systematic way, secured by judicial control. I can see no major problems in the legal framework. The number of measures actually conducted was still too low in 2014 and 2015, but positive trends in the key figures give hope that in the following years preventive detention will be kept as short as necessary. Hence, I conclude that preventive detention changed its character from a usually arbitrary deprivation of liberty to a usually non-arbitrary deprivation of liberty. In 2015 there was still much to do. What is important is that ways are found to motivate all detainees to participate in treatment and that this treatment is actually available. If preventive detention really changed its character, it must be possible to convince the vast majority of detainees that treatment can shorten their detention. Whether enough was done for one individual to minimise the time in detention and therefore making the detention non-arbitrary, still needs to be assessed individually.

Regarding the proportionality of execution, Art. 66c § 1 nr. 2 StGB rules that preventive detention facilities have to enable conditions that are as close as possible to life in freedom, taking security aspects into account, and they are spatially or organisationally separated from prisons. The constitutional separation requirement as one specification of the constitutional distinguishing requirement gets less fulfilled than under the old law that demanded some organisational separation.[362] However, for the ECHR it is not decisive to what degree the distinction requirement is fulfilled. For Art. 5 § 1 cl. 2 lit a) ECHR it is important that the deprivation of liberty is non-arbitrary and proportional. But also here, any lack of organisational separation entails the danger that the responsible authorities treat preventive detainees similarly to prisoners and maybe consequently too much as security concern and too little as patients.

The approximation of the detention to the life in freedom gets shaped by the *Länder's* execution laws. According to these laws the cells need to have a specially separated sanitary area.[363] The cells have 14-25 square meters.[364] If one follows the line of reasoning that the approximation to life in freedom can be interpreted as life in freedom of persons who live together with many other people for some years, then one can conclude that the overall equipment of the cells is comparable to, for instance, a student's dorm.[365] An obligation to work is now only left in Bavaria and only if it serves the treatment plan.[366]

To recall, the German distance requirement is not decisive for the ECHR. But to give some proportions, the most populated *Land* North Rhine-Westphalia pays 250,23 Euro per day of preventive detention or 200 Euro when it buys preventive detention capacities in other *Länder*,[367] whereas a regular prisoner costed 135,65 per day in 2017.[368] Patients in psychiatric hospitals cost North Rhine-Westphalia about 255 euro per day.[369] This indicates that the

[362] Art. 140 § Execution of Sentences Act, *supra* note 195; Dessecker, "The new law of preventive detention", *supra* note 197, p. 312.
[363] Dessecker, "The new law of preventive detention", *supra* note 197, p. 316; Dessecker, "§ 66c StGB", *supra* note 177, recital 12.
[364] *Ilnseher v. Germany* [GC], *supra* note 121, § 81.
[365] Dessecker, "§ 66c StGB", *supra* note 177, recital 12.
[366] Dessecker, "The new law of preventive detention", *supra* note 197, p. 317.
[367] Wiese, *supra* note 343; Westfalenpost, "JVA Werl überfüllt: Es fehlen Plätze für Sicherungsverwahrte" (correctional facility in Werl overcrowded: places for preventive detainees missing), 14.11.2019. Available on: https://www.wp.de/region/sauer-und-siegerland/nrw-will-sicherungsverwahrte-in-rheinland-pfalz-unterbringen-id227644697.html?service=amp.
[368] Ministry of Justice North Rhine-Westphalia, Gesantkosten des Vollzugs (total costs of the penitentiary system), published 2018. Available on: https://www.justiz.nrw.de/Gerichte_Behoerden/zahlen_fakten/statistiken/justizvollzug/kosten.pdf.
[369] Ministerium für Arbeit, Gesundheit und Soziales des Landes Nordrhein-Westfalen (Ministry of Labour, Health and Social Affairs of North Rhine-Westphalia) *Maßregelvollzug: Fragen und Antworten* (Execution of

circumstances in preventive detention are substantially better than in prisons. However, it is imperative to keep in mind that preventive detainees are not confined because of their guilt or to their own benefit, but only for a small increase of safety of others or their security-feelings and for Germany being able to limit all other prison-sentences by the guilt of the offenders. Hence, I am of the opinion, that a big amount of money should be spent to make preventive detention as comfortable as possible. But now an amount of money is spent for preventive detainees comparable to the money spent for mentally ill offenders, who are also detained independently from guilt. Under the premise that psychiatric hospitals offer sufficient quality of life, the new preventive detention facilities might do so as well.

However, whether the execution is in fact sufficient to mitigate the burden for single preventive detention facilities and single detainees, needs to be assessed individually.

To sum up, preventive detention changed its character to a measure in that the goal of releasing the detainee fast is now important and the execution is now more proportional. Hence, applying the criteria deduced in chapter 3.2.1.3., preventive detention is not in general arbitrary and unproportional anymore. However, still the analysis of the individual cases is necessary to determine whether the detention is in line with Art. 5 § 1 ECHR that truly protects from the arbitrary and unproportional deprivation of liberty. For detainees who are suited for relaxation and in need for therapy as well as motivated, but do not get both while being confined in circumstances, that could be significantly better, the detention is still arbitrary, unproportional and hence a violation of a narrowly interpreted Art. 5 § 1 ECHR.

5.2. Reserved in judgement

The legal changes concerning reserved preventive detention do not make a significant difference for the exceptions in Art. 5 § 1 cl. 2 b)-f) ECHR. These exceptions still do not allow reserved preventive detention.

Regarding lit. a), also the outcome did not change concerning the causal link, as the ECtHR's main-criterion to examine preventive detention's confirmability. The assessment of dangerousness for the later ordering is now only supplementary based on the offenders development in prison, instead of equally with an overall assessment of him and his offences committed.[370] Hence, compared to the old legal situation, the causal connection between the conviction and the preventive detention is now stronger as its ordering is relatively less based on the offenders conduct in prison. This makes arguments against a causal connection between the conviction and the deprivation of liberty as demanded for Art. 5 § 1 cl. 2 lit. a) ECHR weaker. The demanded causal connection persists after the reforms.

The question whether the new situation is a non-arbitrary and proportional deprivation of liberty in the sense of Art. 5 § 1 ECHR, has the same answer as for preventive detention that is ordered in the judgement. The execution of the detention is the same for both forms and the conditions under which they are ordered, still do not make a difference for assessments of arbitrariness and proportionality. The difference in the conditions to order detention between Art. 66 and Art. 66a StGB is basically that the reservation of the detention needs a lower degree of probability of dangerousness. Also the final assessment of dangerousness after the reservation is much closer to the detention. For the overall assessment

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measures of betterment and prevention, questions and answers). Available on: https://www.mags.nrw/massregelvollzug-fragen-und-antworten. Accessed 26.5.2020.

[370] Comparison of Art. 66a § 2 StGb old version with Art. 66a § 3 StGB new version available on: http://www.buzer.de/gesetz/6165/al26894-0.htm.

of the offenders and his offences committed, Art. 66a StGB takes supplementary into account the development till the decision, instead of the tendency to commit crimes which is part of Art. 66 StGB. But the tendency to commit crimes will be important in the evaluation of the dangerousness anyway.[371]

As analysed for preventive detention ordered in the judgement, also reserved preventive detention is now not anymore executed generally arbitrary and unproportional. Also the specific conditions of every single reserved preventive detention need to be assessed individually to determine whether they are in conformity with Art. 5 § 1 ECHR.

5.3. Retrospective preventive detention and retrospective prolongation of preventive detention

For new cases, the only possibility left to order preventive detention retrospectively is regulated in Art. 66b § 1 StGB (§ 3 of the old version). It concerns offenders previously detained in psychiatric hospitals.[372] This possibility will be examined in the second part of this subchapter.

Only for *Altfälle* (old cases) in which the triggering offence was committed before the 1.6.2013, retrospective preventive detention, as previously governed by Art. 66b § 1, 2 StGB old version, remains possible.[373] The 10-year maximum duration for preventive detention was abolished in 1998. It still can happen that the preventive detention of an offender, who committed his triggering offence before 1998, exceeds this maximum duration. For both scenarios, Art. 316f Introductory Act to the Criminal Code governs the conditions under which individuals can be kept in preventive detention, although their detention violated the Convention. For both, "mental disorder" is the decisive criterion along with high level of dangerousness. These criteria are also decisive for detention under the Therapy Detention Act, that also creates a possibility to keep individuals detained, whose preventive detention was against the Convention.[374] After a judgement of the Constitutional Court, the requirements in the Therapy Detention Act have to be interpreted like the requirements in Art. 316f Introductory Act to the Criminal Code.[375] This made the Therapy Detention Act essentially irrelevant for the practice.[376] Consequently, the numbers of offenders in therapy detention were reduced to only one offender in late 2013 and the CPT was told this last offender would soon be released.[377] Additionally, the legislator had the idea that all new preventive detention facilities are appropriate for detention under the requirements of Art. 5 § 1 cl. 2 lit. e) ECHR, making these facilities in principle also adequate under the Therapy Detention Act.[378] Taking

[371] Ullenbruch and Morgenstern, "§ 66a StGB", *supra* note 220, recital 95.
[372] Meyer-Ladewig, Harrendorf and König, "Art. 5", *supra* note 98, recital 30. Ebner, *supra* note 58, pp. 92-95; Joachim Renzikowski "Abstand halten! – Die Neuregelung der Sicherungsverwahrung" (Keep distance! - The new rules on preventive detention), *NJW* (issue 23, 2013): 1638 (1642).
[373] Old version of Art. 66b StGB available on: https://lexetius.com/StGB/66b,3.
[374] Art. 1 § 1 Therapy Detention Act, *supra* note 307.
[375] BVerfGE 134, 33, *Tenor*" (operative part of the ruling) nr. 3, §§ 68-108, 134 f., 138.
[376] Meyer-Ladewig, Harrendorf and König, "Art. 5", *supra* note 98, recital 30; Renzikowski, *supra* note 372 p. 1643; *Ilnseher v. Germany* [GC], § 230; *Ilnseher v. Germany* [GC], dissenting opinion Judge Pinto de Albuquerque joined by Judge Dedov, *supra* note 40, § 28.
[377] Council of Europe, 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 2 December 2013, CPT/Inf (2014) 23, 24.7.2014, § 9. Available on: https://www.refworld.org/docid/53d10c124.html.
[378] Bundestagsdrucksache 17/9874 (Bundestag printed paper 17/9874), p. 11; Kinzig, "§ 66c StGB", *supra* note 340, recital 14.

the circumstances of the introduction of therapy detention into account,[379] therapy detention seems to be just preventive detention named differently. Therefore, in the first part of this subchapter, I will assess together retrospective preventive detention, retrospectively prolonged detention and therapy detention to see whether the criterion of "mental disorder" in combination with the required very high degree of dangerousness, is able to justify these forms of detention under Art. 5 § 1 cl. 2 lit. e) ECHR, namely the detention "of persons of unsound mind" and whether these forms of detention are in line with Art. 7 § 1 cl. 2 ECHR.

