PUBLIC LAW

Preventive Detention of Dangerous Offenders Re-examined: A Comment on two decisions of the German Federal Constitutional Court (BVerfG – 2 BvR 2029/01 of 5 February 2004 and BVerfG – 2 BvR 834/02 – 2 BvR 1588/02 of 10 February 2004) and the Federal Draft Bill on Preventive Detention of 9 March 2004

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A.

Preventive detention is, together with life imprisonment, the harshest sanction in German criminal law. In the form of a "measure for improvement and security"[1] of indeterminate duration, preventive detention potentially may be enforced until the death of the offender. Such a measure may be imposed together with a term of imprisonment on offenders regarded as dangerous[2] and implemented after the fixed term of imprisonment has been served.[3] The history of this provision goes back to a Nazi law against habitual criminals that was enacted in 1933 and retained after the end of the Second World War. In the context of the debate about the new criminal laws in the 1960s preventive detention was severely criticised. The result was that in 1969 both the formal and material requirements for the imposition of preventive detention were made more restrictive. This led, in turn, to it being imposed far less frequently. While in the 1960s more than 200 people were sentenced to preventive detention annually, by the early 1990s this figure was fewer than 40 a year.[4] There was an equivalent reduction of the number of people in prison on preventive deten-

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[1] A "Maßregel der Besserung und Sicherung"; *see* § 61 StGB.

[2] For the circumstances under which this can be done, see § 66 StGB.

[3] § 67 of the Penal Code.

[4] The figure was 31 in 1990, *see* BUNDESAMT FÜR STATISTIK (Wiesbaden, Strafverfolgungsstatistik 1990).

https://doi.org/10.1017/S207183220001275X Published online by Cambridge University Press

tion on a given day, from around 1500 at the beginning of the 1960s to fewer than 200 in the 1980s, that is, about 0.3 per cent of the total prison population.

In recent years, however, and particularly since the enactment of the Law for the Prevention of Sexual Offences and Other Dangerous Criminal Acts of 26 January 1998, the annual number of sentences of preventive detention has increased again, to 74 in 2001. The number of persons serving this sentence on a given day has also increased gradually, to 230 on 31 March 2003. The introduction of the 1998 Law must be seen against the background of a number of very serious, widely publicised sexual offences in Germany and the horrific case of Dutroux in Belgium, which caused a public outcry across Europe.

In these circumstances it was possible for Parliament also to amend § 66(3) of the Penal Code to allow the imposition of preventive detention even where offenders had no previous convictions.[5] In 2002 a further amendment allowed preventive detention to be ordered for offenders who formally qualified for its imposition when, after conviction, they proved to be dangerous. This applied while the offender was serving a determinate sentence, in instances where the option of subsequently imposing preventive detention had been reserved when the original determinate sentence was passed.[6]

The laws of 1998 and 2002 were introduced under pressure from the opposition by the governing coalition of the Social Democrat and the Green parties. The conservative opposition had wanted to go further and allow for the imposition of preventive detention after an offender had begun serving a determinate sentence, even where no provision had been made for such an option in the original sentence. From 1998 onwards the conservative Federal States such as Bavaria, Baden-Würtemberg, Hesse and Saxony-Anhalt had made several attempts in the *Bundesrat* (Upper House) to introduce a law allowing for subsequent preventive detention in such a form. When all such legislative initiatives were defeated, either in the *Bundesrat* or in the *Bundestag* (Lower House) where the government held a majority, some of the States redefined the problem as one of "police law", a matter within their competence, as the States are responsible for law and order. They filled the alleged "security vacuum" with their own State legislation. This took the form of so-called offender incarceration laws (*Straftäterunterbringungsgesetze*).

[5] *See Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten*, v. 26.1.1998 (BGBl. I S. 160).

[6] *See* § 66a of the Penal Code, v.21.8.2002 (BGBL I S. 3344).

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This political conflict between Federal and State legislatures formed the basis of the debate underlying the second decision under review, that of 10 February 2004. The legal dispute was about whether or not individual States had the competence to legislate on this question. If it was a question of police powers to prevent dangers, as the States claimed (and as the Federal Ministry of Justice and the Federal government somewhat surprisingly agreed in their response to the constitutional objection), then the individual States had the constitutionally guaranteed original power to legislate.[7] If, however, preventive detention was a matter of criminal law, it was a matter of concurrent competence that had to be decided at Federal level.[8] If the Federal legislator had regulated the matter comprehensively by introducing § 66a into the Penal Code (as the applicant to the Federal Constitutional Court in this case claimed) the State legislature had no further legislative competence.[9]

The background to the first decision under review, that of 5 February 2004, was the above-mentioned amendment to the provisions relating to preventive detention in 1998. Prior to 1998 preventive detention that was imposed for the first time was restricted to a maximum of 10 years.[10] In 1998 this absolute maximum was abolished and replaced by the requirement that after 10 years there had to be a particularly careful examination of whether further detention was still justified.[11] At the same time the criteria for release[12] were made more restrictive. Before 1998 it was sufficient to hold that it was justifiable to put the offender to the test, if it was thought likely that he would commit no further offences: this meant that a residual risk of failure could be accepted. Jurisprudence of the courts held that if the offences that the offender was thought likely to commit were relatively petty, it was more justifiable to take this residual risk and release an offender.[13] The 1998 reformulation of the provision repealed the clause about putting the offender to the test and replaced it with a clause dealing with what could be expected of the offender. Release of an offender on licence (and therefore from preventive detention) is now allowed only "if it is to be expected that outside detention the detainee will commit no illegal acts".[14] Here the constitutional question was whether worsening the posi-

[7] *See* article 70 of the *Grundgesetz*.