5.3.1. Based on mental disorder – old cases

5.3.1.1. Art. 5 § 1 ECHR

A thing in common to all forms of preventive detention described above is that they are designed to enable forms of preventive detention against which the ECtHR established that the causal link as demanded for Art. 5 § 1 cl. 2 lit. a) ECHR does not exist.

But Art. 316f Introductory Act to the Criminal Code and the Therapy Detention Act are designed to justify detention under lit. e), the detention "of persons of unsound mind".

Firstly, I will assess whether these new forms of preventive detention can be justified under lit. e) according to the ECtHR's established principles and, secondly, I will evaluate whether the entire German conduct to maintain retrospectively ordered or prolonged preventive detention is in line with lit. e). Before assessing the single criteria, I recall that all exceptions in Art. 5 § 1 ECHR have to be interpreted narrowly to fulfil its fundamental purpose to protect individuals from arbitrary detention.[380]

The ECtHR states that the term "unsound mind" cannot be defined precisely, because it evolves with the progress in psychiatry.[381] Hence, the ECtHR uses the following criteria first developed in *Winterwerp v. the Netherlands*.[382] The deprivation of liberty because of an "unsound mind" is only allowed if three conditions are met: it must be reliably proven that a person has an unsound mind in form of "a true mental disorder"[383], the detention must be necessary and detention is only allowed to continue as long as the mental disorder persists.[384]

Applying these principles to German preventive detention, the necessity of the detention is rather unproblematic because the ECtHR also accepts the need to protect the individual concerned from harming others as reason.[385] Preventive detention mainly serves this cause. Additionally, the criterion of the persistence of the mental condition is unproblematic for preventive detention. The German law just allows the detention as long as

[379] *See supra* chapter 4.
[380] *See supra* note 90.
[381] *Winterwerp v. the Netherlands*, *supra* note 90, § 37; *Glien v. Germany*, *supra* note 90, § 72; *Ilnseher v. Germany* [GC], *supra* note 121, § 127.
[382] *Winterwerp v. the Netherlands*, *supra* note 90; Meyer-Ladewig, Harrendorf and König, "Art. 5", *supra* note 98, recital 51.
[383] *Winterwerp v. the Netherlands*, *supra* note 90, § 39; *Glien v. Germany*, *supra* note 90, § 72; *Bergmann v. Germany*, *supra* note 121, § 96; *Ilnseher v. Germany* [GC], *supra* note 121, § 127.
[384] Meyer-Ladewig, Harrendorf and König, "Art. 5", *supra* note 98, recital 51.
[385] *Glien v. Germany*, *supra* note 90, § 73; *Hutchison Reid v. the United Kingdom* (Application nr. 50272/99, judgement of 20 February 2003, published in Reports of Judgements and Decisions 2003-IV), § 52.

the concerned mental disorder persists and causes a high degree of danger.[386] These conditions are judicially controlled at least every year.[387]

The primary problematic issue is whether "*psychische Störung*"[388] in the German law constitutes a "true mental disorder" in terms of the ECtHR's case-law. The term in the ECtHR's case-law has to be interpreted autonomously, independently from national law.[389] Thus, the question is whether "*psychische Störung*" fulfils all criteria of "true mental disorder", as named by the ECtHR, in a narrowly interpreted Art. 5 § 1 cl. 2 lit. e) ECHR, namely "the lawful detention of persons of unsound mind". To answer this question, I will first describe the term "*psychische Störung*" in the German law and then – assess whether this term is in line with the ECtHR's case-law.

There is no conclusive definition of *psychische Störung*.[390] According to the legislative materials, the German term "*psychische Störung*" does not require the levels of mental conditions as described in Art. 20 f. StGB that diminish or remove criminal liability and are preconditions to detain offenders in psychiatric hospitals as per Art. 63 StGB.[391] The notion is similar[392] to the choice of terminology in the World Health Organisation's 10th revision of the International Classifications of Diseases and Related Health Problems (ICD-10), chapter V or in the 4th edition of the Diagnostic and Statistical Manual of Mental Disorders by the American Psychiatric Association.[393] The legislator stated that *psychische Störung* covers a broad spectrum of disorders that is only partly classified as mental illness in the psychiatric-forensic practice of professional diagnostics and treatment.[394] The legislator had in mind especially dissocial personality disorders and disorders of sexual preference, like paedophilia and sadomasochism.[395] Personality disorders and disorders of sexual preference are subdivisions of "disorders of adult personality and behaviour" in the ICD-10 system.[396] Dissocial personality disorders were diagnosed for the majority (80,8% according to a limited

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[386] Art. 67d § 2 cl 1, 67e § 2 StGB, Art. 316f § 2 cl. 4 Introductory Act to the Criminal Code, *supra* note 76, Art. 1, 13 Therapy Detention Act, *supra* note 307.

[387] Art. 67d § 2 cl 1, 67e § 2 StGB, Art. 316f § 2 cl. 4 Introductory Act to the Criminal Code, *supra* note 76. The Therapy Detention Act seems not to prescribe a specific timeframe for reviews, but Art. 12 f. Therapy Detention Act, *supra* note 307, regulate that the therapy detention ends after 18 months if not prolonged before and that the court ends it ex officio as soon as its preconditions cease to exist.

[388] "*Psychische Störung*" is normally translated with "mental disorder". To avoid confusion with the term "true mental disorder" of the ECtHR's case-law, I will use the German term for the notion used in the German law from here on.

[389] *Petschulies v. Germany* (Application nr. 6281/13, judgement of 2 June 2016), § 74.

[390] S.K. Gairing, F. de Tribolet-Hardy, K. Vohs, E. Habermeyer, "Sicherungsverwahrte (§ 66 StGB) Merkmale der Täter und ihre Bedeutung für die Erfolgsaussichten eines therapeutischen Vollzugs" (Characteristics of offenders in preventive detention (§ 66 StGB) and their significance for the prospects of success of therapeutic enforcement), *Der Nervenarzt*, (issue 1, 2013): 65 (70).

[391] Bundestagsdrucksache 17/9874 (Bundestag printed paper 17/9874), p. 31; Holm Putzke, "Art. 316e EGStGB" (Art. 316e Introductory Act to the Criminal Code) in *Münchener Kommentar zur StPO* (Munich Commentary on the Code of Criminal Procedure), volume 3/2, 1st edition, ed. Christoph Knauer, (Munich: C.H. Beck, 2018), recital 15.

[392] The German verb in the sentence in the legislative materials cannot be translated precisely. It describes that the German notion "*psychische Störung*" is inspired by the ICD-10 classification of mental disorder and comes close to it, without being the same. ("in diesem Sinne ist auch der Begriff der „psychischen Störung" in Nummer 1 zu verstehen, der sich zugleich an die Begriffswahl der heute in der Psychiatrie genutzten Diagnoseklassifikationssysteme ICD- 10bzw. DSM- IV... **anlehnt**" [emphasis added]).

[393] Bundestagsdrucksache 17/3403 (Bundestag printed paper 17/3403), p. 54.

[394] *Ibid*.

[395] *Ibid*.; Bundestagsdrucksache 17/9874 (Bundestag printed paper 17/9874), p. 31.

[396] World Health Organisation, International Statistical Classification of Diseases and Related Health Problems 10th Revision (ICD-10)-WHO Version for 2019, Chapter V Mental and behavioural disorders (F00-F99). Available on: https://icd.who.int/browse10/2019/en#/F65.

scientific sample) of preventive detainees before the introduction of the category *psychische Störung*.[397] Now (dissocial) personality disorder is most common mental disorder leading to the establishment of *psychische Störung* that justifies retrospectively ordered or retrospectively prolonged preventive detention.[398] Common critique against dissocial personality disorders as additional justification for preventive detention is that this disorder is more an external description of the offender than an inner condition or that the commitment of an offence is the main factor leading to the diagnosis of this disorder.[399] Thus, allegedly, circular logic is used to justify the detention:[400] The offender has a dissocial personality disorder, because he offended; because he has a dissocial personality disorder, he will offend again; consequently, he is dangerous and should be preventively detained. In ICD-10 the dissocial personality disorder is described as follows:

> Personality disorder characterized by disregard for social obligations, and callous unconcern for the feelings of others. There is gross disparity between behaviour and the prevailing social norms. Behaviour is not readily modifiable by adverse experience, including punishment. There is a low tolerance to frustration and a low threshold for discharge of aggression, including violence; there is a tendency to blame others, or to offer plausible rationalizations for the behaviour bringing the patient into conflict with society.[401]

Indeed, the first 37 out of 76 words or 3 out of 4 sentences of this definition describe exactly the typical reasons to get into prison, in general, and, more specifically, into preventive detention, in the first place. It is challenging to imagine how someone gets into preventive detention for recidivism without fulfilling some of the indications for dissocial personality disorder. Individuals whose behaviour is modifiable by punishment are probably not very likely to be convicted several times.

On top of that, it is very easy to imagine how everything in this description could be very different in artificial prison-environments compared to life in freedom. Hence, conduct in prison does not seem very suitable to establish or maintain such a diagnosis.

Mental disorders are prevalent in 50-70% of the German population.[402] According to the first study about mental conditions of prisoners in Germany (2002-2003), 88% of

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[397] Gairing et al., *supra* note 390, p. 68; Alex, "First empirical conclusion", *supra* note 152, p. 152; Jutta Elz, Rückwirkungsverbot und Sicherungsverwahrung. Rechtliche und praktische Konsequenzen aus dem Kammerurteil des Europäischen Gerichtshofs für Menschenrechte im Fall M. ./. Deutschland (Prohibition of retroactive effect and preventive detention. Legal and practical consequences of the European Court of Justice's Chamber judgement on human rights in the case of M. *v.* Germany), (Wiesbaden: Kriminologische Zentralstelle e.V., 2014), pp. 308 f.

[398] Elz, *supra* note 397, pp. 308 f.

[399] *Ilnseher v. Germany* [GC], dissenting opinion Judge Pinto de Albuquerque joined by Judge Dedov, *supra* note 40, § 42; The European Prison Litigation Network's third party submission cited in *Ilnseher v. Germany* [GC], *supra* note 121, § 125; Elz, *supra* note 397, p. 309; Gairing et al., *supra* note 390, pp. 65, 70; Hans-Ludwig Kröber, ',Psychische Störung' als Begründung für staatliche Eingriffe in Grundrechte des Individuums" ("Mental disorder" as a justification for state encroachment on the fundamental rights of the individual), Forensische Psychiatrie, Psychologie, Kriminologie (issue 2011[5]): 234 (242).

[400] *Ilnseher v. Germany* [GC], dissenting opinion Judge Pinto de Albuquerque joined by Judge Dedov, *supra* note 40, §§ 42 f.

[401] (ICD-10)-WHO, *supra* note 396, Chapter V Mental and behavioural disorders (F00-F99), F60.2.

[402] Deutsche Gesellschaft für Psychiatrie, Psychotherapie und Nervenheilkunde, DGPPN (German Society for Psychiatry, Psychotherapy and Neurology), "Zur Entscheidung des Bundesverfassungsgerichts zu den Regelungen zur Sicherungsverwahrung vom 04.05.2011. Stellungnahme der Deutschen Gesellschaft für Psychiatrie, Psychotherapie und Nervenheilkunde (DGPPN)" (On the decision of the Federal Constitutional Court on the rules on preventive detention of 04.05.2011. Statement of the German Society for Psychiatry, Psychotherapy and Neurology [DGPPN]), *der Nervenarzt*, (issue 7, 20119): 933 (935).

prisoners suffer at least from one mental or personality disorder.[403] Dissocial personality disorders affect 33% of male prisoners.[404] According to a newer scientific sample (2009/2010), 80,8% of preventive detainees suffer from a dissocial personality disorder.[405]

Hence, it is not surprising that in a study on the aftermath of *M. v. Germany* conducted by Elz, not a single evaluated preventive detainee was released solely because he had no *psychische Störung*.[406] Out of 35 detainees evaluated, who were released following the highest German court's rulings after *M. v. Germany,* that established the criterion of an especially high level of dangerousness and later added *psychische Störung* as criterion, *psychische Störungen* were investigated in 21 court proceedings and were affirmed 15 times.[407] Instead, the most frequent reason for releases was that the demanded degree of dangerousness was not reached.[408] On a side note, in 18 of these 21 cases, the medical experts diagnosed a (dissocial) personality disorder as defined in ICD-10.[409] So three offenders with (dissocial) personality disorder were not established to suffer from a *psychische Störung*. This shows that German courts do not accept every mental disorder as *psychische Störung*.

However, against this backdrop, it is remarkable that in *Ilnseher v. Germany* [GC], the German government stated:

> The statistical material available (see paragraph 91 above) showed that many of the detainees whose preventive detention had been prolonged or ordered subsequently had been released since the *M. v. Germany* judgment had become final. It was thus clear that only some of the detainees concerned had been considered as persons of unsound mind and remained in detention and that there could be no question of all the preventive detainees concerned being classified as suffering from a true mental disorder.[410]

The cited statistical material in § 91 of said judgement reads:

> on 10 May 2010, when the judgment in the case of *M. v. Germany*… became final, 102 persons were in subsequently prolonged preventive detention. On 31 March 2017… 41 of the 591 persons in preventive detention were in subsequently ordered or prolonged preventive detention.

These data do not prove at all that detainees were released due to insufficient *psychische Störung*. As can be inferred from the Elz's study, it was much more likely that offenders were released for other reasons like an insufficient level of dangerousness. Maybe some detainees just died. Hence, it is quite surprising that the Grand Chamber declared that now retrospective preventive detention

> is essentially based on a mental disorder existing at the time when the measure is imposed and rendering the person dangerous.[411]

In my estimation, after the ICD-10 definition of dissocial personality disorder and numbers described above, it would be more adequate to describe retrospective preventive detention as

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[403] C.-E. von Schönfeld, et al., "Prävalenz psychischer Störungen, Psychopathologie und Behandlungsbedarf bei weiblichen und männlichen Gefangenen" (Prevalence of mental disorders, psychopathology and treatment needs in male and female prisoners), *Der Nervenarzt* (issue 7, 2006): 830 (834, 838). In the strict epidemiological sense, the study was not representative. (*Ibid*., p. 830).
[404] Von Schönfeld, et al., *supra* note 403, p. 838.
[405] Gairing et al., *supra* note 390, p. 68.
[406] Elz, *supra* note 397, pp. 308 f.
[407] *Ibid*., p. 308.
[408] *Ibid*.
[409] *Ibid*.
[410] *Ilnseher v. Germany* [GC], *supra* note 121, § 122.
[411] *Ibid*., § 106.

a measure that is imposed against offenders so dangerous that they normally fit in some broad category of the mental disorder anyhow.

However, the considerations above show that the threshold of *psychische Störung* defined unclearly in the German legislation is rather low. But, as seen above, the German courts do not qualify every mental disorder as sufficient *psychische Störung*. Due to the limitations of this thesis, I will not examine lower courts' decisions, but the pointers the Constitutional Court gave.

The Constitutional Court advised the lower Courts to firstly examine the dangerousness and only if the offender is dangerous, then, lastly, investigate *psychische Störungen*.[412] This explains why Elz could find no offender who was released purely because of his insufficient severe mental conditions and it refutes the government's argumentation that the strictness of the criterion of *psychische Störung* was the reason for the reduced number of retrospective preventive detainees.

The Constitutional Court did not specify *psychische Störung* itself, but referred to the legislative power already used to establish the term *psychische Störung* and to various ECtHR judgements circumscribing the notion of "true mental disorder".[413] Via selecting references and quotations from ECtHR cases, the Constitutional Court highlighted that there is no conclusive definition of "true mental disorder"; that it must warrant compulsory confinement; that the disorder must persist; that merely different social behaviour is not sufficient; that dissocial personality disorders or psychopathic disorders can fulfil the definition; that the Convention States have a margin of appreciation for establishing the existence of a mental disorder in the terms of the Convention and that the legislator is mainly responsible to define *psychische Störung*, as he already did.[414] So the Constitutional Court does not give specific guidelines to the German courts, but the judgement might be interpreted as encouragement to the courts to align the German legislation and the ECtHR's guidelines regarding "true mental disorder" within the described "margin of appreciation".

In another judgement, the Constitutional Court explained that the courts need to interpret the indeterminate legal concept *psychische Störung*, that it is not identical to definitions established by medical science and that it is independent of the possibility to treat the conditions clinically.[415] Instead, the judgement stresses via a citation from the legislative materials that it was decisive for the legislator that an abnormally aggressive and seriously irresponsible behaviour was shown by a convicted offender.[416] The legislator in turn, referred to this judgement without dissent when explaining the new law that introduced *psychische Störung* in Art. 316f Introductory Act to the Criminal Code.[417] This indicates that *psychische Störung* is just another way to describe an extremely high level of dangerousness, but not an independent criterion. The required level of dangerousness translated means: a high-level risk of the most serious violent or sexual offences inferred from specific circumstances relating to

[412] BVerfGE 128, 326, § 176.
[413] *Ibid*., §§ 152, 173.
[414] BVerfGE 128, 326, §§ 152, 173. The ECtHR judgements the Constitutional Court referred to were: *Winterwerp v. the Netherlands*, *supra* note 90, §§ 37, 39; *Hutchison Reid. v. the United Kingdom*, *supra* note 385, § 19; *Trajče Stojanovski v. the former Yugoslav Republic of Macedonia* (Application nr. 1431/03, judgement of 22 October 2009), § 34; *Kallweit v. Germany*, *supra* note 94, § 55.
[415] German Federal Constitutional Court, Beschluss vom 15.9.2011, file number 2 BvR 1516/11, BVerfGK 19, 62, §§ 37-39. Available on: https://www.juris.de/perma?d=KVRE395691101. §§-division was made by juris.
[416] *Ibid*., § 37.
[417] Bundestagsdrucksache 17/9874 (Bundestag printed paper 17/9874), p. 31.

the personality or behaviour of the person detained.[418] I cannot imagine how this level of dangerousness can be reached without an abnormal level of aggression and seriously irresponsible behaviour. Since the Constitutional Court advised lower courts to assess *psychische Störung* after the dangerousness was established, it seems impossible that the criterion "*psychische Störung*" is ever decisive for releasing an offender. Thus, it is effectively not a criterion. Art. 316f Introductory Act to the Criminal Code and the Therapy Detention Act effectively base continued retrospective ordered and prolonged preventive detention just on an extreme high level of dangerousness. Additionally, *psychische Störung* has no concrete criteria. It seems intended that the minimal mental issues, that the ECtHR might accept for Art. 5 § 1 cl. 2 lit. e) ECHR, are sufficient to the German law without restrictions like the scientific acceptance of the mental conditions.