[8] *See* article 74(1) No.1 of the *Grundgesetz*.

[9] *See* article 72(1) of the *Grundgesetz*.

[10] *See* § 67d(1) of the Penal Code prior to its 1998 amendment.

[11] In terms of § 67d(3) of the Penal Code.

[12] In terms of § 67d(2) of the Penal Code.

[13] For details and citations, see Dünkel *in* NOMOS-KOMMENTAR § 57 Rn 14.

[14] § 67d(2) of the Penal Code.

https://doi.org/10.1017/S207183220001275X Published online by Cambridge University Press

tion of a detainee who was already in prison when the amendment was introduced offended against the explicit constitutional prohibition on retrospective legislation[15] and against the legitimate expectations that a citizen may have of the State (*Vertrauenschutzgedanke*). The question also arose as to whether the legislator was bound on constitutional grounds (in particular by its duty to protect human dignity) to introduce a statutory maximum period for preventive detention.

B.

Both decisions are highly significant. This is not only because they address, in the context of preventive detention, fundamental questions about the competence to legislate and the scope of the prohibition on retrospective legislation, but also because they lay down constitutional prerequisites for the organisation of preventive detention. The decisions thus set limits on the strategies for closing of the so-called "security gaps" that would otherwise lead to ever-expanding use of criminal law and imprisonment on grounds of security.

While in the first case the constitutional objection was ultimately unsuccessful, it nevertheless led to important constitutional clarifications and to the further development of earlier judicial decisions that had recognised the guiding standard of resocialisation that had emerged from the protection of human dignity and the commitment to the welfare state (*Sozialstaatsprinzip*) (see III). In the second decision the constitutional objection was largely upheld (see IV). Noteworthy about this decision was the conclusion of a divided court that, in spite of the unconstitutionality of the legislation passed by individual States, it should remain in force until 30 September 2004, with the result that the specific complainants remain in detention until then. In this way the Federal Constitutional Court sought to give the Federal legislator the opportunity to create a Federal statutory regime that would meet needs of the States. It remains doubtful, however, whether it will be possible to legislate along these lines in a way that will be constitutionally acceptable (see V).

C.

The decision of 5 February 2004 concerned an applicant who claimed that his continued preventive detention under the Penal Code as amended in 1998 was unconstitutional. The applicant was someone who had spent most of his life from the age of 15 onwards in prison, at first for property crimes, subsequently for robbery and causing dangerous bodily harm, and finally for attempted murder and robbery. He had repeatedly been violent in prison, too and as a result he had been sentenced to

[15] *See* article 103(2) of the *Grundgesetz.*

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further terms of imprisonment. His last sentence in 1986 was to imprisonment for five years to be followed by preventive detention. In terms of the old law, as it stood at the time of his conviction, the appellant should therefore have been released from preventive detention in 2001.

During his detention the applicant's impulsive-aggressive behaviour was conspicuous (i.a. he broke a fellow prisoner's nose following a trivial provocation) and he began to associate with the rightwing extremist skinhead movement. Several psychiatric reports came to the conclusion that the applicant was still dangerous and therefore his further detention was essential.

By way of introduction to its judgment the Federal Constitutional Court noted that preventive detention did not constitute an infringement of the human dignity of the detainee, or cruel, inhuman or degrading punishment, if there was a guarantee that the detainee retained a realistic chance of "again becoming part of free society".[16] As it had done for life imprisonment, the Federal Constitutional Court held that preventive detention is only constitutional if adequate treatment is offered to counteract the detrimental effects of incarceration. The State could use deprivation of liberty to protect itself against dangerous offenders, but had to seek to achieve the resocialization of the person in preventive detention.[17] Preventive detention as currently organised met this standard. The Court based this conclusion on its understanding of prison conditions derived from a general enquiry that it addressed to State ministries of justice and from the evidence it heard from prison practitioners. It found that preventive detention was normatively and practically organised around the idea of resocialization and does not amount to the mere warehousing of detainees. However, the Court was critical of the fact that the State administration of justice did not have uniform statistical material about preventive detention. It required the introduction of a regular, examination that would show clearly that the persons in preventive detention had a realistic possibility, not only legally but also in practice, of achieving liberty again. This should include inquiries into whether detainees had sufficient opportunities for resocialization, in particular, for treatment, therapy or work.

There was no constitutional requirement that the maximum period of preventive detention must be set in advance.[18] The history of the ten year maximum went back

[16] See the early (1977) decision of the Federal Constitutional Court in the leading case on the principles governing life imprisonment, (BVerfGE 45, 187) discussed in detail in DIRK VAN ZYL SMIT, TAKING LIFE IMPRISONMENT SERIOUSLY 145 (2002).

[17] *Leitsatz* 1a: As is customary, the Court spells out the principles (*Leitsätze*) that are to be derived from the decision at the beginning of the judgment.