In the picture, that *psychische Störung* is nothing special for preventive detainees, it fits that retrospectively ordered or prolonged preventive detentions are not executed in psychiatric hospitals as per Art. 63 StGB, but in preventive detention facilities together with ordinary preventive detainees not detained because of a *psychische Störung* and that no execution laws distinguish between the two groups. If preventive detention facilities were special institutions for mental health patients, it would need justification to detain there also mentally healthy offenders together with mental unhealthy offenders.[419]

To conclude, taking the legislative materials and the Constitutional Court's decisions into account, the definition of *psychische Störung* remains unclear. The analysis only indicated that *psychische Störung* describes a mental state that is very common for preventive detainees and that probably does never alter the outcome of the decision to perpetuate retrospectively ordered or retrospectively prolonged preventive detention. Because the term is so vague it will be hard to assess, whether "*psychische Störung*" fulfils the criteria of "true mental disorder".

On the other hand, the legislator and Constitutional Court deduced the benchmarks for *psychische Störung* from ECtHR judgements and continuously stressed that this criterion needs to be in line with Art. 5 § 1 cl. 2 lit. e) ECHR.[420] This could facilitate gradual convergence of the German term with the European through the case-law. The problem is that the ECtHR judgements do not clearly define what a "person of unsound mind" is because it "does not lend itself to precise definition, since its meaning continually evolves as research in psychiatry progresses"[421]. This means, to find out, whether the German courts use *psychische Störung* like the ECtHR defines "true mental disorder", one would need to always thoroughly compare the current case law of both court systems. But this conduct would be also very impractical as there are infinitive descriptions of mental conditions, if recognized scientific classifications of mental disorders are not decisive. Hence, more concrete factors for "true mental disorder" would be helpful to determine the Convention-conformability of *psychische Störung*.

The lack of sufficiently concrete criteria for "*psychische Störung*" and "true mental disorder" makes it very hard to determine whether the German term is compatible with the

[418] Art. 316f § 2 cl. 2 Introductory Act to the Criminal Code, *supra* note 76.
[419] *Ilnseher v. Germany* [GC], dissenting opinion Judge Pinto de Albuquerque joined by Judge Dedov, *supra* note 40, § 128.
[420] Bundestagsdrucksache 17/3403 (Bundestag printed paper 17/3403), pp. 53 f.; Bundestagsdrucksache 17/9874 (Bundestag printed paper 17/9874), p. 31; BVerfGE 128, 326, §§ 151-155; German Federal Constitutional Court, 2 BvR 1516/11, *supra* note 415, § 36.
[421] *Petschulies v. Germany*, *supra* note 389, § 59, *cf.* § 74 as well.

ECtHR's definition. The ECtHR might be able to concretise its principles through its case-law. For example, the Court expressed serious doubts whether a dissocial personality disorder alone constitutes a "true mental disorder", but accepted a personality disorder with psychopathic elements aggravated by abuse of alcohol.[422] Nevertheless, because of the infinitely different combinations and levels of intensity of mental conditions, these principles would need to be concretised in many more cases, before they could help to answer the questions posed here whether *psychische Störung* is in line with "true mental disorder" and whether the German retrospectively ordered or prolonged preventive detention is in line with Art. 5 § 1 cl. 2 lit. e) ECHR. The ECtHR's Fifth Section, that decides in the first instance about preventive detention cases, still speculated that the notion of *psychische Störung* might be wider than the notion "persons of unsound mind" or its French text version's "aliéné".[423] But the Grand Chamber fully gave up on these question and declared that

> the Convention does not require that the notions used in domestic law, and in particular the notion of [*psychische Störung*], be defined or interpreted in the same manner as terms used in the Convention. What is decisive, in the Court's view, is whether the domestic courts, in the case before them, have established a disorder which can be said to amount to a true mental disorder as defined by this Court's case-law.[424]

It might be normally sufficient for the ECtHR, that decides individual cases, only to determine which individual of many possible descriptions of mental conditions amount to "true mental disorders", rather than to assess how national notions are to interpret. But *psychische Störung* was particularly invented and introduced to maintain a practice that without this criterion violated the Convention according to ECtHR's case-law. This means that the German law is incompatible with the ECtHR's case-law in all cases in that "*psychische Störung*" is interpreted in a wider manner than "true mental disorder".

However, since the German legislative materials and highest courts' decisions refer back to the ECtHR for the interpretation of *psychische Störung*, the attempt to answer the question posed here, whether the German retrospectively ordered or prolonged preventive detention is in general in line with the ECHR, goes in circles. Additionally, one could argue that already the ECtHR's and European Commissions of Human Rights case-law restricts itself not always to narrow interpretations of Art. 5 § 1 cl. 2 lit. e) ECHR. For instance, according to the Commission in *X. v. Germany*, "unsound mind" also includes not only mental illnesses, but also "abnormal personality traits"[425]. According to *Hutchison Reid v. the United Kingdom* the possibility to treat a mental disorder is not decisive for the justification of a deprivation of liberty under lit. e).[426]

Thus, I will now assess instead whether the entire German conduct of continued retrospectively ordered or prolonged preventive detention is in line with the spirit or aim of Art. 5 § 1 ECHR to avoid all forms of arbitrary deprivation of liberty.

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[422] *Ibid*., §§ 77 f. with further reference for instances where the court doubted the sufficient graveness of dissocial personality disorders.
[423] *Glien v. Germany*, *supra* note 90, § 87; *Petschulies v. Germany*, *supra* note 389, § 76.
[424] *Ilnseher v. Germany* [GC], *supra* note 121, § 150.
[425] European Commission of Human Rights, *X. v. Germany*, (Application nr. 7493/76, Commission decision of 12 July 1976, published in D.R. Volume 6, 182), p. 182.
[426] *Hutchison Reid. v. the United Kingdom*, *supra* note 385, § 52.

For the German conduct being in line with Art. 5 § 1 cl. 2 lit. e) ECHR argues that the German law explicitly demands that the dangerousness results from a *psychische Störung*.[427] Hence, some sort of mental condition is a statutory requirement and must even cause the dangerousness as primary reason for detention.[428] But this pro-argument is greatly relativised by *psychische Störung* just describing in another way dangerousness, independently from scientific medical categories and without any identifiable minimum-requirements. Since dangerousness is normally assessed prior to *psychische Störung*, the latter is usually without effects on the outcome of the decision to detain an offender. *Psychische Störung* cannot be called "a true mental disorder", if one interprets Art. 5 ECHR narrowly. Of course, it is possible that individual offenders with "*psychische Störung*" have also what can be called an "unsound mind" in a narrowly interpreted Art. 5 ECHR. But for retrospectively ordered or prolonged preventive detention in general to fit under lit. e), it would have been better if the German law required scientific acknowledged mental conditions, with concrete and high minimum-standards that differ from an alternative description of dangerousness.

The other big pro-argument is that the required level of dangerousness is very high. Heavy violent and sexual offences can have grave impacts on victims. The danger of such crimes presumably infringes the security-feeling of the general public. Preventive detention constitutes a safer frame of therapy for offenders than freedom. The security-feeling of the general public probably gets more protected with prison walls than state-of-the-art reintegration methods. Hence, preventive detention protects the important legally protected rights of the potential victims and the legitimate value of the general public's security-feeling in a secure way. Also, a narrowly interpreted lit. e) must enable to protect these values. This argument about safety is relativised with the mathematically inevitable high number of false positives in preventive detention. Even in 2017, after the strong reduction to 41 detainees in retrospective or prolonged preventive detention, taking a possible rate of 85% false positives in ordinary preventive detention as base,[429] still many detainees would not commit heavy crimes in freedom.

Notwithstanding how disgusted the general public might be by certain types of crimes, the strictest form of retrospective ordered or prolonged preventive detention has only potential to reduce such crimes, but never to fully erase them. Those types of crimes will always be committed by not-yet-convicted offenders. Sexually motivated murders (against children and by released offenders) were an important part of the debate initiating the expansion of preventive detention since 1998. Since 1987, sexual murders and rapes resulting in death are declining; in the 21 years from 1999 to 2019 the total number of sexual abuses of children resulting in death was 21, with the earliest recorded year 1999 counting 5 as the highest number in this period.[430] Since, prior to 1998, the society was able to endure more of those

[427] Art. 316f § 2 cl. 2 Introductory Act to the Criminal Code, *supra* note 76, Art. 1 § 1 nr. 1 Therapy Detention Act, *supra* note 307.
[428] Art. 316f § 2 cl. 2 Introductory Act to the Criminal Code, *supra* note 76, Art. 1 § 1 nr. 1 Therapy Detention Act, *supra* note 307.
[429] *See* for the numbers of detainees *Ilnseher v. Germany* [GC], *supra* note 121, § 91. *See* for the possible rate of false positives *supra* note 156.
[430] Bundeskriminalamt (German Federal Criminal Office), *Polizeiliche Kriminalstatistik. Grundtabelle – ohne Tartortverteilung ab 1987. 4-stelliger Straftatenschlüssel. V1.0 erstellt am: 04.02.2020* (Police crime statistics. Basic table - without distribution of places of crimes from 1987. 4-digit crime key. V1.0 created on: 04.02.2020), rows 82-114, 148-180, 518-536, 847-867. Available on: https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/PolizeilicheKriminalstatistik/2019/Zeitreihen/Faelle/ZR-F-01-T01-Faelle_excel2.xlsx?__blob=publicationFile&v=2. Increases 1991 and 1993 are probably explainable by the inclusion of Berlin and the East German *Länder*.

crimes without the instruments of retrospectively prolonged or ordered preventive detention, it seems questionable whether these forms of preventive detention infringing human rights the most are necessary.

A pro or contra argument could be, that just 41 detainees are still affected.[431] One could say that just 41 infringements of freedom are not so grave compared to the benefits to justify and enable generally in Germany guilt-adequate sentences and protect the general public and its security-feeling. But human rights treaties are only worth something if no individual is sacrificed for the benefit of the general public. Thus, the low number of humans treated inhumanly can never be an argument. Germany has no constraining financial problems. For example, in the first half-year 2019 the surplus was 45,3 billion Euro.[432] Hence, Germany is able to pay police observing this 41 allegedly maximal dangerous individuals.