[18] *Leitsatz* 1b.

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only to the criminal law reform of 1975. The system of repeated examination of whether detainees were ready to be released guaranteed, according to the Court, "the appropriate procedural legal certainty". In addition, it was significant in this regard that the recent amendment of § 67d(3) of the Penal Code allowed the extension of preventive detention beyond ten years only in exceptional cases.

The Federal Constitutional Court kept in mind the limits of its jurisdiction when it emphasised that when evaluating the suitability of the necessity of a penal policy resulting in stricter preventive detention the legislator had a margin of appreciation that was susceptible only to limited judicial scrutiny.

The tension between the right to liberty of the detainee and the security requirements of the wider population had to be resolved, the Court held, by applying a stricter standard of proportionality to the loss of liberty as the period of detention increased in individual cases [19] This was expressed, *inter alia*, in the fact that the relationship between rule and exception in § 67d(2) was reversed in § 67d(3) of the Penal Code in favour of routine release after 10 years. The point of departure of the legislation was that "the danger after 10 years routinely has been disposed of".[20] This prohibited the authorities from simply repeating prognoses of dangerousness that had not been rebutted. Concrete, current indications of continuing dangerousness were required. Any doubt was to be resolved in favour of the detainee. Only in instances where the presumption against continued dangerousness after ten years had been rebutted, could further detention follow. This applied also to those who were repeatedly detained in preventive detention. (In this respect the newly amended provision is milder than its predecessor.[21])

Following some of its earlier decisions,[22] the Federal Constitutional Court emphasised the importance of relaxations of the regime as a requirement for a scientifically based prognosis in respect of the future conduct of a detainee.[23] Since they were required for making the prognoses, the prison authorities could not refuse relaxations without sufficient grounds for doing so. Furthermore, the judgment contained interesting indications on how preventive detention should be organised:

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[19] *Leitsätze* 2a and 2b. In this instance to the doctrine of proportionality as applied to the implementation of sentences of life imprisonment (*see* BVerfGE 70, 297 (311)) is adopted.

[20] See in this regard Streng, FESTSCHRIFT FÜR LAMPE 611, 633 and the further sources cited there.

[21] Cf. § 67d(1) of the Penal Code prior to its amendment.

[22] Cf. BVerfG *NJW* 1998, 1133 (1134); *NStZ* 1998, 373 (374).

[23] On relaxations of prison regimes, *see* D. van Zyl Smit, *Leave of Absence for West German prisoners. Legal Principle and Administrative Practice*, 28 BRITISH JOURNAL OF CRIMINOLOGY 1, 1-18 (1988).

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because it served solely to prevent the individual detainees from committing further crimes, they should be given privileges – in the case of long periods of detention additional privileges – "in order to guarantee a minimum quality of life to detainees without hope".

Particularly explosive was the question of the applicability of the constitutional prohibition of retrospectivity[24] to preventive detention. In this respect the Federal Constitutional Court confirmed, in keeping with its earlier judgments, that this constitutional principle applied only to criminal punishments imposed to expiate guilt and not to measures of improvement and security such as preventive detention.[25] Punishments and preventive measures had different points of departure and objectives:

"Preventive detention, in contrast to punishment does not serve the purpose of expiating a committed crime, but serves to protect the public from the offender."

Notwithstanding their undeniable similarities – on the one hand, punishment in addition to retribution for the offence served preventive purposes, and, on the other hand, measures of preventive detention were limited in terms of § 62 of the Penal Code by an explicit reference to proportionality to the offence[26] – the Federal Constitutional Court found it inappropriate to extend the scope of the absolute prohibition of retrospective punishment to the rules on preventive detention. This argument was supported by analogy with detention on remand and the detention of mentally ill persons under state law, which were both also not subject to the prohibition of retrospectivity.

Finally, the judgment concluded that the overarching ideal of protection of trust, the *Vertrauensschutzgedanke* (a doctrine akin to legitimate expectations in English administrative law), which was deduced from the principle of the *Rechtsstaat,* was not infringed.[27] The punishment-focused prohibition of retrospectivity in Article 103(2) of the *Grundgesetz* did not mean that retrospectivity in other areas is automatically acceptable. The citizen had to be able to rely on the legal order, which was why changes that might undermine this trust required particular justification. The Federal Constitutional Court distinguished between so-called genuine retrospectivity, where the legal results of an act that happened before the passage of new legislation were modified, and so-called spurious retrospectivity, which referred to conduct committed previously but where the legal implications only resulted after the

[24] As contained in article 103(2) of the *Grundgesetz*.

[25] *Leitsatz* 3.

[26] See in this regard Jung, *Was ist Strafe? Ein Essay* 33 (2002).

[27] *Leitsatz* 4.

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new rule has been announced. The removal of the ten-year maximum was a "spurious" form of retrospectivity, which impaired citizens' legitimate expectations less than a "genuinely" retrospective law. Nevertheless, the absolute maximum did give the detainee the expectation of certainly being released at the latest after ten years. This expectation was subject to the statutory provision in § 2(6) of the Penal Code that for decisions relating to preventive measures were governed by the law applicable at the time that they are made.[28] However, this still did not mean that the interest of the legislator automatically had precedence above the legitimate expectation of the detainee that an existing rule, *in casu* the old version of § 67d(1) of the Code, would remain in force. What was required was a weighing of competing interests. In this instance the Federal Constitutional Court decided that public security should take precedence. The "interest in protection of potential victims of potential criminal offences" was stronger, more existential, than the threatened fundamental rights of the potential victim.