The most important argument is the entire history of the introduction of preventive detention based on *psychische Störung*. At the end of the nineteenth century, von Liszt proposed to name not guilt adequate sentences *just differently*.[433] It became common understanding in the German law tradition that preventive detention is purely preventive, but till 1969 this preventive detention was executed in the "*Zuchthaus*", the former most severe version of German prisons.[434] In 1975, the 10-years maximum requirement for preventive detention was introduced inter alia to make judges less reluctant to order preventive detention perceived as life-imprisonment.[435] Then in times of declining heavy violent and sexual offences, excessive media coverage of individual cases like Dutroux and growing public pressure were big factors to introduce many laws abolishing the 10-years maximum duration and expanding the ordering possibilities from 1998 on.[436] In 2004, under pressure in face of increasing forms of preventive detention with questionable relationship to the prohibition on retroactivity of penalties, the Constitutional Court began to demand a stronger distinction from prison-sentences and an increasing therapeutic character of preventive detention.[437] In 2009, the expansion of preventive detention was halted by the ECtHR in *M. v. Germany* explaining that preventive detention is essentially executed like prison-sentences. Some detainees were released and the conditions of preventive detention got more therapy and reintegration orientated, but the legislator and Constitutional Court also searched for a way to keep very dangerous offenders detained, albeit prohibitions of retrospective worsening. The only possibility they saw, was Art. 5 § 1 cl. 2 lit. e) ECHR.[438] So they integrated the translation of the ECtHR's criterion "true mental disorder" as *psychische Störung* into the law. *Psychische Störung* is not really defined or limited for instance by medical definitions. Important is just that the offender's mental condition is somehow producing danger and that the ECtHR accepts it as "true mental disorder". In this process, the German legislator and Constitutional Court refer repeatedly to the ECtHR judgements regarding "true mental

[431] *See supra* note 429.
[432] Manager Magazin "Rezession droht - doch Deutschland schwimmt in Geld" (Recession looms - but Germany is swimming in money), 27.8.2019. Available on: https://www.manager-magazin.de/politik/deutschland/deutschland-haushaltsueberschuss-von-mehr-als-45-milliarden-euro-a-1283807.html.
[433] *See supra* chapter 2.
[434] Drenkhahn, "Incapacitation or Treatment Intervention?", *supra* note 119.
[435] BVerfGE 109, 133, §§ 6, 14.
[436] See *supra* chapter 2.
[437] BVerfGE 109, 133 §§ 126 f., 89 f., 93.
[438] Bundestagsdrucksache 17/3403 (Bundestag printed paper 17/3403), pp. 53 f; BVerfGE 128, 326 § 143.

disorder"[439] and those judgements all go back to the *Winterwerp*-case that introduced the necessity of "a true mental disorder in § 39. In § 37 this *Winterwerp*-case reads:

> The Convention does not state what is to be understood by the words "persons of unsound mind". This term is not one that can be given a definitive interpretation: as was pointed out by the Commission, the Government and the applicant, it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread.

It would need a high degree of interpretation art to understand *Winterwerp* in a way that this judgement endorses the above described history of continued retrospectively ordered or prolonged preventive detention or, expressed differently, that a state, instead of science, invents a category of mental illness in order to be able to show "greater understanding of the problems of mental patients", who were not treated as mentally ill offenders before, but very similar to prisoners, and solves their problems by detaining them.

It is true that the Convention and its interpretation evolve over time with scientific and societal progress. But normally that means a higher protection of rights, not lower. It is probable that the society changed from accepting widely criminological findings resulting in less severe penalties in the sixties and seventies to a society that is highly afraid of certain possible imagined types of offenders, after big media coverage of single extreme cases. Although the number of sexual murders against children went down, it is understandable how humans get frightened by extensive media coverage of cases like Dutroux. It is also understandable that politicians react to such feelings in the population and try to form laws that enable to detain at least once-caught offenders forever, instead of trying to explain to the population why nobody can erase types of crimes fully and that all predictions of future heavy crimes lead to many false positives. Positively interpreted, the media coverage about cruel crimes raised awareness of the danger for potential victims of offenders who are not classified as mentally ill and therefore cannot be detained possibly forever in psychiatric hospitals according to Art. 63 StGB. There needs to be some kind of solution regarding heavily dangerous offenders and it should not be just releasing them. But the question this thesis tries to answer is not whether the German laws are understandable from a human perspective, but whether they are in line with the ECtHR. If the argumentation was just based on understandability, it would become arbitrary. One can also argue that an offender, who committed one crime aged 19, then got convicted once without the ordering of preventive detention; then five days before he would have been released, a new law, with legislative process in that he was one out of three examples mentioned by a head of prison to prove the need of retrospective preventive detention for young adults, allows that he is preventively detained possibly for life; and then he is still kept in detention after an human rights court ruled that detentions like his are against human rights; then this individual might also understandably doubt whether human rights apply to him. But exactly that happened to Mr. Ilnseher.[440] Hence, understandability of political decisions cannot be the criterion to assess the

[439] Bundestagsdrucksache 17/3403 (Bundestag printed paper 17/3403), pp. 53 f; BVerfGE 128, 326 §§ 151-155, 173; Bundestagsdrucksache 17/9874 (Bundestag printed paper 17/9874), p. 31; German Federal Constitutional Court, 2 BvR 1516/11, *supra* note 415, §§ 36 f.; Bundestagsdrucksache 17/9874 (Bundestag printed paper 17/9874), pp. 31 f.

[440] Bundestagsdrucksache 16/9643 (Bundestag printed paper 16/9643), p. 4 referring to the hearing of Mr. Konopka in Protokoll des Rechtsausschusses der 103. Sitzung in der 16. Wahlperiode, 28.5.2008, p. 8. Available on: http://gesmat.bundesgerichtshof.de/gesetzesmaterialien/16_wp/sichverw_jugendr/wortproto.pdf;

conformability with the ECHR that is a human rights treaty that foremost, should protect the individuals against the state, instead of the general public against individuals. Especially those groups with the weakest public representation of interests, such as convicted violent and sexual offenders, are dependent on human rights.

The understandable change of the public perception of heavily violent and sexual offences, can cause changes of law, like longer sentences or more detention for future crimes, but it is not qualified to circumvent basic human rights like the prohibition to retrospectively impose higher penalties or the limitations on grounds for deprivation of liberty in Art. 5 § 1 ECHR. At least when interpreted narrowly, Art. 5 § 1 cl. 2 lit. e) ECHR is not intended to help to establish such circumventions, at the very least – not in connection with the other flaws of preventive detention in connection with *psychische Störung* described above.

Additionally, there is the following special issue regarding the "procedure prescribed by law" and the "lawful detention" in terms of Art. 5 § 1 ECHR. Until the end of 2011, the German courts had to decide whether detainees in retrospectively ordered or prolonged preventive detention could be continuously detained on the basis of the Constitutional Court's transitional provision allowing continued detention if the offenders are heavily dangerous and suffer from a *psychische Störung*.[441] But the new rules regarding enhanced treatment orientation and better confinement conditions entered into force on 1.6.2013. Consequently, courts, that ordered to maintain offenders in preventive detention, effectively ordered to maintain offenders for this period in conditions that were ruled to be against the Convention and against the constitution. Germany admitted that the detentions were not lawful until the new rules were implemented.[442] The remaining question is whether the detention became completely lawful, after the new rules about its execution came into force. If one affirmed this question, then "lawful" in Art. 5 § 1 ECHR could be interpreted that a domestic court can first order a measure of which it knows that it is executed in violation of the Convention, but this measure becomes lawful as soon as it is eventually executed differently.

One could argue that the courts decisions to keep offenders at least temporarily in conditions that are against the Convention are unlawful decisions. In this case it is questionable whether this unlawful decision becomes lawful with retrospective effect in the moment when the execution of the decision is in line with the ECHR.

Called upon to assess this problem the Grand Chamber just cited *W.P. v Germany* that does not discuss this issue, but just affirms that detention can become lawful when later executed in a suitable institution, and argued that also the compatibility with the prohibition of degrading treatment in the terms of Art. 3 ECHR can change over time.[443] That the execution of a measure can first be against the Convention and later consistent with it is evident. But the normal case is that the domestic court assumes its measure is always executed lawfully. The question the ECtHR failed to answer is whether it is a lawfully ordered detention when the court ordered a confinement *knowing* that it will be first executed against the Convention. If the logic, that the Grand Chamber implicitly affirmed by ignoring the question, was in line with the Convention, then the following conduct would also result in a lawful detention: hypothetically domestic courts of Member States could order to confine prisoners in

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Bundesgerichtshof (German Federal Court of Justice), Judgement of 9.3.2010, file number 1 StR 554/09, NJW (issue 21, 2010), 1539. § 26.

[441] BVerfGE 128, 326, "*Tenor*" (operative part of the ruling) III nr. 2 b).

[442] *See supra* chapter 4 *and supra* note 258.

[443] *Ilnseher v. Germany* [GC], *supra* note 121, §§ 114 f., 140 f.

inhumane circumstances, then the ECtHR could rule that this violates the Convention, then the domestic courts could order continued confinement in inhumane circumstances for dangerous offenders and then after the government would have built more prisons with humane conditions, the confinements enabled by these court orders would finally become lawful in the terms of Art. 5 § 1 ECHR. In my opinion, to accept such a logic in general would make misuse too easily possible. Thus, it would be beneficial to oppose such a logic, at least in general, in order to fulfil the aim of Art. 5 § 1 ECHR the prevention of arbitrary deprivation of liberty.

Unlike the ECtHR, the German government had a real argument regarding this issue, namely that the courts ordered Convention-compatible detention.[444] The government further argued that confinement in a suitable institution was not possible before because preventive detention facilities conforming with the new standards were still under construction.[445] But Germany has plenty of psychiatric hospitals. If these are not suitable institutions for people with *psychischer Störung*, but only for offenders with diminished or repealed criminal liability, then *psychische Störung* can hardly be a "true mental disorder". Otherwise true mental disorders could be divided in disorders suitable and non-suitable for treatment in psychiatric hospitals. Thus, either the German courts ordered execution knowing that it will be against the convention for a certain time, although they could have ordered compatible execution temporarily in psychiatric hospitals or *psychische Störung* is even more unlikely to be a true mental disorder.