The Federal Constitutional Court emphasised that it was not its function.to second-guess the penal policy of removing the maximum period. The assumption that potential victims could be better protected in this way, was not subject to constitutional challenge, as the legislator had acted within its margin of appreciation and in particular had not infringed the *Übermaβverbot*[29].

The decision was unanimous, except for the question of legitimate expectations, which was decided in favour of the State by a majority of six to two. The minority judgment is not available yet.

Broadly speaking we find ourselves in agreement both with the result and with the reasoning of the Court. The importance of the judgment goes far beyond immediate constitutional questions, for the Federal Constitutional Court used the opportunity to explain fundamental principles of punishment and preventive measures, which risk getting lost in the current emphasis on security. Thus, for example, it was made clear that security is best assured not by merely locking away potential offenders in long-term preventive detention, but by consistently providing them with opportunities for resocialization.

The assumption that the programmes currently on offer to persons in preventive detention are oriented to resocialization is based, as the Court itself recognises, on

[28] This provision must be read in contrast with § 2(1) of the same Code, which provides that punishment is governed by the law that was in force at time of the commission of the offence.

[29] The prohibition on the State using excessive power or intervening more widely in the lives of its citizens than it is constitutionally allowed to do.

https://doi.org/10.1017/S207183220001275X Published online by Cambridge University Press

inadequate and unsystematic self-report studies of a few State justice administrations. Ideally, given the negative impact of long periods of incarceration, conditions in preventive detention should be at least of the standard of that in socio-therapeutic institutions. However, one can hardly claim that that is currently the case.[30] Once again it is clear that in spite of the efforts of researchers over many years there are large gaps in empirical knowledge about how preventive detention is implemented in practice. The importance of a critical understanding of the practice of preventive detention is emphasised by the view repeatedly expressed by the Court, also in this judgment, that penal administrations should review their increasingly restrictive practice in respect of relaxations of the regime. This builds on earlier decisions from 1998, which also involved prisoners incarcerated for very long periods (including for life). In these decisions it was emphasised that with the increasing duration of incarceration there was a growing duty to assist the prognostic process by responsibly granting relaxations of the prison regime.[31]

For the rest one can live with the effect of decision on penal policy, in so far as the Federal Constitutional Court made it clear that detention the previously absolute ten year maximum required an effective reversal of proof in respect of continuing dangerousness, that in practice would limit it to a few (possibly really dangerous) individual cases.

D.

The second of the decisions under discussion relates to state-level laws about supplementary preventive detention. The Bavarian Act on the Detention of Highly Dangerous Offenders who are Particularly at Risk of Recidivism of 24 December 2001 and the Act of the State of Saxony-Anhalt on the Detention of Offenders who are Particularly at Risk of Recidivism to Prevent Significant Threats to Public Security and Order of 6 March 2002 both envisage the imposition of preventive detention in instances where the formal requirements for the imposition of such detention[32] were present when the sentence was passed and"on the basis of conditions that set in after the conviction, one can conclude that the person concerned is a present and serious danger to the life, bodily integrity, personal freedom or the sexual

[30] *See* KINZIG, DIE SICHERUNGSVERWAHRUNG AUF DEM PRUFSTAND (1996).

[31] BVerfG *ZfStrVo* 1998, 180; *NStZ* 1998, 373; *NStZ* 1998, 430; *NJW* 1998, 1133; *NStZ-RR* 1998, 121 See, however, also the decisions of the Federal Constitutional Court that exclude relaxations in specific cases: *NStZ* 2002, 202 for a lifer who was not prepared to co-operate in meeting the purpose of imprisonment but who had served 26 years; and BVerfG 2 BvR 116/02 for a person in preventive detention for longer than ten years.

[32] That is, detention in terms of § 66(1)1 and 2 and (2) to (4) of the Penal Code.

https://doi.org/10.1017/S207183220001275X Published online by Cambridge University Press

autonomy of others, in particular because during the implementation of his prison sentence he persistently refuses to cooperate in achieving the objective of the prison sentence (§ 2 of the Prison Act) by rejecting psycho- or social therapy that will avoid recidivism".[33]

In its decision of 5 February 2004 the Federal Constitutional Court found that both these laws infringed Article 74(1) of the *Grundgesetz*. That article, read in conjunction with Articles 70(1) and 72(1), stipulates that criminal law is matter of Federal competence. The Court regarded the State laws as materially criminal law,

"because interpretation, based on the literal wording, the legislative history, the structure and the normative objective of the law, led to the conclusion that criminal law encompassed all rules, including supplementary, repressive or preventive state reactions, that were linked to the criminal act, applied solely to the offender and whose practical justification was also supplied by the initial criminal act".

This wide conception of "criminal law" included all punishments, penalties or preventive measures, such as those adopted for improvement and security, that are envisaged as a reaction to an illegal criminal act. The connection with the criminal law remained also if – as in the case of § 66a of the Penal Code – a decision was only made subsequently about the question of preventive detention, which had been reserved in the judgment. This was clear from § 66a(2) of the Penal Code, which provided that the offender, his offence and his progress in prison be considered simultaneously. In the disputed State legislation the connection to criminal law was made in a similar way, for its scope was restricted to offenders and was linked to specific criminal offences. The Federal Constitutional Court pointed out explicitly in this context that this form of detention, if it were unrelated to the criminal offence (for example, the detention of someone who had not been convicted under the criminal law) would go beyond the detention of mentally ill person in terms of State law and would be unacceptable from the perspective of proportionality:

"Long-term detention of a citizen who was mentally healthy and who had not been convicted, or had not been convicted of a serious criminal offence, in order to lessen the danger that he might commit offences would not be compatible [with the *Grundgesetz*]."

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[33] Article 1(1) of the BayStrUBG. Art1(1) of the UBG LSA is almost identical. In Bavaria a three judge chamber of the court for the implementation of prison sentences can impose such preventive detention for a period which in principle has no maximum, while in Saxony-Anhalt such preventive detention is initially for a period of six months which be may extended by an additional twelve months.

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Equally unacceptable from a constitutional point of view would be detention based on a prognosis that was divorced from the original offence. The Federal Constitutional Court described as an "unsuccessful device" the attempt of the State legislators to characterise what the they were doing as "police law". On the contrary, given the extent of the inroad, the constitutional perspective required that the prognosis referred back to all relevant biographical data, including the criminal history, about a potential detainee.

The appropriate categorization of the material governed by State law was also revealed, according to the Federal Constitutional Court, by the fact that its detailed procedural provisions were similar to those governing preventive detention. When the State legislator sought to close a gap in the Federal legislation, the competence of the State to do so had to be evaluated on the same basis as the legislation that allegedly had gaps in it; in this instance material that belongs to criminal law. The unconstitutionality of both State laws followed directly from the fact that the Federal legislator had sought to regulate, and had in fact regulated, preventive detention comprehensively, in the sense of Article 72(1) of the *Grundgesetz*, so that the States were left with no competence to make law in this area.

Astonishingly, the unconstitutionality of the two laws did not lead to their being declared null and void. On the contrary, the Federal Constitutional Court announced that they would remain in force until 30 September 2004. This was possible if immediate nullification would remove vitally important protection, which was necessary for the common good. A weighing of the fundamental rights concerned against this led to the conclusion that limitation of such rights should be accepted for a transitional period. As there were several expert opinions confirming that the detainees who stood to be released were highly dangerous, the weighing up process had resulted in the protection of the common good being given precedence. In this regard the Federal Constitutional Court saw the material result of both acts as legitimate in extreme individual cases, but it did not express a view on how, given the limited legislative room for manoeuvre, they could be cast in a constitutionally unobjectionable form. The Court simply noted that if the Federal legislator were to develop a law that allowed for the subsequent imposition of preventive detention of offenders who were still in prison, such a law would not, "if appropriately narrowly formulated, be subject *a priori* to a verdict of unconstitutionality".

On the question of competence the Federal Constitutional Court was unanimous, but on the continuation in force of the unconstitutional legislation, it divided five to three. The unanimity on the first issue is not surprising. At the time that these laws were passed commentators had already noted that what was at stake was a political dispute about penal policy between the States concerned and the Federal govern-

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ment in which the States sought to circumvent the powers of the Federal government.[34] In so far further comment on the justifications advanced by the Federal Constitutional Court and outlined above would be superfluous.

More problematic is the second part of the decision in which the predominant interest of the public good was used to justify the laws remaining temporarily in force and the continuing detention of the two applicants in Bavaria and Saxony-Anhalt respectively. It is worth paying close attention also to the minority judgment of judges Broß, Osterloh and Gerhardt in this regard. They saw a constitutional requirement for the laws to remain in force only if the legislature had contravened the *Untermaßverbot*[35] by failing to act to protect life and limb, personal freedom etc., or when it had adopted a completely inappropriate arrangement. In the current case there could be no talk of that, for, if someone was released from detention, they were subject to close supervision (*Führungsaufsicht*),[36] an intensive form of intervention to control and assist them. Failure to follow the conditions of intensive supervision could be punished at criminal law.[37] Furthermore, the conditions could be combined with measures to reduce danger in terms of general police law (for example, covert or overt observation). In some circumstances a person could also be detained under State laws governing the mentally ill, which remained in force without any additional restriction.

The various networks of social control made it clear that on release of such persons society would not be defenceless. In addition, the minority judgment pointed out that the nullification of the State laws meant that the legal position as it existed before they were passed was reintroduced. This reflected the will of the Federal legislature, for, when it expanded preventive detention in 1998 and 2002, it had expressed its opposition to further restrictions of the kind that the State laws had sought to introduce. This was clear from the majority finding that the Federal legislature had sought to regulate, and had regulated, preventive detention comprehensively and finally. When the Federation had exercised its legislative discretion "finally", it was not the function of the Federal Constitutional Court to keep the matter open, while the right to liberty of the applicants was being infringed. That the legislature erroneously had adopted as its point of departure that the States had legislative competence changed nothing, for the Federal government had, when it

[34] Dünkel & Kunkat, *Neue Kriminalpolitik* 16 (2001); Kinzig *NJW* 1455 (2001); Ullenbruch *NZtS* 291 (2001).