In *Glien v. Germany* the ECtHR still criticised that the legal possibilities to execute preventive detention in institutions appropriate for mental health patients were not used while the new preventive detention facilities were still under construction.[446] Against this background and given the severity of continued retrospective ordered or prolonged preventive detention, it is unfortunate that the Grand Chamber ignored the question posed to it whether detention can be still considered as "lawful" and enabled by a "procedure prescribed by law" in the terms of Art. 5 ECHR if a court ordered the detention knowing that it will be temporarily against the Convention.

My assessment is that confinement knowingly ordered to be temporarily executed against the Convention, while different possibilities potentially not violating the Convention exist, is not compatible with a narrow interpretation of "lawful" and does not become "lawful" in the sense of a narrow interpretation after an anticipated change in the conditions.

To conclude, the forms of retrospectively ordered or prolonged preventive detention justified with *psychische Störung* are against the aim of a narrowly interpreted Art. 5 § 1 cl. 2 lit. e) ECHR to prevent all forms of arbitrary deprivation of liberty. Additionally, a narrow interpretation of lawful procedure does not allow to order measures that are temporarily unlawful. Continued retrospectively ordered and prolonged preventive detention violates Art. 5 § 1 ECHR.

5.3.1.2. Art. 7 § 1 cl. 2 ECHR

To be detained possibly for life is undoubtedly more severe than just a prison sentence or preventive detention with a 10-years maximum duration. Hence, the only question remaining is whether the detention as per Art. 316f Introductory Act to the Criminal Code or the

[444] *Ibid*., § 121.
[445] *Ibid*.
[446] *Glien v. Germany*, *supra* note 90, § 104.

Therapy Detention Act constitutes a penalty in the terms of Art. 7 § 1 cl. 2 ECHR. Therefore, I will now apply the Welch-criteria the ECtHR uses to assess this question.[447]

Retrospectively ordered or prolonged preventive detention still has a conviction as precondition in the German law. Thus it "was imposed following conviction for a 'criminal offence'"[448].

Under the domestic law, all forms of preventive detention are still qualified as purely preventive measures. Nevertheless, the history of its invention and execution can be interpreted differently and the German Constitutional Court ruled that it was executed too much like penalties, as explained above.

Regarding the nature and purpose the ECtHR explained that preventive detention is

> extended because of, and with a view to the need to treat a mental disorder… changed to such an extent that it was no longer to be classified as a penalty within the meaning of Article 7[449]

while ordinary preventive detention remained a penalty.[450] But, as showed above, *psychische Störung* is a precondition that likely never made a difference for the outcome of decisions about preventive detention and is executed exactly like ordinary preventive detention. A purely formal precondition should not alter the categorisation as penalty. The purpose of preventive detention with *psychische Störung* as condition can be better described as attempt to justify continuous detention of dangerous offenders, although their detention was against the Convention and constitution.

But maybe the ECtHR's premise, that ordinary preventive detention is still a penalty, is wrong. Maybe preventive detention in general has now the nature of a purely preventive measure.

As argued above, the new legal framework for the execution of preventive detention is capable of facilitating rehabilitation and release as fast as possible and a detention environment that is close enough to life in freedom. I would argue, that this also means that preventive detention can be qualified as preventive measure, instead of penalty in the individual cases in which the detention is actually executed optimally regarding both benchmarks. If an offender is perfectly rehabilitated from the first day in prison on, then his preventive detention is in fact just as long as necessary. Some solution for very dangerous offenders is necessary. It can be a solution, within the minimum standards guaranteed by the ECHR, to confine offenders longer than their guilt indicates, as argued above.[451] But this extension of confinement can only be legitimate as long as absolutely necessary to lower the dangerousness of the offender detained. Then the preventive detention is truly predominately preventive. That over 51.000 prisoners, but under 600 preventive detainees are confined,[452] shows that preventive detention has a high threshold. Preventive detention in connection with *psychische Störung* demands an even higher level of dangerousness.[453] This high level was a common reason, unlike *psychische Störung*, to end retrospectively ordered or prolonged

[447] *See supra* notes 272 f.
[448] *Ilnseher v. Germany* [GC], *supra* note 121, § 215.
[449] *Ibid*., § 213; *cf*. also *Bergmann v. Germany*, *supra* note 121, § 182; *Becht v. Germany* [Application nr. 79457/13, judgement of 6 July 2017], § 44).
[450] *Ilnseher v. Germany* [GC], *supra* note 121, §§ 213, 228; *Bergmann v. Germany*, *supra* note 121, § 181.
[451] *See supra* chapter 3.2.1.3.
[452] *Ilnseher v. Germany* [GC], *supra* note 121, § 91.
[453] *See supra* notes 310 f.

preventive detention.[454] So preventive detention is not arbitrary under the premise that one accepts the prediction methods and it can be a preventive measure, instead of a penalty. But, if a single day of confinement is wasted without reintegration measures, then every day that the offender needs to stay longer in confinement than guilt-adequate, is arbitrary deprivation of freedom under preventive aspects and therefore predominately a penalty. Art. 7 ECHR serves to protect from arbitrary punishment.[455] The confinement is arbitrary when it is claimed to serve only a preventive cause, but the confinement is not fully necessary for prevention because not everything for reintegration and therefore prevention is done. Of course, in reality, it is impossible to fulfil the just posed requirements of using every day for reintegration, but there must be a concept in force, that facilitates those requirements and gets credibly executed.

If the ECHR allowed to alter retrospectively the classification as penalty via adding some prerequisites and bettering execution, then full arbitrariness would arise. Then Convention states would be allowed to first confine offenders without Convention-compatible reasons under bad circumstances and wait to find better reasons and to improve the circumstances to make the confinement compatible. This would constitute an easy circumvention of *nulla poena sine lege*. According to Art. 15 ECHR, no derogation of Art. 7 ECHR is allowed "[i]n time of war or other public emergency threatening the life of the nation". It seems inconsistent to allow instead a circumvention of Art. 7, for example, as in the case of continued retrospectively ordered or prolonged preventive detention, just for the reasons to improve the security-feeling of the population and to get a small gain in security.

Hence, I conclude that what determines the penalty character of individual preventive detentions is whether everything was done to reintegrate from the first day of confinement on and whether the purely preventive part of the confinement was executed in a non-punitive way.

This, as a rule, will not alter the punitive nature of preventive detention in connection with *psychische Störung* that is typically used for old cases in that Germany wants to keep offenders detained. Thus the offenders were usually already long confined before the German reforms of preventive detention changed the legal framework towards therapy and reintegration. The law makes it theoretically possible that an offender committed his crimes before the 1.6.2013, after this date, gets into a prison that does everything for his reintegration and afterwards preventive detention is ordered retrospectively and executed perfectly. In this case, preventive detention in connection with *psychische Störung* would not have a punitive nature. But this scenario is highly unlikely because preventive detention against such an offender would be typically ordered or reserved in the judgement. Apart from this theoretical exception, preventive detention in connection with *psychische Störung* still has a punitive nature.

For the next Welch-criterion, namely the procedure and implementation, it is noteworthy that the criminal courts decide over preventive detention and the civil courts over therapy detention, the latter being now unimportant in reality.[456] However, the only arguments the Grand Chamber presented on this Welch-criterion were that criminal courts are "particularly experienced"[457] and that criminal and civil courts are "courts with ordinary

[454] *See supra* notes 406-408.
[455] *S.W. v. the United Kingdom* (Application nr. 20166/92, judgement of 22 November 1995, published in Series A nr. 335-B), § 34; *Del Río Prada v. Spain* [GC], *supra* note 97, § 153.
[456] *Ilnseher v. Germany* [GC], *supra* note 121, §§ 229 f.; *see supra* notes 376 f.
[457] *Ilnseher v. Germany* [GC], *supra* note 121, § 331.

jurisdiction"[458]. This indicates that the Grand Chamber does not weigh this Welch-criterion as important. However, the criterion predominately speaks for a penal character of preventive detention.

The last Welch-criterion is severity. Preventive detention is arguably the most severe measure in Germany, as outlined above.[459] When it becomes retrospectively ordered or prolonged against the Convention and the constitution, but offenders are just kept detained justified by a high level of dangerousness and the ineffective criterion *psychische Störung*, it is even more severe. On the other hand, preventive detention is now credibly directed towards therapy and reintegration.[460] The conditions might be adequately close to life in freedom.[461] Nevertheless, as established in the last subchapter, it is still an arbitrary deprivation of liberty and hence very severe.

To conclude, apart from theoretical exceptions and one unimportant criterion for the unimportant therapy detention, all Welch-criteria speak for preventive detention in connection with *psychische Störung* to be still a penalty. Hence, it is still a penalty in the terms of Art. 7 ECHR. Thus this form of preventive detention violates Art. 7 § 1 cl. 2 ECHR.

5.3.2. Art. 66b § 1 StGB – new cases

For new cases, the only possibility for retrospectively ordered preventive detention is regulated in Art. 66b § 1 StGB.[462] It is essentially identical to former Art. 66b § 3 StGB.[463] As described more detailed above,[464] if an individual was indeterminately detained according to Art. 63 StGB in a psychiatric hospital because he was not or not fully criminally liable in the sense of Art. 20 f. StGB and had to be released from the psychiatric hospital according to Art. 67d § 6 StGB because his mental condition was not longer as described in Art. 20 f. StGB, Art. 66b § 1 StGB allows to retrospectively order preventive detention under certain conditions. As one condition, the dangerousness is evaluated with an overall assessment of the offender and his acts committed. The minimal difference compared to 2004 is that now supplementary the development of the offender till the decision about the order of preventive detention is taken into account, whereas before it was the development during the execution of the measure in the psychiatric hospital. Before the reforms, the ECtHR rightly declared that this form of preventive detention had no causal connection as demanded for Art. 5 § 1 cl. 2 lit. a) ECHR.[465]

I cannot see any reason, why this should have changed. Especially the possibility that after the indefinite placement in a psychiatric hospital, indefinite preventive detention might follow, will not have been part of any judgement.[466] Hence, Art. 66b § 1 StGB still cannot be justified by Art. 5 § 1 cl. 2 lit. a) ECHR.

One could consider, whether the new concept of mental disorder or the new standard in executing preventive detention makes Art. 66b § 1 StGB now compatible with lit. e). But

[458] *Ibid*.
[459] *See supra* notes 2-4.
[460] *See supra* chapter 5.1.
[461] *See Ibid*.
[462] Meyer-Ladewig, Harrendorf and König, "Art. 5", *supra* note 98, recital 30; Ebner, *supra* note 58, pp. 92-95.
[463] Fischer, *supra* note 291, § 66b, recital 1.
[464] *See supra* chapter 3.2.3.2.
[465] *See supra* note 295.
[466] Peglau, "Dialogue", *supra* note 232, p. 498.

Art. 66b § 1 StGB does not anyhow require a mental disorder. The opposite is the case. It applies for offenders who are not suffering from a mental condition as demanded for Art. 63 StGB. Hence, also Art. 5 § 1 cl. 2 lit. e) ECHR cannot justify preventive detention ordered as per Art. 66b § 1 StGB. Consequently, it violates Art. 5 § 1 ECHR.

Regarding Art. 7 § 1 cl. 2 ECHR, the Court only sees preventive detention that is ordered "because of, and with a view to the need to treat a mental disorder, which [is] a new precondition"[467] as no penalty in the terms of Art. 7 § 1 ECHR. This is clearly not foreseen in Art. 66b § 1 StGB. Hence, Art. 66b § 1 StGB constitutes a penalty in the terms of Art. 7 § 1 cl. 2 ECHR according to the ECtHR's case-law.

Nonetheless, the application of the line of reasoning developed in the last subchapter could lead to the conclusion that Art. 66 b § 1 StGB can be purely preventive and therefore of non-punitive nature in individual cases. The confinement in a psychiatric hospital as per Art. 63 StGB is not dependent on guilt, but only serves to cure mental illnesses that cause dangerousness. It is plausible that a form of dangerousness persists after the mental illness is cured. If from the first day in hospital to the last day in preventive detention everything is done to reintegrate the offender as fast as possible, one could classify this confinement as purely preventive and therefore non-punitive. But the Welch-criteria "procedure and implementation" as well as "severity" still argue for a classification as penalty. On the other hand, the detention as per Art. 66b § 1 StGB does not necessarily follow a conviction, as the prior confinement in a psychiatric hospital can be ordered for offenders without criminal liability. Regarding such offenders, no guilt is established in the judgement and therefore they are not convicted.

One can probably decide one way or the other regarding the classification as penalty. However, in case of doubt, human right treaties should work for individual humans. For the offenders concerned, it will feel like a penalty to be confined with ordinary preventive detainees who are convicted criminals. Thus, also the preventive detention as per Art. 66b § 1 StGB should constitute a penalty in the terms of Art. 7 § 1 ECHR.

Therefore, this form of preventive detention violates Art. 7 § 1 cl. 2 ECHR when the triggering offence was committed before the possibility to order preventive detention this way had existed. Art. 66b § 1 StGB was introduced into the law on 29.7.2004. Hence, for offences committed subsequently, it is not a heavier penalty than applicable at the time of the offence.

However, Art. 66 § 1 StGB always violates at least Art. 5 § 1 ECHR.

6. CONCLUSIONS

Every society needs to decide what to do with heavily dangerous offenders. In this thesis, the German preventive detention system was used as an example to illustrate how problematic the solution is to keep allegedly particularly dangerous criminals confined longer than other offenders. From a human rights perspective, it is very problematic to detain convicted offenders longer, independently from their guilt in the vague hope to increase the security of the general public.

Nonetheless, allegedly dangerous offenders need to be handled in some way. It is not necessarily a better solution to imprison all offenders including those deemed as not

[467] *Ilnseher v. Germany* [GC], *supra* note 121, § 213.

dangerous longer independent from their guilt, than to have short prison-sentences limited by guilt and to detain the offenders deemed most dangerous longer. As shown above,[468] the principle of guilt-adequate sentences generally ensures much less long prion-terms in Germany than in most comparable other European states.

However, from a criminological and human rights perspective it would be the best to use short guilt-adequate prison-sentences and to reintegrate offenders deemed dangerous without confining them after their prison-terms. But the ECHR constitutes just a European minimum standard for human rights. As desirable as it would be that the States Parties use the most human rights-friendly option to solve the problem of allegedly particularly dangerous criminals, they still have a margin of appreciation under the Convention. The security-feeling of the general public is easier to protect with measures that include confinement for dangerous offenders than with prevention measures in freedom. Although this feeling might be irrational, it is important for not fully rational societies which have to accept the state monopoly of violence. Also, it is very probable that some crimes with grave consequences for the victims can be prevented if the confinement of the most dangerous offenders does not automatically end after their guilt-adequate prison-sentence. When taking these considerations into account, also solutions for the problem of heavily dangerous offenders lie in the states' margin of appreciation, although they are not optimal from a human rights perspective. At least this holds true as long as the common human rights minimum standards in Europe still allow for some confinement-based forms of prevention.

Hence, a system that has very short prison-sentences in general and only detains a small number of the most dangerous offenders longer can still lie in the states' margin of appreciation under the Convention. Nevertheless, such a system is so problematic that it can only be in accordance with the ECHR if the inner shaping is in accordance with very strict human rights standards.

These standards must include that from the first day in prison on, the state does everything to reintegrate the offenders. Otherwise the state's decision not to do everything makes the confinement longer than necessary and therefore not purely preventive anymore, but also punitive. If in the case of unnecessary long confinement, prevention is the only justification under national law or the Convention. Any confinement becomes arbitrary when it is unnecessary long for prevention purposes. Since the limited prediction accuracy for future heavy crimes produces so many false positives, this very infringing form of confinement is always on the edge to arbitrariness. Therefore, it needs to be scrupulously and regularly verified.

Such an infringing confinement should always be clearly in line with the basic human right *nulla poena sine lege*, because for the detainees it feels like punishment regardless of sophisticated theoretical justifications. A society must be able to decide prior to crimes about the handling of dangerous offenders and cannot expect to handle them according to the societies fluctuating trends in perception of crimes.

It is also imperative that after the prison-sentence inter alia compensating for guilt the subsequent confinement, in that a special sacrifice for the general public is inflicted on the offenders without their guilt, the circumstances of living are as good as possible. Otherwise the confinement is unproportional.

[468] *See supra* chapter 3.2.1.3. and Appendix 1.

I strongly welcome the ECtHR playing the most important role in halting the expansion of preventive detention and in facilitating its change from a measure with very little difference to ordinary punishment to a measure that evolves towards actual prevention, as described above. Even better would have been if the ECtHR followed through with pushing Germany to a truly preventive – preventive detention. The Court accepted the non-decisive criterion *psychische Störung* to alter the entire characterisation of the most human rights unfriendly forms of preventive detention. Its newer judgements are also strangely uncritical towards German declarations about the new quality of treatment in preventive detention and they contain contradictive claims. This suggests the assumption that the ECtHR made political decisions.

The German Constitutional Court likes to claim that it is in a dialogue with Strasbourg. That is certainly a good idea when the human rights of different individuals are balanced, for instance, in parental custody cases. But for preventive detention the rights of individuals are balanced with the rights of the general public. Human rights treaties should protect predominately individuals. Hence, it would have been preferable if the dialogue would have been more unidirectional; more the ECtHR explaining Germany the importance of individual rights and less Germany explaining Strasbourg how to circumvent human rights guarantees in order to reach more security-feeling.

From a political point of view, it is understandable that the ECtHR did not want to be too critical with Germany. Germany strongly changed preventive detention, invested a lot of money and at least found plausible arguments to be in line with the ECHR. In contrast, other Member States provoke a lot more judgements and seem much more reluctant with following ECtHR judgements such as Turkey or Russia, that even implemented a law *expressis verbis* to be able to stop the implementation of international judgements.[469] But strategic considerations should have implied the opposite to the Court. Now it will have much more difficulties not to be overly tolerant with other countries arguing that allegedly dangerous individuals need to be confined. It is understandable that the Court did not want to alienate that part of the public for which retribution or security from a group of offenders perceived as different and dangerous are important. But the imagination of a group that consists out of people who are just unchangeably different, has always been a typical pattern to restrict human rights. Although most members of the public the public might think they could never be deemed as heavily dangerous violent or sexual offender with an abnormal or crazy mind, human rights must also protect people in such situations. In fact, especially groups with the weakest public representation of interest depend on human rights. Hence, it would have been better if the ECtHR had tried not to alienate the part of that society that highly values human rights protection including groups of humans perceived as most different and dangerous. A human rights court should protect the most vulnerable parts of society. The ECtHR did not do everything to protect the many false positives in forms of preventive detention that were ruled to be against the Convention or against the German constitution.

[469] European Court of Human Rights, *Analysis of statistics 2019*, January 2020, pp. 4, f., 8, 12 f. Available on: https://www.echr.coe.int/Documents/Stats_analysis_2019_ENG.pdf; Open Society Justice Initiative, *Briefing Paper. Summary of ECtHR Judgments Presented to the Committee of Ministers*, November 2015, pp. 10-13, 15-17, 23-27. Available on: https://www.justiceinitiative.org/uploads/6015c5b3-2f0d-4288-9a34-4cbfaf13030f/briefing-summary-echr-judgment-com-20151120.pdf; Nils Muižnieks, Thomas Hammarberg and Álvaro Gil-Robles, "As long as the judicial system of the Russian Federation does not become more independent, doubts about its effectiveness remain" published in *Kommersant* 25.2.2016. Available on: https://www.coe.int/en/web/commissioner/-/as-long-as-the-judicial-system-of-the-russian-federation-does-not-become-more-independent-doubts-about-its-effectiveness-remain.

The likelihood that German preventive detention and its execution becomes fully preventive and in line with the ECHR would have been higher if the ECtHR had not accepted very questionable forms of preventive detention so easily, but instead kept the pressure high on Germany to fulfil the ECHR's human rights standards. It is possible that such a strict scrutiny would also have accelerated the process in Europe to a minimum standard where the right to freedom is respected regardless of perceived danger.