[35] The prohibition on the State failing to use its authority in order to protect its citizens.

[36] See § 67d(2) and (3) of the Penal Code.

[37] See § 145a of the Penal Code.

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amended the preventive detention legislation in 1998 and 2002, considered and rejected, on the grounds that they were neither necessary nor constitutionally acceptable, the proposals of the States. If the Constitutional Court resisted this decision and substituted its own penal policy, a matter that was within the competence of the legislature alone, it infringed the principle of the division of powers. As a result the judges in the minority came to the conclusion that there was no statutory basis for the further detention of the applicants.

The minority advanced a further argument against the State laws remaining in force, which was derived from the general regulation of the prohibition on retrospectivity in Article 2(1) read with Article 20(3) of the *Grundgesetz*. When a person had served his sentence, further detention imposed in terms of the State laws in connection with the original offence amounted to a genuine form of retrospectivity in respect of conduct that had already been dealt with. Such reconsideration was only allowed and constitutionally possible under the strict conditions set by § 362 of the Criminal Procedure Act.

In our view the minority judgment is more convincing than that of the majority, because it takes into account more fully the many possible forms of supervision through criminal law, police law and general social control that are available, without denying that in this case one was dealing with people who possibly were highly dangerous. There have always been such people and it is not as if society must now capitulate in total helplessness in their wake.

Harsh criticism was also expressed by a former judge of the Federal High Court[38], Foth, who declared that the continuing in force of the State laws in spite of their unconstitutionality was "incomprehensible, even criminal."[39] He continued that the Federal Constitutional Court should order the immediate release of the persons involved; otherwise there would be a case of wrongful detention, which the prosecution service should investigate. In his view an unconstitutional law that denied liberty (in contrast with an unconstitutional tax law) should not remain in force "for even one day". This drastic choice of words from a former judge of a highest court may be surprising. However, it is consistent with the views expressed in the minority judgment. It will be interesting to follow the further course of the matters.

[38] *Bundesgerichtshof,* the highest Court dealing with civil and penal matters.

[39] *Frankfurter Rundschau* of 25 February 2004.

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E.

The Federal legislature has moved quickly to take advantage of the opportunity that the Federal Constitutional Court, wrongly in our view, gave it to introduce a modified version of the State laws that the Court had declared unconstitutional. On 9 March 2004 the Federal Ministry of Justice published a draft bill that provides for the subsequent preventive detention also of offenders in whose sentences provision is not made for such detention. It proposes to amend § 66b of the Penal Code. §66b (1) is to read as follows:

Where, after a conviction of one of the offences listed in § 66(3)1 [i.e. sexual offences], there are indications before the end of the consequent sentence of imprisonment, that the offender presents a grave danger to the public, the Court can order subsequent preventive detention, if the overall evaluation of the offender, his offences and his development in prison indicates a high probability that he will commit serious offences that would heavily damage the victim psychologically or physically and if the further requirements of § 66(3) are met.

The proposed amendment to § 66b(2) extends the qualifying offences to other violent offences if they are accompanied by a sentence of imprisonment of more than four years. Finally, the new subparagraph (3) allows subsequent preventive detention for those persons who are to be released from a measure that had led to their detention in a psychiatric institution if the conditions that had led to their absence of criminal capacity have fallen away: and also if they have previous convictions that led to a sentence of imprisonment of at least three years or had previously been in preventive detention, and the other conditions of § 66(3) had been met.

Following the extension in late 2003[40] to young adults of the law allowing preventive detention to be imposed subsequently if it that possibility had been reserved in the initial sentence,[41] the new draft bill provides for a similar extension of the new form of preventive detention to them. In terms of the bill young adults[42] serving sentences of more than five years and in some circumstances those who have been confined in psychiatric institutions will also be subject to preventive detention, even if no mention was made of such a possibility in their initial sentences.[43]

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[40] By the law on the law on the alteration of the provisions on criminal offences against sexual integrity of 91 December 2003 (BGBl. I S. 3007); See in this regard Frommel, *Neue Kriminalpolitik* 6 (2004).

[41] *See* § 106(3) of the Juvenile Justice Act (*JGG*).

[42] Offenders under the jurisdiction of the Juvenile Courts, sentenced for offences committed at the age between 18 and 21 years.

[43] *See* § 106(5) and (6) of the Juvenile Justice Act as amended by the proposed bill.

https://doi.org/10.1017/S207183220001275X Published online by Cambridge University Press

The procedure to be followed in terms of a proposed amendment to the Criminal Procedure Act is that the original hearing should be reinstated.[44] A requirement for the imposition of preventive detention is that there must be opinions provided by two outside experts; that is, persons who are not already involved with the treatment of the prisoners or psychiatric detainees concerned.

From the point of view of retrospectivity it is significant that the draft bill will apply to all detainees who were held in terms of State law in Baden-Würtemberg, Bavaria, Lower Saxony, Saxony-Anhalt and Thuringia. It is clear that with the draft bill the legislature is seeking to close all the "security gaps". In the final analysis it is clear that one has to do with the total adoption by the Federation of the State laws that were rejected on grounds of lack of legislative competence.

In our view the draft bill may be criticised in various respects. Most crucially, it is incompatible with the constitutional requirements that the Federal Constitutional Court has set.

The capitulation of the Federal Ministry of Justice to the conservative majority in the *Bundesrat* is symptomatic of the general lack of a clear penal policy on the part of the red-green Federal government.[45] Equally serious is that the Federal government has not used the margin of appreciation that the Federal Constitutional Court left it. Instead of simply transforming the State law into Federal law, it could have thought of alternatives. For one thing one could have built on the Federal Constitutional Court's call for provision for a "narrow exception" and provided narrowly for further preventive detention only for those convicted of intentional killing or rape. Instead of simply locking people away one could also have extended the strict supervision in the community to which the minority judgment refers and qualitatively improved the supervision on offer.

Significant doubts remain about whether the strict constitutional requirements the Federal Constitutional Court set, have been met. In contrast to the existing provisions of § 66a of the Penal Code, which are constitutionally somewhat dubious but still defensible, the proposals in the draft bill clearly infringe the rule against retrospectivity. Such a breach of fundamental principle would be conceivable if it could be shown that there was no other way to prevent concrete, serious danger to the common good. Such a claim is made, but the alternatives of improved infrastructure, treatment, supervision and control within and outside the framework of imprisonment and the implementation of preventive detention measures are not con-

[44] See the new § 275a of the Criminal Procedure Act proposed by the draft bill.

[45] For a general critique, see Dünkel, *Neue Kriminalpolitik* 2 (2003).

https://doi.org/10.1017/S207183220001275X Published online by Cambridge University Press

sidered. This is even worse in respect of the draft proposals for the subsequent imposition of preventive detention on young adults, for, notwithstanding protestations to the contrary, the breadth of these proposals creates an instrument that infringes the principle of proportionality.

Even if the Federal Constitutional Court does not regard the imponderability of prognoses as decisive, their reliability is still of constitutional significance: how sure must a prognosis be to meet the standard of "high probability" of further serious crime being committed? 99%, 95%, 80% or even less? Two aspects of the evidence on probability need to be identified: first, how high the risk of recidivism is and, secondly, the degree of seriousness of the crimes against life, bodily integrity etc. These questions are very hard to answer, as the overall recidivism rates of violent and sexual offenders are particularly low.[46]

These prognostic questions are relevant to the principle of legal certainty (*Bestimmtheitsgrundsatz*) expressed in Article 103(2) of the *Grundgesetz*, for with the new proposals there are three points of proportionality analysis, of which the two negative prognoses are not defined clearly enough. Thus, in the case of a positive prognosis, when this can be justified in the light of security interests of the general population, conditional release of an offender is possible[47] after half or two thirds of the term of imprisonment has been served. In the case of a negative prognosis the full sentence is served, while if the prognosis is particularly negative (In what form? With what degree of probability?) the imposition of a supplementary period of preventive detention will be possible.

Further, the question of whether the law is necessary arises in the context of the general proportionality test. If one could predict with a high degree of certainty the probability that someone would commit very serious crimes in the future, it would be easier to support the law as being necessary.[48] However, it must first be considered whether there was a high probability that less interventionist means of close supervision in the community coupled with further restrictions and police measures such as observation would not give a similar degree of protection to potential victims. In this regard it is significant that the draft bill includes instances where the formal requirements for preventive detention in terms of § 66(3) of the Penal Code were met when sentence was imposed, but where there was no evidence at that stage that the offender was particularly dangerous and where therefore no reserva-

[46] Cf. Dünkel, *in* NOMOS-KOMMENTAR § 57 Rn 110, 123 (2003); JEHLE, HEINZ & SUTTERER, LEGALBEWÄHRUNG NACH STRAFRECHTLICHEN SANKTIONEN 69 ((2003).

[47] In terms of § 57 of the Penal Code.

[48] Cf. Peglau 2000 *ZRP* 150.

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tion was entered[49] for the subsequent imposition of preventive detention. On what could a subsequent prognosis rely to demonstrate dangerousness? Surely only on conduct in prison! However, in its decision of 5 February 2004, which dealt with the extension of preventive detention beyond the ten year limit that then applied, the Federal Constitutional Court required reference to be made to all relevant biographical data about a potential detainee, including the criminal history. It held that conduct in prison alone was not a sufficient basis for a prognosis of dangerousness.

If the known living conditions and previous record of an offender were not enough at the stage of the verdict to lead to a reservation being made in terms of § 66a of the Penal Code, through what wonderful process would a prognosis of dangerousness based on failure to co-operate with resocialization programmes in prison or the like (in combination with a biography and an offence that apparently did not provide the basis for a negative prognosis) be possible with the required degree of certainty? This would be metaphysics and has nothing in common with serious research on prognoses of future behaviour. A constitutionally acceptable prognosis would only be possible if one conceded that the initial judgment was entirely erroneous. This concession leads, however, to a further question: With what degree of certainty can a further error be excluded? What the Federal Constitutional Court requires in respect of prognoses is like the squaring of the circle. Experts cannot and should not take part in such a game, for prognoses based on new information drawn solely from conduct in prison are unreliable and offend the rules of scientifically acceptable prognosis research.[50]

The claim that serious dangerousness cannot be diagnosed at the time of sentence, but well at some later stage has been shown to be scientifically unreliable.[51] Kinzig[52] has demonstrated convincingly that currently more than 60%, perhaps as many as more than 90% of preventive detainees probably are "false positives", that is, those persons who are inappropriately diagnosed as dangerous. It is a truism of prison research that only to a limited extent can conclusions based on behaviour in prison be drawn about likely behaviour on the outside. Refractory "difficult" behaviour of a prisoner may merely be a reflection of his will to survive and may need to be evaluated positively for prognostic purposes, while inconspicuous behaviour may

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[49] In terms of § 66a of the Penal Code.