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APPENDIX 1: LENGTH OF INCARCERATION IN GERMANY COMPARED TO ENGLAND AND WALES

1. PRISONERS IN GERMANY ORDERED BY LENGTH OF THE PENALTY

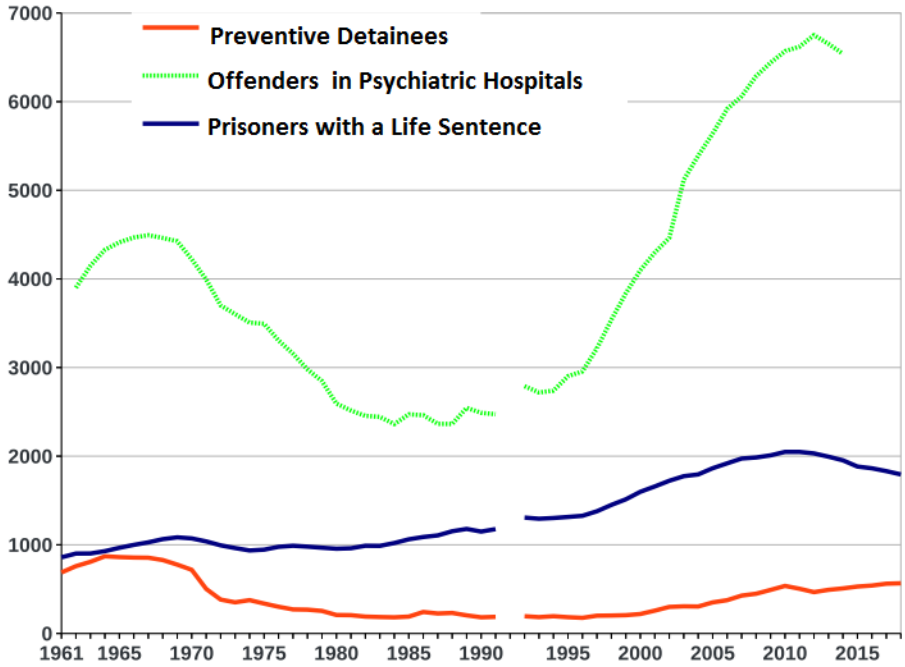
Prisoners by length of inprisonment in Germany until 2018 (translation)					
Number of prisoners in Germany according to expected duration of execution of the sentence from 2007 to 2018 (cut-off date in each case 31.3.)					
	under 3 months	3 months - 1 year	more than 1 year - 5years	more than 5 years - 15 years	lifelong including preventive detainees
2007	6.695	20.462	28.951	6.192	2.400
2008	6.193	19.597	28.006	6.119	2.433
2009	6.294	19.775	27.409	5.900	2.500
2010	6.238	19.803	26.564	5.504	2.584
2011	6.165	19.876	26.273	5.201	2.552
2012	5.852	19.180	25.680	4.864	2.497
2013	5.716	18.835	25.065	4.539	2.486
2014	5.854	18.345	23.583	4.272	2.461
2015	5.971	17.194	22.729	4.106	2.412
2016	6.222	16.799	21.594	3.840	2.403
2017	6.072	17.627	21.880	3.672	2.392
2018	5.657	17.232	21.971	3.737	2.360

[470]

[470] Source: Statista, *Strafgefangene nach Vollzugdauer in Deutschland bis 2018* (number of prisoners in order of duration of execution of the sentence in Germany until 2018), published on 14.1.2020. Available on: https://de.statista.com/statistik/daten/studie/75829/umfrage/strafgefangene-nach-vollzugsdauer-in-deutschland/.

Indeterminate custody in Germany including psychiatric hospital

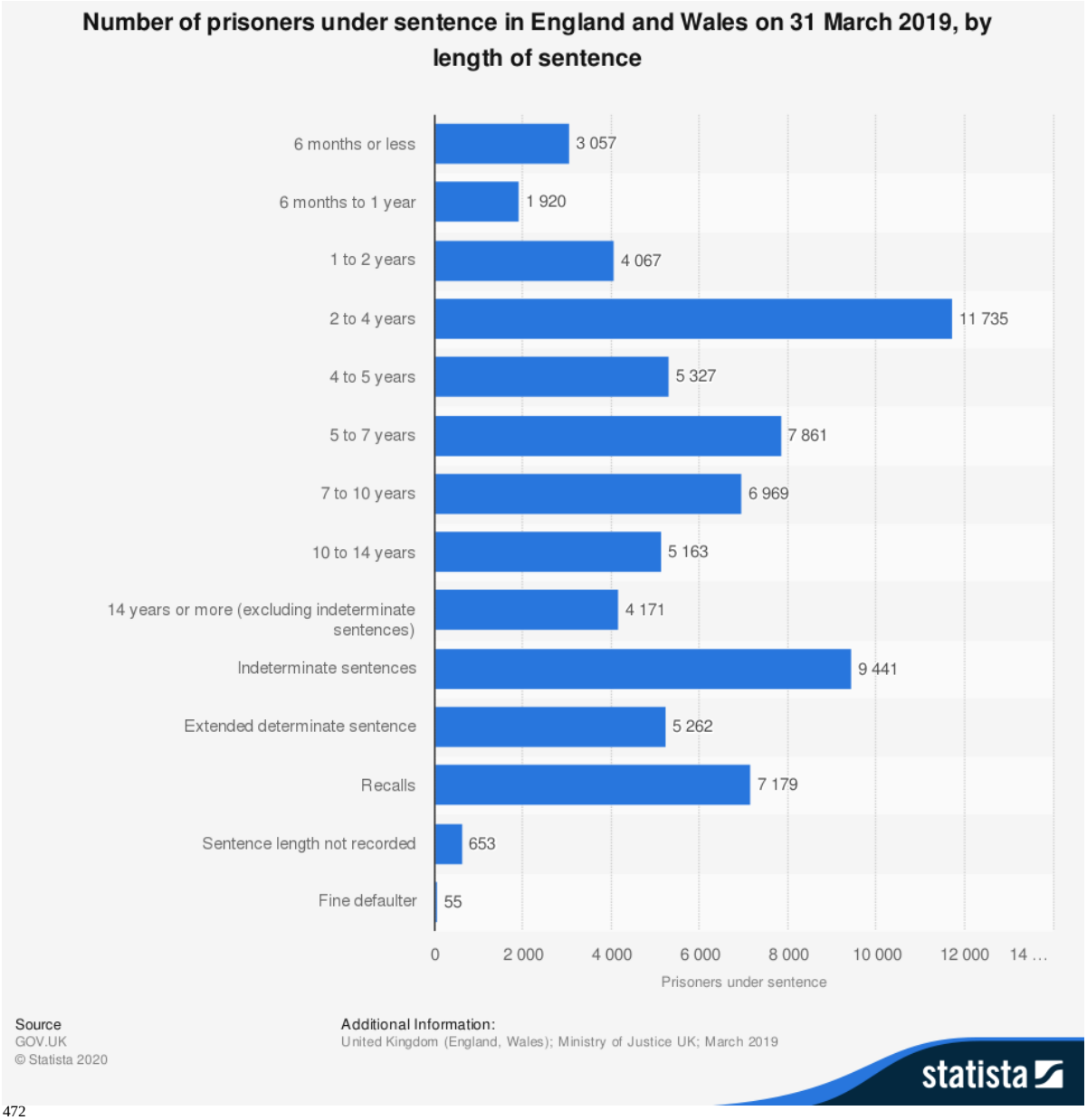
Illustration 2: Development of occupancy figures for preventive detention, placement in psychiatric hospitals and life imprisonment according to the statistics of the execution of penalties and measures of betterment and prevention (1961-2018) (translation)



Since the beginning of the nineties also East German numbers are included.[471]

[471] Dessecker and Leuschner, *empirical study*, *supra* note 145, p. 7.

2. IN DETAIL COMPARISON TO ENGLAND AND WALES



[472]

Germany has 83 million inhabitants. England and Wales have about 59 million inhabitants.

2.1. Long sentences

Comparing the total of prisoners with long sentences (over 5 years), excluding life sentences: Germany had 3737 in 2018 and England and Wales had 7.861+6.969+5.163+4.171=24.164 in 2019.
Germany: 4,5 long time prisoners/100.000 Inhabitants
England and Wales: 41,0 long time prisoners/100.000 inhabitants.
This does not even take into account the extended determinate sentences that are probably mostly also above 5 years. Since 2005 England and Wales have additionally longer prison-sentences for prisoners that are deemed

[472] Source: Statista, *Number of prisoners under sentence in England and Wales on 31 March 2019, by length of sentence*, published on 24.3.2020. Available on: https://www.statista.com/statistics/283478/prisoners-in-england-and-wales-by-sentence-lengths/.

dangerous ("Extended Sentence for Public Protection" till 2012), since 2012 "Extended Determinate Sentence".[473]

2.2. Indeterminate sentences

England and Wales have also much more indeterminate sentences.

In Germany 2360 lifelong prisoners and preventive detainees equals 2,8 indeterminate sentences/100.000 inhabitants.

In England and Wales, it is 16,0 indeterminate sentences/100.000 inhabitants.

The differences cannot be explained with Germany detaining more offenders in psychiatric hospitals.

About 6600 offenders in psychiatric hospitals (*see* above "Illustration 2") equals 8,0/100.000 inhabitants in Germany. Offenders with diminished or no criminal liability in combination with dangerousness have to be placed in a psychiatric hospital.[474]

In England and Wales 4821 restricted patients are detained in hospitals[475] equals 8,1/100.000 inhabitants, in 2018. That mental-ill offenders are placed in a hospital, instead of prisons is optional in England and Wales.[476]

[473] Prison Reform Trust Advice and Information Service. *Extended Sentences*. Available on: http://www.prisonreformtrust.org.uk/Portals/0/Extended%20sentences%20information%20sheet.pdf.
[474] Art. 63 StGB.
[475] Ministry of Justice United Kingdom. *Restricted Patients 2018 England and Wales*, p. 1 Available on: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/796926/restricted-patients-statistical-bulletin-2018.pdf.
[476] *Ibid*., p. 2.