[50] See the critical comments in a different context of Schoch, *in* FESTSCHRIFT FÜR KAISER; Nedopi, FORENSICHE PSCYHIATRIE 248 (2000); Dünkel, *Nomos-Kommentar* § 57 Rn 118 (2003).

[51] *See* Dünkel & Kunkat, *Neue Kriminalpolitik* 16 (2001).

[52] Kinzig *NJW* 1457 (2001).

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be an expression of a purposive accommodation to the regime without being prepared to change, which would rather justify a negative prognosis. Finally, what is being observed are the effects of imprisonment, that is, a form of conduct for which the prison is at least co-responsible. In these cases the prison certifies its own shortcomings. Not the allegedly dangerous prisoner but those responsible for the implementation of the prison sentence become the security risks.

The indicators mentioned in the draft bill,[53] such as threats made by the person who is to be released, or intensive contacts with groups that are prepared to use violence, are not in any way empirically sound criteria. Every prison governor presumably knows such threats, which originate in the real frustration of prison life and mostly are not meant seriously in the long term. A further offence committed during imprisonment is also not a good indicator, for it either leads to a further conviction that is sufficiently serious for it alone to justify preventive detention, or it is so minor that subsequent preventive detention is not justifiable. The motivation of the draft bill points out correctly that failure to enter, or to continue with, social therapy alone is no indicator and that it can only play a role in an overall evaluation. Indeed, those who fail to continue with social therapy more often become recidivists than those who carry their programmes through to their conclusions; however, only a very small percentage of those who are released are subsequently convicted of serious crimes of violence.[54] This argument is in any event somewhat cynical, as long waiting periods (in Baden-Würtemberg of up to a year) and limited treatment capacity make access to social therapy virtually impossible. Moreover, in individual cases ceasing therapy can be seen as a positive survival strategy.

The apparent guarantee of due process of the prognosis, by including two independent expert opinions, is inadequate. One can hardly imagine that the two external experts, who do not know the prisoner, his development and the prison conditions, and who can judge these less accurately than the prison psychologist or psychiatrist, can come to a reliable prognosis of dangerousness. The judicial authority to decide on preventive detention may also be a hollow shell, for what judge will risk, in the face of two expert opinions, being blamed for serious crimes that an offender may commit in the future?

The new draft of § 66b of the Penal Code may be regarded as disproportionate from another point of view too. The current law provides that an offender who has served his full sentence may be placed under supervision in order to reduce the risk

[53] *See* motivation 20.

[54] *See* Dünkel & Drenkhahn, *in* FORSCHUNGSTHEMA STRAFVOLLZUG 387 (Bereswill & Greve eds., 2001).

https://doi.org/10.1017/S207183220001275X Published online by Cambridge University Press

of recidivism by providing appropriate assistance and control.[55] Infringement of the conditions of release is, as has been seen, a criminal offence.[56] The draft bill on supplementary preventive detention does not claim, let alone prove, that supervision in the community is ineffective. However, if the milder measure is apparently not less efficient, there is no necessity for the more fundamental infringement of the rights of potential offenders. This will not be demonstrable in individual cases, since no experimentally controlled efficacy studies have been conducted.

The judgment of the Federal Constitutional Court of 5 February 2004 may prove to be a Pyrrhic victory for the opponents of supplementary preventive detention. For the Federal legislature now seems to be prepared to concede also in this area to pressure from the States. Note, however: This variant was also propagated by individual States in 2002, when the reservation in the initial verdict of the possibility of subsequently imposing preventive detention was being discussed (which subsequently became § 66a of the Penal Code).[57] At the time it was still rejected because a majority of the *Bundestag* saw a reservation in the original sentence as the outside constitutional limit on the imposition of preventive detention. Supplementary preventive detention without a prior reservation was rejected, because it breached the formal and material legal limits set by the sentence, it undermined the guarantees of the rule of law against reopening the criminal process to the potential disadvantage of the convicted offender and it infringed the general prohibition on retrospectivity. The objections remain valid. Unfortunately the Federal Constitutional Court failed to set more precise limits for a general supplementary form of preventive detention. Possibly such detention is not constitutional at all, even if the Federal Constitutional Court did not want to give this verdict in advance.

There will certainly be further constitutional litigation, if the passage of the draft bill into law is not blocked. This seems unlikely however, since little resistance can be expected from the Social Democrats in the media driven debate about security gaps and risks. The only hope is that the Green Party has expressed some doubts about the inclusion of first offenders and young adults.

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[55] *See* § 68f of the Penal Code.

[56] § 145 of the Penal Code.

[57] *See*, *e.g.*, the *Bundesrat* draft BR-Drs 507/02.

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